The Protection of Fundamental Rights in Composite Banking Supervision Procedures

De bescherming van fundamentele rechten in het samengestelde bankentoezicht

(met een samenvatting in het Nederlands)

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Acknowledgments

In the early days of the Single Supervisory Mechanism, I had the chance to do a traineeship at the Directorate General Services of the European Central Bank. I immediately understood the plethora of legal questions to which the novel architecture of EU banking supervision gave rise to. This manuscript marks the end of a period of intensive researching and writing. During the writing process, I have had the opportunity to gain an in-depth understanding of the tension between effective enforcement of banking supervision law and the protection of fundamental rights in a multijurisdictional setting.

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Argyro Karagianni
Athens, 5 January 2022

To my parents

List of Abbreviations

ABoR: the ECB's Administrative Board of Review
AFSJ: area of freedom, security and justice
AML: anti-money laundering
BoG: Bank of Greece
BRRD: Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012
CFR: Charter of Fundamental Rights of the European Union
CJEU: Court of Justice of the European Union
CRD IV: 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
CRR: 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
DG COMPETITION: the European Commission's Directorate-General for competition
DNB: Dutch Central Bank
EASA: European Union Aviation Safety Agency
EBA: European Banking Authority
ECB: European Central Bank
ECHR: European Convention on Human Rights
ECtHR: European Court of Human Rights
EFSF: European Financial Stability Facility
ELEAs: European law enforcement authorities
EOA: the Dutch Economic Offences Act (*Wet op de economische delicten*)
ESRB: European Systemic Risk Board
ESM: European Stability Mechanism
ESMA: European Securities and Markets Authority
EU: European Union
euro area: the Member States of the European Union whose currency is the euro
FSA: the Dutch Act on Financial Supervision (*Wet op het financieel toezicht*)
GALA: the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*)
IIU: the ECB's independent investigatory unit
JSTs: Joint Supervisory Teams
LPP: legal professional privilege
LSI: less significant credit institution, as defined in Article 2(7) of the SSM Framework Regulation
NCA: national competent authorities, as defined in Artice 2(2) of the SSM Regulation
OLAF: European Anti-Fraud Office
OSIs: on-site inspections

OSITs: on-site inspections teams
PPP: periodic penalty payment
PSI: privilege against self-incrimination
SB: the ECB's supervisory board, as defined in Article 26(1) of the SSM Regulation
SI: significant credit institution, as defined in Article 2(16) of the SSM Framework Regulation
SREP: supervisory review and evaluation process
SSM: single supervisory mechanism
SSM Framework Regulation: 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 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
Statute of the ESCB: Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank
TEU: Treaty on European Union
TFEU: Treaty on the functioning of the European Union

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CHAPTER I: Introduction

1. Banking supervision through composite procedures

Before November 2014, the responsibility for the arrangement of banking supervision rested with EU Member States, which typically entrusted the prudential oversight of credit institutions to independent national central banks.[1] However, a number of financial crises[2] posed serious threats to the financial stability of the Eurozone. Against this backdrop, in November 2008 the EU Commission mandated an expert group, chaired by Jacques de Larosière, to examine the causes of the crisis and to bring forward proposals for establishing an "efficient, integrated and sustainable European system of supervision."[3] The publication of the de Larosière report, which has – *inter alia* – attributed the crises to ineffective risk assessment mechanisms, problems of competences, a lack of cooperation among supervisors, and a lack of consistency in the supervisory powers granted to NCAs across different Member States,[4] jumpstarted a series of legislative reforms, among which was the establishment of the SSM.[5]

In 2013, the Council adopted Regulation 1024/2013 (SSM Regulation),[6] which bestows upon the ECB exclusive competence to carry out a number of specific prudential supervisory tasks vis-à-vis euro area credit institutions,[7] ranging from authorizing credit institutions and assessing acquisitions of qualifying holdings, to ensuring compliance with requirements on own funds, liquidity, large exposure limits, and leverage.[8] The ECB carries out the aforementioned exclusive tasks under a Single Supervisory Mechanism, composed of the ECB and national competent authorities (NCAs).[9] The creation of the SSM exhibits not just a degree of Europeanization, but in fact an "XL degree of Europeanization."[10]

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[1] Christos V. Gortsos, *The Single Supervisory Mechanism (SSM): legal aspects of the first pillar of the European Banking Union* (Nomiki Bibliothiki 2015), 124-125

[2] Patrizia Baudino, Diarmuid Murphy, Jean-Philippe Svoronos, "The banking crisis in Ireland'(October 2020), "FSI Crisis Management, Series no.2 < https://www.bis.org/fsi/fsicms2.pdf> accessed 13 December 2021; Tobias H. Troger, "Organizational choices of banks and the effective supervision of transnational financial institutions" (2012) 48 Texas International Law Journal 177

[3] European Commission, "High Level Expert Group on EU financial supervision to hold first meeting on 12 November" (Press Release) IP/08/1679 (November 2008)

[4] The de Larosière Group, "Report of The High level group on financial supervision in the EU" (February 2009) <http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf> accessed 13 July 2021 ("De Larosière report")

[5] Council of the European Union, "Council approves single supervisory mechanism for banking" (October 2013) < https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/139012.pdf> accessed 13 July 2021

[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 [2013] OJ L 287/63 ("SSM Regulation")

[7] SSM Regulation, art 4; Case C-450/17 P-*Landeskreditbank Baden-Württemberg v ECB* [2019] ECLI:EU:C:2019:372, para 38 ("L bank case")

[8] For the specific tasks, see SSM Regulation, art 4(1)(a) until 4(1)(i).

[9] SSM Regulation, art 6(1)

[10] According to Scholten and Ottow 2014, an XL degree of Europeanization can be seen when an EU agency or institution shares powers with national authorities, but the former can issue to the latter instructions, has legally binding powers and direct EU-level sanctioning powers, albeit some reliance on national supervisors cannot be excluded either. Miroslava Scholten and Annetje Ottow, "Institutional design of enforcement in the EU: the case of financial markets" (2014) 10 Utrecht Law Review 80, 8

However, even in the context of such a high degree of Europeanization, the EU legislature did not opt for complete centralization. It appears that the setup of the shared system of banking supervision and enforcement[11] invests on national expertise, not only in terms of technical expertise, but also with respect to more practical issues, such as close proximity to supervised entities and language skills. In other words, although exclusive competence rests with the ECB, NCA staff members often functionally become part of EU structure.[12] At the same time, various punitive and non-punitive decisions are adopted both by the ECB and NCAs, in accordance with composite procedures. This research focuses more specifically on composite SSM procedures that result in the imposition of punitive sanctions either at the EU or the national levels ("composite enforcement procedures").

Even though a detailed conceptualization, definition and taxonomy of composite enforcement procedures are provided in the subsequent chapters, it is important to note that composite administration is certainly not a new phenomenon. As rightly pointed out by Advocate General Sánchez-Bordona in the *Berlusconi* case,[13] composite procedures "already existed in areas such as structural funds, agriculture and the appointment of members of the European Parliament, for example. But the use made of them within the Banking Union is much more intensive and more frequent than in other areas."[14] As a corollary, the different types of composite procedures[15] bring to the fore distinct legal challenges that are worth researching.

2. Complete fundamental rights protection in composite banking supervision procedures?

Europeanization of supervision and enforcement challenge traditional systems of control that were designed for and developed in the context of a single State jurisdiction. This dissertation looks into the system of fundamental rights protection as a mechanism that guides and controls executive action, by offering legal certainty and legal protection and by ensuring a minimum level of procedural fairness. After all, both the ECB and NCAs are – respectively – part of the EU's and of the Member States' executive and, as such, subjected to the rule of law and must, among others, observe fundamental rights.[16]

As stated in the previous section, enforcement of EU prudential supervision law takes place through composite procedures. When the two concepts that are at the core of this dissertation (namely, composite enforcement procedures and fundamental rights) meet, a series of pressing questions immediately come to the fore. When the EU and the national legal spheres interlock and the different

[11] Ton Duijkersloot, Argyro Karagianni and Robert Kraaijeveld, "Political and judicial accountability in the EU shared system of banking supervision and enforcement" in Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities (*Edward Elgar Publishing 2017)

[12] Luchtman & Vervaele refer to that *modus* of interaction between the EU and national authorities as Organleihe. See, Michiel Luchtman and John Vervaele, "*Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)"* (Utrecht University 2017) < http://dspace.library.uu.nl/handle/1874/352061> accessed 13 December 2021, 251

[13] Case C-219/17 *Berlusconi and Fininvest* [2018] ECLI:EU:C:2018:1023

[14] Case C-219/17 *Berlusconi and Fininvest* [2018] ECLI:EU:C:2018:1023, Opinion of AG Campos Sánchez-Bordona, para 3

[15] See for instance Wissink, who supports the following categorization: common procedures, bottom-up procedures in ongoing supervision, top-down procedures in ongoing supervision and sanctions of a criminal nature which are in turn divided in bottom-up and top-down procedures. Laura Wissink, *Effective Legal Protection in Banking Supervision: An Analysis of Legal Protection in Composite Administrative Procedures in the Single Supervisory Mechanism* (Europa Law Publishing 2021) 13

[16] Frank Meyer, "Protection of fundamental rights in a multi-jurisdictional setting of the EU" in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU Agencies* (Edward Elgar Publishing 2020)

components of the various composite procedures cannot easily be segregated, can the right to privacy, the rights of the defense, the right to an effective remedy and the *ne bis in idem* principle – as we currently know them – still fulfill their protective function?

Although SSM composite enforcement procedures form a functional unity, the legal safeguards in the different phases of a composite enforcement procedure are not always integrated. Owing to the fact that different authorities are active in the information-gathering phase and in the sanctioning phase of one and the same procedure, it may often be the case that divergent fundamental rights standards are simultaneously applicable in one and the same procedure. Is it then a fundamental rights problem that in the ECB's legal framework the protection of the legal professional privilege (LPP) does not extend to in-house lawyers, while in the Netherlands, where the evidence is being introduced for punitive sanctioning,[17] in-house lawyers fall under the LPP's protective scope? Should the Dutch judge reviewing the final decision ignore these differences in fundamental rights standards and admit the evidence or can she exclude this evidence? And is that in line with the general principle of the effectiveness of EU law?

A somewhat tweaked example, which seeks to illustrate that fundamental rights issues come to the fore not only in vertical, but also in diagonal[18] composite enforcement procedures, is the following. Let us imagine that the Greek NCA has the power to intercept telecommunications.[19] Following reasonable suspicions, it exercised that power vis-à-vis a senior manager of a Dutch credit institution, which operates through a branch in Greece. The Greek NCA has good reasons to believe that, based on that interception, the Dutch credit institution may be violating corporate governance rules prescribed by Article 74 of Directive 2013/36/EU (CRD IV).[20] It therefore transfers that information to the ECB, which further transfers it to the DNB and requests from it the opening of sanctioning proceedings. Assuming that such conversations are protected by the right to privacy in the Netherlands, in the sense that only judicial authorities are empowered to intercept telecommunications, is the "diagonal" lack of legal certainly that the Dutch credit institution is faced with a fundamental rights problem?

And there are even more questions that come to the fore, which often transcend the SSM and the domain of administrative law, reaching the core of Member States' criminal law enforcement systems. In various Member States,[21] prudential legislation is also enforced through criminal law. What if the public prosecutor in the Netherlands investigates violations of the Dutch prudential supervisory framework while – at the same time – the ECB, based on the same facts and historical event, has also opened punitive sanctioning proceedings? How is the duplication of proceedings to be avoided or coordinated?

[17] For a more in-depth discussion of that hypothetical scenario of mine, see Argyro Karagianni, "How to ensure defense rights in the composite SSM setting?" (EU Law Enforcement Blogspot, December 2019), <https://eulawenforcement.com/?p=7334#> accessed 14 July 2021

[18] Herwig C. Hofmann, "Multi-Jurisdictional Composite Procedures-The Backbone to the EU's Single Regulatory Space" (2019) *University of Luxembourg Law Working Paper* 003-2019, 21 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399042 accessed 13 December 2021

[19] The Greek NCA does not have that power at its disposal. This is a purely hypothetical scenario which seeks to highlight what questions come to the fore when diagonal composite procedures and diverging fundamental rights intersect

[20] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338

[21] For a comparative overview, see Silvia Allegrezza (ed), *The Enforcement Dimension of the Single Supervisory Mechanism* (Wolter Kluwer 2020)

The EU legislator is generally silent about fundamental rights protection in composite enforcement procedures. Currently, only the general principles of EU law[22] offer certain guidance, but within this new complex and novel reality, it must be examined whether, and if so, how these principles, which were developed in the context of decentralized implementation of Union law, can be made fit for purpose.

3. Research question

The research question which this dissertation seeks to answer, is the following*:*

Do SSM procedures that may lead to national or EU punitive sanctions comply with the right to privacy, the rights of the defense and the *ne bis in idem* principle and, if not, how should the existing legal framework be adjusted to ensure such compliance?

Implicit in this question are three goals: an evaluative, a normative, and a legal design. The evaluative goal entails an appraisal of how fundamental rights are currently integrated in composite SSM enforcement procedures, in order to ultimately assess whether disproportionate or arbitrary interferences with the studied fundamental rights do occur. The second and the third goals entail that if fundamental rights are not sufficiently protected in the current composite SSM legal framework, which recommendations follow for the design of the SSM legal framework in the future.

To answer the central research question, the dissertation is steered and guided by a set of research sub-questions:

1) What does composite punitive law enforcement entail, and how does it manifest itself in the Single Supervisory Mechanism (SSM)?
2) What is the content of the right to privacy, of defence rights, and of the *ne bis in idem* principle in punitive enforcement procedures?
3) How do the legal orders of the EU, the Netherlands, and Greece guarantee these fundamental rights in the framework of composite SSM enforcement proceedings?
4) If deficiencies are found to exist, how should the SSM framework, including its relations to criminal justice systems, be adjusted to ensure compliance with fundamental rights?

4. Methodology

Now that the central research question and the guiding sub-questions have been introduced, in this section, I shall explain the methods that will be deployed to answer the foregoing questions, as well as the dissertation's overall approach.

The dissertation relies primarily on doctrinal legal research. To answer the first sub-question, namely what (punitive) composite law enforcement entails and how it manifests itself in the SSM, the dissertation will first study the academic literature and case law in which the phenomenon of composite

[22] Michiel Luchtman, Argyro Karagianni and Koen Bovend'Eerdt, "EU administrative investigations and the use of their results as evidence in national punitive proceedings" in Fabio Giuffrida and Katalin Ligeti (eds) *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (ADCRIM Report, University of Luxembourg 2019) 13-16 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021

administration and composite administrative procedures has been developed. Second, in order to offer a typology of the different composite enforcement procedures that are evident in the SSM, the dissertation will analyze the institutional design of the SSM by scrutinizing the legal framework surrounding its operation.

To answer the second sub-question, the dissertation will study the Charter of Fundamental Rights of the EU (CFR) and the European Convention on Human Rights (ECHR), as well as the jurisprudence of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR). In their case law, the two Courts have defined and shaped the ways in which the right to privacy, the rights of the defense and the *ne bis in idem* principle cast their safety net over (natural and legal) persons in the context of puntitive enforcement procedures. In addition to the legal texts and landmark judicial decisions, the work of prominent legal scholars interpreting the law will also be consulted.

To answer the third sub-question, a study of the EU-level legal framework, of two national legal orders, and of their mutual interactions is necessary. With respect to the EU level, I shall study the relevant EU primary and secondary sources and policy documents, in order to pinpoint the different instances in which EU law interacts with national law. Then, I will study the case law of the CJEU and, where applicable also of the ECtHR, to determine the precise content of the fundamental rights that have been taken aboard in this dissertation, in order to ultimately assess whether the way in which these fundamental rights are integrated in the SSM legal framework is on par with the requirements set out by fundamental rights.

The EU and national legal orders cannot be examined in isolation; the composite reality necessitates that the links between different legal orders and the protection of fundamental rights at the intersection between those different legal orders are also studied. In that regard, in addition to the EU level, I have chosen to study the national legal systems of the Netherlands and of Greece. This choice must obviously be accounted for. The reasons for selecting these two jurisdictions are based on the differences in organization and "maturity" of protection of fundamental rights and the state of affairs in the financial sphere. These differences provide for some diversity and will also contribute to the validity of the research. The notion of punitive administrative proceedings in the Netherlands seems to be highly developed, whereas in Greece only recently – and after severe pressure from the ECtHR – Courts have started discussing and considering the potentially punitive character of administrative fines. Furthermore, while in the Netherlands, in addition to administrative law enforcement, prudential law is criminally enforced by means of special criminal law (the Economic Offenses Act), in Greece this is dealt with through ordinary criminal law. Finally, Greece had been in the eye of the storm for almost a decade, as a severe financial crisis hit its banking sector, while in 2015 capital controls were imposed, to prevent a collapse of the financial system. At the same time, the Netherlands was experiencing a bloom in *inter alia* its banking and real-estate sectors.

The study into two national jurisdictions will then look into how the studied Member States have regulated cooperation with the ECB (SSM part) and the protection of fundamental rights. In other words, where EU law points back to national law, how does – in turn national law – regulate the bottom up (national-EU) interactions? How are fundamental rights accommodated in composite procedures, from a bottom-up perspective? And to what extent do the relevant Dutch and Greek national authorities realize the EU dimension of their tasks?

In studying the two national legal orders, I will look into the system of prudential supervision law enforcement in the Netherlands and in Greece. More specifically, I will first analyze the system of administrative law enforcement in place by studying the enforcement powers of the Dutch and the Greek NCA and the applicable legal safeguards therein. I shall furthermore look into how the national legal frameworks regulate the cooperation of DNB and BoG with the ECB, by studying the legal rules that foresee the transfer of information (for enforcement purposes) from the two studied NCAs to the EU level/ECB. Thereafter, I shall examine how Dutch and Greek administrative Courts assess – if at all – foreign materials in terms of their lawfulness and fairness. I will do so in order to ultimately assess whether persons who have been the addressees of a national punitive sanction, imposed on the basis of an SSM composite procedure, can have access to a court and seek an effective remedy for potential violations of rights that took place in another legal order.

Next, I will also study the extent to which the Netherlands and Greece enforce prudential regulation by means of criminal law and, if so, I will assess whether fundamental rights, at the intersection between SSM administrative law enforcement and national criminal law enforcement, are sufficiently safeguarded. In doing so, I will study the enforcement powers of the relevant national judicial authorities and inquire into whether there are (national) legal rules in place to ensure that the two enforcement responses do not undermine the fundamental rights of supervised persons.

To answer the fourth sub-question, in Chapter VI, I shall bring together the findings of the three investigative chapters (EU, the Netherlands, Greece). By studying the mutual interactions of the three legal orders, the chapter will pinpoint different instances in which gaps in the complete protection of fundamental rights may be evident. The normative answer to the fourth sub-question is provided in Chapter VII, which brings forward concrete recommendations for ensuring compliance of the SSM legal framework with fundamental rights.

5. Delineation

A lot can be said about this topic. Indeed, the potential territory into which one can delve is immense. Inevitably, I had to make certain choices and focus on those issues that I consider to be the most relevant in light of the main research question, thereby leaving aside other important issues. In that light, this section has a twofold function: one, it helps the reader understand from the outset what falls within and what falls outside the scope of this research; two, the reader can understand which topics have been excluded (for reasons of feasibility) yet do remain relevant and can thus be seen as suggestions for a future research agenda.

In the SSM, a wide range of final decisions is adopted, ranging from supervisory measures to punitive fines.[23] The dissertation distinguishes between supervisory decisions and punitive decisions. In proceedings that may lead to a punitive decision, law enforcement authorities may often need to anticipate[24] such future punitive proceedings and thus take into account criminal law principles already in the non-punitive legs of an enforcement procedure. On the other hand, procedures leading to the imposition of supervisory measures are generally non-punitive in nature, since they aim at prevention rather than punishment. Hence, law enforcement authorities do not need to observe criminal law safeguards. Having said that, the focus of this research is on punitive enforcement; therefore, preventive supervisory measures and the procedures preceding their imposition are excluded from its scope.

[23] In a similar vein, Wissink makes a distinction between the "supervisory" and the "investigatory" phase, see Wissink (n 15) 10

[24] Luchtman, Karagianni and Bovend'Eerdt (n 22) 8-9

The aforementioned discussion leads me to my next point, an explanation and justification of the specific rights that are taken aboard in this dissertation. The focus is on those rights that ought to be afforded in the course of punitive administrative investigations and the lack of which can negatively affect the legal position of affected persons in future punitive proceedings. Within this framework, the most relevant rights are the right to privacy (Articles 7 CFR/8 ECHR), the (criminal) rights of the defense and particularly the privilege against self-incrimination and the legal professional privilege (Articles 47 and 48(2) CFR), the fundamental right of *ne bis in idem* (50 CFR) and the principle to effective judicial protection and particularly its "access to a court" dimension (Article 47 CFR/6 ECHR). However, it must be noted that, in view of the fact that the right of access to a court is to a significant extent also embedded in Articles 7 CFR and 48(2) CFR, in this dissertation, the discussion of the right of access to a court will be incorporated in the analysis of Articles 7 and 48(2) CFR.

The right to privacy is the fundamental right which is typically at stake in the context of administrative on-site inspections.[25] Regarding the (criminal) rights of the defense, the dissertation focuses on the legal professional privilege (LPP) and the privilege against self-incrimination because both rights allow a person to build an effective defense strategy. An additional reason as to why I deem a combined analysis of the LPP and of the privilege against self-incrimination to be relevant relates to the fact that violation of LPP creates a domino effect and (almost) inevitably leads to violation of the privilege against self-incrimination: if the client is not certain that information shared with his lawyer will remain confidential, his privilege against self-incrimination will become illusory. In that respect, it has rightly been said that "unconstrained access by the lawyer to incriminating information in the possession of the clients is, in reality, what the privilege seeks to protect."[26] Concerning the right of access to a court, I have chosen to focus on that particular constituent of the principle of effective judicial protection because I am primarily interested with whether persons whose fundamental rights may have been violated can seek an effective remedy against this violation before a court. It goes without saying that other aspects of judicial protection, such as the intensity of fines review, are undoubtedly interesting; however, these questions relate mostly to the sanctioning and less (if at all) to the investigative phase of an enforcement procedure. A logical corollary of the fact that I only focus on the access to a court dimension of judicial protection, is that an analysis of the ECB's Administrative Board of Review (ABoR), as well as a discussion on liability regimes, exceed the scope of my dissertation. Finally, a justification of why the *ne bis in idem* prohibition is taken aboard should be given; in administrative investigations leading to the imposition of punitive sanctions, the *ne bis in idem* principle may "force" authorities with overlapping competences to coordinate their actions in the investigative stage, in order to avoid violation of the principle at the sanctioning phase of law enforcement. Given that the ECB's (sanctioning) competences may overlap with other authorities' tasks, it is essential to examine the extent to which the relevant legal frameworks provide for rules to coordinate the actions of the different authorities.

It is certainly not to be overlooked that additional rights are of paramount importance. Think, for instance, of the presumption of innocence (Article 48(1) CFR), the legality principle (Article 49(1) CFR/Article 7 ECHR), the right to good administration (Article 41 CFR), along with all of its sub-rights and the right to the protection of personal data (Article 8 CFR). An inquiry into those exceeds the scope

[25] Daniel Segoin, "The investigatory powers, including on-site inspections of the ECB, and their judicial control" in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union (*Edward Elgar Publishing 2021) 300

[26] Eric Gippini-Fournier, "Legal professional privilege in competition proceedings before the Commission: Beyond the cursory glance" (2004) 28 Fordham International Law Journal 967, 1002

and limits of this research for various reasons. The presumption of innocence and the legality principle were not taken aboard because, in contrast with the studied rights, the presumption of innocence and the legality principle are not relevant in the context of administrative investigations, but rather at a later stage, namely the sanctioning stage. From a temporal point of view, Article 41 CFR does not play such a significant role in the phase preceding the notification of a statement of objections, on which this PhD focuses. It goes without saying that Article 41 CFR does play a significant safeguarding role, but only after the statement of objections has been notified to persons concerned, in which case supervised persons must be granted the right to have access to the file and the right to be heard, in order to effectively defend themselves and respond to the accusations of the public authority. As to the right to the protection of personal data, the PhD is not concerned with the protection of personal data, but does recognize that important questions may come to the surface, in view of the fact that, in requesting information and in carrying out on-site inspections, supervisory authorities will often come across the personal data of bank clients.

After having explained which fundamental rights are at the core of this dissertation and which ones are not, the question that naturally comes to the fore is whose fundamental rights this research does consider. I am primarily interested in how the fundamental rights of legal persons (credit institutions) are protected. In addition to that, I am also interested in the way in which the fundamental rights of natural persons are protected, to the extent that they can also be the addresses of final punitive decisions, by NCAs or by national judicial authorities.

The next choice concerns the question of types of composite procedures. Generally speaking, composite procedures have been classified in literature as vertical, horizontal, and diagonal.[27] In the SSM setting, vertical procedures are those in which the ECB interacts with one national legal order, and a final decision is taken either by the ECB or the NCA. Horizontal procedures are those that take place between the NCAs of at least two EU Member States. A final decision is adopted by the NCA of Member State A, whereas preparatory acts took place under the responsibility of the NCA of Member State B. In other words, even though in horizontal procedures, national authorities still act under the scope of Union law, an EU authority does not partake in the different phases of such horizontal enforcement procedures.[28] Diagonal composite procedures, are understood as procedures which end with one final binding act, adopted either by the ECB or by the NCA, whereas the input may stem from the ECB and from various NCAs, which all operate under the ECB's command.[29]

Against this background, the focus here is on vertical and on diagonal composite procedures, and that is because I do not see any room for horizontal procedures taking place within the specific context of the SSM. Even for the supervision of less significant credit institutions (LSIs), while NCAs will often cooperate with each other, they do so under the auspices of the ECB, which is exclusively competent also for the supervision of LSIs.[30] That said, I depart from the premise that the horizontal interactions between different national legal orders have – in the particular framework that I study here – been "diagonalized," so to speak, as all banking supervision procedures in the euro area are now conducted under the aegis of the ECB.

[27] Hofmann (n 18)
[28] An example of an area of competence in which horizontal composite procedures increasingly take place are administrative cooperation in fiscal matters, see Paolo Mazzotti and Mariolina Eliantonio, "Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnelan, and the Constitutional Law of the Union" (2020) 5 European Papers 41
[29] Hofmann (n 18)
[30] SSM Regulation, Art 4(1); L bank case (n 7) para 38

Within the framework of vertical and diagonal composite administrative procedures, the dissertation focuses only on *enforcement* procedures, meaning composite procedures that (can) lead to the imposition of sanctions of a criminal nature, either by the ECB on the basis of input provided by NCAs ("bottom-up enforcement procedures") or by a national authority on the basis of input provided by the ECB ("top-down enforcement procedures"). In that respect, common procedures and procedures in ongoing supervision, which generally lead to the adoption of supervisory decisions and measures[31] do not fall within the scope of the dissertation. They will only be discussed to the extent that information obtained during these non-punitive phases may affect supervised entities' rights in future punitive procedures.

A logical corollary of the fact that I focus on composite *EU* enforcement procedures is that – from a jurisdictional point of view – the dissertation is concerned with the obtainment, transfer and use of information that takes place on EU territory. In other words, enforcement action aimed at credit institutions that operate – possibly also through branches and subsidiaries – on EU territory. It is not to be overseen that several credit institutions, which have been licensed by the NCA of a euro area Member State, may often operate in third countries through branches or subsidiaries.[32] In cases of such cross-border establishments, where the ECB will either be the home or the host supervisor, it must often cooperate with the supervisory authorities of third countries.[33] However, these types of procedures are not discussed in the dissertation, as they are not composite procedures, at least not within the meaning that the concept has in EU law.

A next important methodological choice concerns the question of which type of information. I am interested in operational information, that is, information which is (potentially) useful for an ongoing supervision or for the potential opening of a (punitive) investigation,[34] in the sense that it allows law enforcement authorities to identify gaps in compliance. Even though "information" and "intelligence" are two distinct terms, the former meaning "knowledge in raw form"[35] and the latter meaning

[31] 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 [2014] OJ L 141/1, Part V ("SSM Framework Regulation")

[32] In 2015, Ignazio Angeloni, then Member of the ECB's supervisory board, mentioned in that respect in one of his speeches that "In 2008, before the crisis resulted in a retrenchment of international activities, the world's five largest banking groups, which all have their headquarters in Europe and account for 10% of global banking assets, had over 50% of their credit risk exposures and approximately 60% of their employees outside of their home country." Ignazio Angeloni, "The SSM and international supervisory cooperation" (16 April 2015) https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150417.en.html accessed 17 July 2021

[33] See, for instance, the MoU that has been concluded between the ECB and the UK Financial Conduct Authority which inter alia regulates issues of supervisory cooperation and exchange of information between the two authorities. Memorandum of Understanding for supervisory cooperation between the European Central Bank and the Bank of England and the Financial Conduct Authority (2021) accessed 5 February 2022 https://www.bankingsupervision.europa.eu/legalframework/mous/html/ssm.mou_2019_pra~fbad08a4bc.en.pdf accessed17 July 2021

[34] Michele Simonato, Michiel Luchtman, and John Vervaele (eds), "Exchange of information with EU and national enforcement authorities: Improving the OLAF legislative framework through a comparison with other EU authorities" (Report, Utrecht University, March 2018) https://orbilu.uni.lu/bitstream/10993/35503/1/Utrecht_University_Hercule_III_Exchange_of_information_with_EU_and_national_enforcement_authorities.pdf accessed 13 December 2021

[35] UNODC, *Criminal Intelligence. Manual for Front-Line Law Enforcement* (New York, United Nations, 2010), 1 < https://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal_Intelligence_for_Front_Line_Law_Enforcement.pdf> accessed 12 July 2021

information which has been evaluated,[36] I use the two interchangeably, for the sole reason that a distinction between "information" and "intelligence" is not recognized in the EU-level legal framework,[37] although SSM-generated information may serve as intelligence at the national level.[38] Both information and intelligence may constitute evidence or may be used as evidence in punitive proceedings, but – in the absence of EU law harmonizing the law of evidence – that is something to be determined by each jurisdiction.

A last question that needs to be answered is which types of interactions of the SSM with national criminal law I shall study. Allegrezza[39] distinguishes between two types of potential interactions. On the one hand, EU administrative enforcement of prudential rules can potentially overlap with national criminal enforcement of either "financial crime," under which she groups market abuse, money laundering, terrorism financing, and insider trading, or with "crimes that protect fair banking as Rechtsgut,"[40] examples of which are false supervisory disclosure, carrying out banking activities without an authorization *et cetera*. In this research, I focus on the latter and I will be referring to these types of offenses as "prudential offenses." While the relationship of the SSM with financial crime, such as for instance money laundering, is particularly interesting and highly topical,[41] I have decided to exclude it from the scope of the present research for reasons of feasibility.

It shall also be stated that the dissertation discusses legislation, case law, policy documents, and the academic literature which was available up until 1 July 2021. Examples used throughout the dissertation are illustrative but not necessarily exhaustive and the scenarios discussed are mostly imaginary, in the sense that I use them as a means to illustrate certain situations that may well happen in practice.

6. Academic and societal relevance

This work is situated in the realms of EU public law enforcement[42] and EU composite administration.[43] The attribution of direct enforcement powers to EU law enforcement authorities is an increasingly

[36] Ibid
[37] According to Cocq, in EU law more generally, there is not yet any clear and distinct definition of either "information" or "intelligence." Céline Cocq, "Information and 'intelligence': the current divergences between national legal systems and the need for common (European) notions" (2017) 8 New Journal of European Criminal Law 352, 359
[38] See *infra* Chapter 3, Section 7.3.1
[39] Silvia Allegrezza, "Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies" (2020) 4 EUCRIM 302 < https://eucrim.eu/articles/information-exchange-between-administrative-and-criminal-enforcement-case-ecb/> accessed 13 December 2021
[40] Ibid
[41] See in that respect, the Multilateral agreement on the practical modalities for exchange of information pursuant to Article 57a(2) of Directive (EU) 2015/849 (2015) https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2545547/e83dd6ee-78f7-46a1-befb-3e91cedeb51d/Agreement%20between%20CAs%20and%20the%20ECB%20on%20exchange%20of%20information%20on%20AML.pdf accessed12 July 2021
[42] Jan Jans, Sascha Prechal and Rob Widdershoven (eds), *Europeanisation of Public Law*, Europa Law Publishing (2nd ed, Europa Law Publishing 2015); Annetje Ottow, "Europeanization of the supervision of competitive markets," (2012) 18 European public law 191
[43] See for instance, Sergio Alonso de Leon, *Composite Administrative Procedures in the EU* (Iustel 2017); Mariolina Eliantonio, "Judicial review in an integrated administration: the case of composite procedures" (2015) 7 Review of European Administrative Law 65; Herwig Hofmann, Gerard Rowe, and Alexander Türk, *Administrative Law and Policy of the European Union*, Oxford (OUP 2011); Giacinto della Cananea, "The European Union's mixed administrative proceedings" (2004) 68 Law and Contemporary Problems 197

common phenomenon[44] and questions with respect to how fundamental rights are to be ensured in EU composite administration remain highly topical.[45]

Within this broader context, I examine a specific example, the Single Supervisory Mechanism. Since the establishment of the SSM, a lot has been written. There is a wealth of research on institutional aspects of the SSM,[46] research on the systems of executive control therein, such as political accountability,[47] legal protection,[48] and even fundamental rights.[49] However, all these contributions focus either on non-punitive enforcement or solely on the EU legal order. To my knowledge, research on the protection of fundamental rights in composite punitive proceedings has not yet been undertaken.[50] It is this gap in existing academic knowledge that the present research aims to fill.

In addition to contributing to the academia, the research also purports to exert influence beyond academia. In the first place, it seeks to provide practical recommendations for the future, particularly for policy-makers and for supervisory authorities. In the second place, the results of this research may prove relevant for the future legal design of other ELEAs that will be carrying out enforcement by means of composite procedures. The EU Commission has already signaled that the supervision of anti-money laundering (AML) will likely undergo Europeanization as well.[51]

7. Structure of the book

Against the foregoing, the book is divided in the following three parts:

Part I: Conceptual

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[44] Miroslava Scholten, "Mind the trend! Enforcement of EU law has been moving to 'Brussels'," (2017) Journal of European Public Policy 1348; Miroslava Scholten and Michiel Luchtman, *Law enforcement by EU authorities: Implications for political and judicial accountability* (Edward Elgar Publishing 2017)

[45] Sascha Prechal and Rob Widdershoven, "Principle of effective judicial protection" in Scholten and Brenninkmeijer (n 16); Meyer 2020 (n 16); Eliantonio (n 43); Christina Eckes and Joana Mendes, "The right to be heard in composite administrative procedures: lost in between protection?" (2011) 36 European Law Review 651

[46] Klaus Lackhoff, *The Single Supervisory Mechanism, A Practitioner's Guide* (Beck-Hart 2017); Raffaele D'Ambrosio, "The single supervisory mechanism (SSM): selected institutional aspects and liability issues" in Mads Andenas and Gudula Deipenbrock (eds), *Regulating and Supervising European Financial Markets* (Springer 2016); Gortsos 2015 (n 1)

[47] Adina Maricut-Akbik, "Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament" (2020) 58 Journal of Common Market Studies 1199; Fabian Amtenbrink and Menelaos Markakis, "Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction Between the European Parliament and the European Central Bank in the Single Supervisory Mechanism" (2019) 44 European Law Review 3; Duijkersloot, Karagianni and Kraaijeveld 2017 (n 11) Willem Bovenschen, Gijsbert Ter Kuile, Laura Wissink, "Tailor-made accountability within the Single Supervisory Mechanism" (2015) 52 Common Market Law Review 155

[48] Wissink (n 15)

[49] Giulia Lasagni, "Banking Supervision and Criminal Investigation, Comparing EU and US Experiences" (*Springer International Publishing* 2019); Marco Lamandini, David Ramos Muñoz, and Javier Solana, "Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection" (2015) 79 Quaderni di Ricerca Giuridica 1

[50] Allegrezza 2020 (n 21) discusses certain fundamental rights that have been take aboard in this dissertation. However, the focus of that work is on the role of criminal law enforcement in sanctioning prudential offences. While part of my dissertation does focus on this, here I provide and in-depth analysis of the composite protection of fundamental rights in the context of administrative law enforcement by the SSM

[51] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Authority of Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM (2021) 421 final

In Chapter II, the main concepts upon which this research builds are introduced and defined. It is argued that due to the composite setting in which the ECB and NCAs must operate and interact, the right to privacy, defense rights, and the *ne bis in idem* principle have acquired new dimensions. As a corollary, novel questions with respect to the protection of those fundamental rights in a composite enforcement landscape come to the fore. These questions warrant our attention and investigation.

Part II: Investigative

The repercussions of the various composite SSM proceedings for the protection of fundamental rights become evident mostly in the phase in which operational information is introduced as evidence, in a legal order different from the one in which the information was gathered. For that reason, I find that – for analytical purposes – a discussion of the research sub-questions along the distinct phases[52] of 'obtainment of information, "transmission of information," "use of information" is suitable for highlighting the fundamental rights problems that punitive composite EU law enforcement brings to the fore.

In Chapter III, I begin by studying the ECB and the EU legal framework. I analyze the powers that are available to the ECB and its organizational units, the safeguards that are available to supervised entities, the transmissions (for punitive follow-up) that take place within and outside the SSM, the use to which ECB gathered information can be put in punitive EU or national proceedings and the extent to which persons whose rights have been violated, have access to a court in order to receive effective judicial protection.

Chapters IV and V mirror the EU analysis, but this time from a bottom-up perspective, by studying two national jurisdictions: the Netherlands and Greece.

Part III – Analytical and normative

Chapter VI synthesizes the top-down and bottom-up analyses and ultimately concludes the evaluative goal of the research, by answering the question whether compliance with fundamental rights is realized in the current legal framework. Chapter VII realizes the normative and legal design goal of the research by explicitly bringing forward a number of concrete recommendations addressed to supervisory authorities, EU and national Courts, as well as the Union's legislature.

[52] The three *Hercule II* studies that have been concluded in 2017, 2018, and 2019 (two of which I provided input for) followed the same logic and structure and have thus influenced to a significant extent my decision to opt for this analytical approach. See Luchtman and Vervaele (n 12), Simonato, Luchtman, and Vervaele 2018 (n 34); Giuffrida and Ligeti (n 22)

Chapter II: Fundamental rights through the lens of composite law enforcement

1. Introduction

The aim of this chapter is threefold. The first aim is to establish the assessment framework against which the compliance of the punitive SSM procedures with fundamental rights will be evaluated. The second aim consists of raising a number of pertinent fundamental rights questions, which emanate from the relatively recent phenomenon of "Europeanized" supervision and enforcement,[1] yet implemented in a decentralized manner[2] through composite procedures. The third aim consists of assessing whether the current EU constitutional framework surrounding the multilevel enforcement of Union law by both EU and national enforcement authorities is fit for composite enforcement procedures.

Against this background, the chapter is structured in the following way. First, the shift from indirect to direct mechanisms of EU law enforcement, which is increasingly carried out by or under the responsibility of supranational European law enforcement authorities (ELEAs), is explained. Second, the literature on the concept of composite procedures is reviewed and a working definition of "composite enforcement procedures," for the purposes of this dissertation, is provided. Third, I lay down the assessment framework, namely the three protective functions of fundamental rights, which have been taken aboard in this work: legal certainty, procedural fairness, and legal protection. Finally, I pose a number of questions that come to the fore once the following conflicting realities come together: SSM composite enforcement procedures on the one hand and "the fact that the protection of fundamental rights appears to be stuck in the old world of direct and indirect enforcement" on the other hand.[3]

2. Composite enforcement procedures

2.1 Introduction

The EU legal order is one of a kind. It is "a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States, but also their nationals (…)."[4] From the famous *van Gend en Loos* case, it becomes apparent that the EU departs from conventional international law and the notion of State responsibility, since its subjects are not only the States but also EU citizens. In addition, the CJEU has also explained that the EU's own legal system is integrated into the legal systems of the Member States whose Courts are bound to apply.[5] These postulations point to the fact that conventional concepts, such as jurisdiction to prescribe, enforce and adjudicate, fundamental rights, and sovereignty – concepts which were designed for and developed within the contours of the nation-state – may have acquired a new meaning under the auspices of the EU. The existence of EU-wide enforcement spaces, such as the

[1] Miroslava Scholten and Michiel Luchtman, *Law Enforcement by EU Authorities – Implications for Political and Judicial Accountability* (Edward Elgar 2017); Miroslava Scholten and Annetje Ottow, "Institutional design of enforcement in the EU: the case of financial markets" (2014) 10 Utrecht Law Review 80, 8; Annetje Ottow, "Europeanization of the Supervision of Competitive Markets" (2012) 18 European Public Law 191
[2] Case C-450/17 P *Landeskreditbank Baden-Württemberg* v *ECB* [2019] ECLI:EU:C:2019:372, para 41
[3] Frank Meyer, "Protection of fundamental rights in a multi-jurisdictional setting of the EU" in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU Agencies* (Edward Elgar Publishing 2020) 145
[4] Case C-26/62 *van Gend en Loos* v *Administratie der Belastingen* [1963] ECLI:EU:C:1963:1
[5] Case C-6/90 *Andrea Francovich and Danila Bonifaci and Others* v *Italian Republic* [1991] EU:C:1991:428, para 31

single market and the AFSJ and the proliferation of EU law enforcement authorities (ELEAs), have resulted in the creation of innovative, supranational enforcement structures, something that in turn raises novel questions with respect to the protection of fundamental rights thereof.

Against the foregoing, in the below sections I define the concept of composite law enforcement. In doing so, I first discuss the shift from the traditional (decentralized) method of EU law enforcement, to novel direct, composite *modi* of enforcement. Thereafter, I explain why the Single Supervisory Mechanism (SSM), on which this research focuses, can be perceived as a composite enforcement system.

2.2 From decentralized to direct EU law enforcement

Public enforcement[6] of the law (hereafter "law enforcement"), has been defined as "public actions with the objective of preventing or responding to the violation of a norm."[7] Concerning the constituents of law enforcement, some scholars speak of supervision, investigation, and enforcement,[8] while others refer to the enforcement of regulation as a process of detecting, responding, enforcing, assessing, and modifying.[9] In this work, enforcement is understood in the way posited by Vervaele: monitoring compliance with the law, investigating alleged infringements of legal norms, and sanctioning violations thereof.[10]

Law enforcement is inextricably linked to the sovereign State, which exercises jurisdiction over its own territory. The jurisdiction to prescribe, to enforce, and to adjudicate is thus vested in the State.[11] The jurisdiction to prescribe implies the exclusive competence of the State to lay down substantive legal norms and the procedural rules on how the substantive legal norms are to be enforced. Jurisdiction to enforce denotes the sovereign State's competence to motivate compliance of its citizens with the substantive legal rules. Traditionally, this task is entrusted to judicial and administrative authorities, as well as the police, even though every State is free to define and determine what constitutes an administrative and what a judicial authority.[12] The jurisdiction to adjudicate implies the State's competence to initiate actions vis-à-vis individuals who failed to comply with substantive legal norms.

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[6] Public enforcement is to be distinguished from the concept of "private enforcement," which has been defined as "situations in which government responds to perceptions of unremedied systemic problems by creating or modifying a regulatory regime and relying in whole or in part on private actors as enforcers," Stephen B. Burbank, Sean Farhang and Herbert M. Kritzer, "Private enforcement" (2013) 17 Lewis & Clark Law Review 640

[7] Volken Röben, "The enforcement Authority of International Institutions," in Rüdiger Wolfrum, Armin von Bogdany, Matthias Goldmann, and Philipp Dann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2009) 821

[8] Meyer (n 3)

[9] Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (OUP 2011) 228

[10] John Vervaele, "Shared governance and enforcement of European law: From comitology to a multi-level agency structure?" in Christian Joerges and Ellen Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing 1999) 131

[11] See for example Martin Böse, Frank Meyer, and Anne Schneider, *Conflicts of Jurisdiction in Criminal Matters in the European Union* (Nomos 2014) 22-23; Cedric Ryngaert and John Vervaele, "Core values beyond territories and borders: The internal and external dimension of EU Regulation and Enforcement" in Ton van den Brink, Michiel Luchtman, Miroslava Scholten (eds), *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement* (Intersentia 2015) 299

[12] John Vervaele and Andre Klip (eds), *European Cooperation between Tax, Customs and Judicial Authorities*, (Kluwer Law International 2002) 12

In the EU, the three constituents of jurisdiction are shared between the EU and its Member States. As far as the jurisdiction to prescribe substantive norms is concerned–depending on the policy area and the type of competence – it is either vested exclusively in the EU,[13] or in both the EU and the Member States (shared competence).[14] But even when the Member States have shared competence with the EU, and are thus enabled to autonomously prescribe substantive rules (where the Union has not exercised its competence),[15] a Member State's jurisdiction to prescribe is shaped and influenced by the concrete objectives of the Union, which are codified in Article 2 TEU.[16]

As far the jurisdiction to enforce is concerned, several actors are entrusted with enforcing obligations imposed by EU law: the Member States, EU institutions and private parties.[17] The traditional method of enforcing EU law is that of indirect or decentralized enforcement.[18] The starting point in that regard is the principle of procedural or enforcement autonomy, which implies that where EU law does not lay down rules for enforcement, Member States are free to specify national procedural rules for the enforcement of EU rights.[19] Next, the EU Commission monitors whether Member States comply with EU law, by for instance ensuring that they have transposed correctly and timely EU Directives.[20]

However, indirect enforcement does not always bring about the desirable results. In numerous sectors and policy areas, where law enforcement had previously been a competence that rested with the national level, it transpired that there were either cases of non-implementation of EU policies by Member States or cases of non-compliance, due to *inter alia* political unwillingness, lack of national resources *et cetera*.[21] For example, the recent financial crises demonstrated in an unequivocal way that national supervisors may be State-centered and not fully aware of their EU-wide mandate, and the cross-border nature of banking activities and therefore serve national interests.[22] Subsequently, it has been argued

[13] According to Article 3(1) TFEU, the Union has exclusive competence in the areas of customs, competition rules, monetary policy for euro area Member States, common commercial policy and the conservation of marine biological resources under the common fisheries policy

[14] According to Article 4(2) TFEU, the Union shall share competence in the following areas: internal market; social policy for the aspects defined in the TFEU; economic, social and territorial cohesion; agriculture and fisheries, except for the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom; security and justice; and common safety concerns for the aspects defined in the TFEU.

[15] TFEU, art 2(2)

[16] The relevant provision reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"

[17] Herwig C.H. Hofman, Gerard C. Rowe, and Alexander H. Türk, *Administrative Law and Policy of the European Union* (OUP 2011) 691 et seq

[18] Christopher Harding, "Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a 'Joint Action' Model" in Christopher Harding and Bert Swart, *Enforcing European Community Rules. Criminal Proceedings, Administrative Procedures and Harmonization* (Dartmouth Pub 1996)

[19] Jan Jans, Sascha Prechal and Rob Widdershoven, *Europeanisation of Public Law* (2nd edn, Europa Law Publishing 2015)

[20] European Commission, "Member States' compliance with EU law in 2019: more work needed" (Press Release, 31 July 2020) < https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1389> accessed 14 July 2021

[21] Miroslava Scholten, "Mind the trend! Enforcement of EU law has been moving to 'Brussels'" (2017) 24 Journal of European Public Policy 1348

[22] Shawn Donnelly, "Power Politics and the Undersupply of Financial Stability in Europe" (2014) 21 Review of International Political Economy 980; Zdenek Kudrna, "Cross-Border Resolution of Failed Banks in the European Union after the Crisis: Business as Usual" (2012) 50 Journal of Common Market Studies 283

that when implementation or compliance with EU law fails at the national level, some degree of Europeanization will likely follow.[23]

There are different methods that the EU will deploy in order to address the aforementioned enforcement deficit. One approach has been the establishment of networks of national enforcement authorities. Networks serve as hubs for exchanging information, best practices and experiences. Indeed, in the last decade, networks have acquired a more institutionalized structure.[24] However, they often lack binding law enforcement powers or resources, while at times coordination between authorities may also prove to be problematic.[25]

Another way of addressing the enforcement deficit is through the creation of direct enforcement mechanisms, which implies the attribution to EU actors of direct monitoring, investigating, and/or sanctioning powers vis-à-vis private entities.[26] The EU Commission, as the primary enforcer of EU competition law, is the oldest example of a system of direct enforcement of EU law. More and more EU policy areas are experiencing a shift from indirect enforcement mechanisms to direct *modi operandi*. This has resulted in a proliferation of EU law enforcement authorities (ELEAs), which are active in policy areas that range from competition and medicines to food, financial supervision, fisheries control, the protection of financial interests of the EU, and more.

There exist compelling reasons for bestowing direct enforcement powers upon ELEAs. Centralization and Europeanization can potentially address issues of non-implementation and non-compliance, since an EU watchdog will serve the collective interests of the Union and not those of individual Member States. Another advantage of creating ELEAs consists of that law enforcement is immediately coupled with the concept of 'functional territoriality."[27] In other words, the territorial scope of ELEAs' powers is not limited to the territory of a single Member State, but extends to the EU territory as a whole.[28] Of course, the flipside of the coin is that such authorities may *inter alia* face challenges with respect to legitimacy,[29] present an accountability gap, and more.[30] Within ELEAs that carry out direct EU law enforcement, novel composite operational structures and *modi* of interaction between EU and national levels have been instituted. The term "composite EU law enforcement" is conceptualized and defined in the next section.

[23] Miroslava Scholten and Daniel Scholten, "From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover?" (2017) 55 Journal of Common Market Studies 925
[24] Ottow (n 1) 201; Wolfgang Weiss, "Agencies versus networks: From divide to convergence in the administrative governance in the EU," (2009) 61 Administrative Law Review 45
[25] David Coen and Mark Thatcher, "Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies" (2008) 28 Journal of Public Policy 49
[26] Miroslava Scholten, Michiel Luchtman, and Elmar Schmidt, "The proliferation of EU enforcement authorities: a new development in law enforcement in the EU," in Scholten & Luchtman 2017 (n 1) 1
[27] John Vervaele, "European criminal justice in the European and global context" (2019) 10 New Journal of European Criminal Law 7
[28] Hanneke van Eijken, Jessy Emaus, Michiel Luchtman, and Rob Widdershoven, "The European Citizen as Bearer of Fundamental Rights in a Multi-Layered Legal Order" in Ton van den Brink, Michiel Luchtman and Miroslava Scholten (n 11) 292
[29] Giandomenico Majone, "From Regulatory State to a Democratic Default" (2014) 52 Journal of Common Market Studies 1216
[30] Yannis Papadopoulos, "Accountability and Multi-level Governance: More Accountability, Less Democracy?" (2010) 33 West European Politics 1030

2.3 Composite EU law enforcement procedures

This dissertation is concerned with composite enforcement procedures. However, before defining what this concept entails, it is necessary to take a step back and explain the broader framework within which composite enforcement procedures take place. That broader framework is often called "composite administration" or "composite administrative procedures," and it has been studied extensively by several renowned administrative law academics.[31] For example, a well-known and authoritative description of composite administrative procedures has been given by Hofmann, who speaks of

> "*multi-step procedures with input from administrative actors from different jurisdictions. They cooperate either vertically between EU and Member State institutions, or horizontally between various Member States, or by combination of procedures between different Member States and EU institutions. A Member State or EU institution then issues the final act or decision based on procedures with more or less formalized input from different levels*."[32]

The above description succinctly portrays the landscape within which the SSM enforcement procedures are situated. Similar to the above description, also in the SSM, administrative actors, i.e., the ECB and NCAs interact through institutional, procedural, and informational cooperation,[33] both vertically and diagonally. Furthermore, they provide one another – often in formal, but also in less formal ways – operational information which may be used by the receiving authority for the adoption of a final act. Within that framework, the dissertation focuses on one particular type of composite administrative procedures, namely composite *enforcement* procedures. By that term, I refer to the different *modi* of interaction between the EU and national levels, whose common denominator consists of that they lead to the imposition of sanctions of a criminal nature,[34] either by the EU authority or by a national authority.

In the context of composite *enforcement* procedures, I am interested not only in the adoption of a final punitive decision, which undoubtedly raises all sorts of interesting issues with respect to the right to effective judicial review,[35] but also in the phases, actions, and choices preceding the adoption of such a final punitive decision. Indeed, the choice of the EU supervisor to obtain information on the territory of a certain jurisdiction and not of another, the gathering of information by hybrid operational structures on the basis of potentially different applicable laws, its further dissemination[36] and use in proceedings

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[31] See *inter alia* Filippe Brito Bastos, "An Administrative Crack in the EU's Rule of Law: Composite Decision-Making and Nonjusticiable National Law" (2020) 16 *European Constitutional Law Review* 63; Mariolina Eliantonio, "Judicial review in an integrated administration: the case of composite procedures" (2015) 7 Review of European Administrative Law 65; Hofmann, Rowe, and Türk (n 17); Herwig Hofmann, "Decision-making in EU Administrative Law-The Problem of Composite Procedures" (2009) 61 Administrative Law Review 199; Evgenia Prevedourou, *I syntheti dioikitiki energeia* (Sakkoulas 2005)

[32] Hofmann 2009 (n 31) 202

[33] Filippe Bristo Bastos, "Composite procedures in the SSM and the SRM – An analytical overview," in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021), 106

[34] For an explanation of that concept, see below Section 3.2

[35] Eliantonio 2015 (n 31)

[36] Michele Simonato, Michiel Luchtman and John Vervaele (eds), "Exchange of information with EU and national enforcement authorities: Improving the OLAF legislative framework through a comparison with other EU authorities" (Report, Utrecht University, March 2018) https://orbilu.uni.lu/bitstream/10993/35503/1/Utrecht_University_Hercule_III_Exchange_of_information_with_EU_and_national_enforcement_authorities.pdf accessed 13 December 2021; Mariolina Eliantonio, "Information Exchange in European Administrative Law: A Threat to Effective Judicial Protection?" (2016) 23 Maastricht Journal of European and Comparative Law 531

of a criminal nature, in a different legal order and by different actors than those that obtained the information, can have significant ramifications for the right to privacy, the rights of the defense of investigated/supervised actors, and for the *ne bis in idem* principle.

Furthermore, depending on the policy area at issue, composite (administrative) enforcement procedures can often have significant ramifications for national systems of criminal law enforcement. This is particularly evident in situations in which the same substantive rules can give rise to both an administrative and a criminal law response, which in turn implies a shared responsibility of administrative and criminal authorities to achieve common EU goals. Within that context, it may be that on the administrative side, an EU authority like the ECB exercises enforcement powers, while for the criminal side, national criminal law enforcement authorities exercise criminal law enforcement powers. For example, SSM authorities are responsible for the administrative law enforcement of Directive CRD IV and Regulation CRR. At the same time, violations of norms contained in these two legal instruments can also be punished by means of criminal sanctions by national judicial authorities.[37] Let us then imagine that a credit institution violates a legal provision which is contained in the CRR and which – under the national law of Member State A – can also lead to a criminal sanction. In this example, criminal enforcement at the national level is within the scope of Union law. Furthermore, it is not inconceivable that significant input for the final – let us say – decision of a national criminal enforcement agency could stem from the ECB or the local NCA. In that sense, composite administrative enforcement procedures may often add complications to the concept of punitive enforcement more generally, which includes not only (punitive) administrative sanctions, but also *strico sensu* criminal sanctions.

Thus far, I have clarified that I am interested in composite enforcement procedures and went on to explain the "enforcement" dimension of the term. But what is, after all, compositeness? And which different composite *modi operandi* can one deduce, when studying the current institutional design of various ELEAs?

Compositeness has been characterized as a "mutually assumed relationship,"[38] in the sense that the different authorities which are functionally cooperating with each other are organizationally separate, yet interdependent.[39] That is to say, the EU and national levels do not exercise powers within their own sphere of competence in complete isolation; their powers and their mandate frequently coincide.[40] Were it not for the national level, ELEAs would not be able to function, since they often rely on the powers and expertise of national authorities for accomplishing EU goals.[41] On the other hand, the Member States, too, need the EU in order to tackle problems that have become too big to solve individually.[42]

[37] CRD IV, art 65(1)
[38] Leondard Besselink, *A Composite European Constitution* (Europa Law Publishing 2007) 6
[39] Armin von Bogdany and Philipp Dan, "International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority," in Wolfrum et al (n 7) 887
[40] Besselink 2007 (n 38) 9
[41] For example, in the case of the Single Supervisory Mechanism, as noted by Weismann, it may be that the ECB lacked the experience to supervise credit institutions: "*This cooperation between the main EU actor in charge, the ECB, and the competent national authorities allows for different degrees of involvement of the latter. This involvement is necessary, not least because the ECB as an institution prior to the establishment of the SSM has had no experience in the micro-prudential supervision of banks*," see Paul Weismann, "The European Central Bank under the Single Supervisory Mechanism-Cooperation, Delegation, and Reverse Majority Voting" (2018) 24 European Journal of Current Legal Issues
[42] Eberhard Schmidt-Aßmann, "Introduction: European Composite Administration and the Role of European Administrative Law" in Oswald Jansen and Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia, 2011) 4-5

Compositeness is a "complex web of relationships which cuts across both the vertical and the horizontal dimension of power allocation."[43] In other words, it does not characterize only the vertical relationship between the EU and its Member States; the interactions between national legal orders acting under the auspices of an EU authority for the attainment of an EU goal (diagonal procedures),[44] are equally important.

In composite enforcement procedures, ELEAs and their national counterparts do not operate on the basis of one *modus* of interaction; in fact, the *modi* between the EU and national level(s) vary to a large extent, even within the same ELEA.[45] While their mandates and the policy areas in which ELEAs are active differ, certain commonalities do exist. To begin with, a characteristic common to all ELEAs, whose procedures are composite of EU and national features, is the fact that there is an ELEA which – from the perspective of its institutional design – is often an EU institution, an agency, or an office.[46] The ELEA works closely with national counterparts, for instance national competition authorities, national banking supervisors, national medicines authorities, anti-fraud coordination services, national prosecutors *et cetera*. Effective enforcement requires action both from the ELEA and its national counterparts. The different authorities are thus often under a duty to cooperate in good faith.[47] For the attainment of a common EU goal, the legal frameworks establish certain composite structures, at different phases of the enforcement process, such as the phase in which information is obtained, the phase where the EU authority and the national counterparts transfer to each other information that could potentially be relevant for enforcement purposes and in the sanctioning phase, i.e., the phase in which information obtained in one legal order is used in another legal order for punitive purposes.

As far as the stage in which information is obtained is concerned, an EU authority may ask for NCA assistance for the "opening of doors," such as in business or private premises.[48] Moreover, mixed teams composed of EU and national staff members,[49] or EU teams,[50] or national teams mandated by an EU authority to carry out information-gathering tasks,[51] obtain information, which may at a later stage be

[43] Giacinto Della Cananea, "Is European Constitutionalism Really Multilevel" (2010) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 283, 302

[44] Herwig C. Hofmann, "Multi-Jurisdictional Composite Procedures-The Backbone to the EU's Single Regulatory Space" (2019) *University of Luxembourg Law Working Paper* 003-2019, 21 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399042 accessed 13 December 2021

[45] Michiel Luchtman and John Vervaele, "*Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)"* (Utrecht University 2017) < http://dspace.library.uu.nl/handle/1874/352061> accessed 13 December 2021

[46] For example, the European anti-fraud office (OLAF)

[47] See for instance SSM Regulation, art 6(2) "*Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information*."

[48] For instance, in the area of EU competition law enforcement, 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 [2003] OJ L 1/1 ("Regulation 1/2003"), art 21(3)

[49] Eg, joint supervisory teams; see *a contrario*, Ambrosio who takes a different approach and argues that "no composite procedure arises when the staff of both national and Union authorities participate in joint supervisory teams (JSTs) and internal resolution teams (IRTs). The JSTs' preparation of proposals for supervisory decisions and their transmission to the SB [supervisory board] are not composite procedures, as JSTs are ECB and not SSM bodies," Raffaele D' Ambrosio, "Composite Procedures within the SSM and the SRM" (November 2020) ECB Legal Working Paper Series 20, 20 https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp20~e8c2267154.en.pdf accessed 14 December 2021

[50] Eg, OLAF external investigations

[51] Eg, ESMA delegated investigations, DG COMP

used as evidence for punitive purposes,[52] either at the EU or at the Member State level, or even across different Member States. The investigatory powers on the basis of which information is gathered may stem from EU law[53] or from national laws.[54]

Once information has been obtained, it is typically transferred to the EU authority. Assuming that the EU authority has at its disposal direct sanctioning powers, the collected information can be used for the adoption of a final sanctioning decision. Assuming that no sanctioning powers are vested in the EU authority, information is often transferred to the national level for (punitive) follow-up.[55] Some EU authorities have been entrusted with partly direct and partly indirect sanctioning powers, and therefore the transfer of information to the national level can also be accompanied with an instruction to the national counterpart to open sanctioning proceedings in accordance with its national law.[56]

In light of the foregoing discussion, a taxonomy of composite elements within EU law enforcement procedures, would be the following:

Composite responsibilities and tasks: Responsibilities and tasks are composite when they are shared by the ELEA and its national counterparts. For instance, in the policy area of EU aviation safety, responsibility is divided between the EASA and national aviation authorities.[57] It may also be that (institutional) responsibility rests with one authority, but the operationalization is composite. For instance, in the SSM, the ECB has been given the exclusive competence to oversee the effective functioning of the SSM,[58] but the tasks for the operationalization of the ECB's exclusive mandate are shared between the ECB and NCAs.[59]

Composite enforcement powers: Powers are composite when, for the realization of one and the same mandate,[60] the enforcement powers flow both from EU and national law(s). For example, in the SSM, the ECB derives a number of enforcement powers directly from EU law, but at the same time it indirectly has all the powers that NCAs have under relevant Union law, while it also enjoys the power to instruct NCAs to make use of national law powers.[61] The mandate is for effective banking supervision; the powers for realizing that mandate are to be found both in EU and national laws.

[52] See for instance in the case of OLAF, Fabio Giuffrida and Katalin Ligeti (eds), "Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings" (ADCRIM Report, University of Luxembourg 2019) 13-16 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021
[53] Eg, ECB powers on basis of SSM Regulation
[54] Eg,. national competition authorities investigating under national law on behalf of another NCA, art 22 Regulation 1/2003
[55] Eg, OLAF Reports; see also Case T-193/04 *Tillack* v *Commission* [2006] ECLI:EU:T:2006:292
[56] Eg, ECB requests NCAs to open sanctioning proceedings vis-à-vis natural persons and for the application of national law implementing EU directives in accordance with SSM Regulation, art 18(5)
[57] See, Florin Coman-Kund, Mikolaj Ratajczyk, and Elmar Schmidt, "Shared enforcement and accountability in the EU Aviation Safety Area: the case of the European Aviation Safety Agency," in Scholten and Luchtman 2017 (n 1) 115-116
[58] Argyro Karagianni and Mirosava Scholten, "Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework" (2018) 34 Utrecht Journal of International and European Law 185
[59] An example of how tasks are composite is the following. The ECB is responsible for the day-to-day supervision of significant banks, while the NCAs carry out the day-to-day supervision of less significant banks.
[60] Eg, protection of the EU's financial interests, effective banking supervision *et cetera*
[61] SSM Regulation, art 9(1)

Composite safeguards: ELEAs and NCAs – who are both acting within the scope of EU law[62] – are bound to apply CFR fundamental rights as a minimum.[63] However, when safeguards have not been exhaustively defined by EU law, or where the EU legal framework in a certain policy area refers back to national law, and an ELEA decides to forward the procedure to the national level, by for instance instructing an NCA to make use of national powers,[64] or by requesting from an NCA to provide physical assistance in the territory of a Member State,[65] or by requesting an NCA to open sanctioning proceedings,[66] safeguards can then defined by national law, as long as the primacy, unity and effectiveness of EU law are ensured. Safeguards are thus composite when, for the realization of one and the same mandate, they are defined both by EU and national law(s).

Composite remedies: In composite enforcement procedures, remedies are typically divided between the EU and the national Courts. Decisions taken by a national authority are reviewed by national Courts. Decisions taken by EU authorities are judicially reviewed by EU Courts. Before the adoption of a final decision though, input is typically provided by different levels and authorities. Therefore, the reviewing court may also need to review actions of administrative organs outside their own jurisdiction.

Against the foregoing, in this work, composite EU law enforcement (procedures),[67] is meant to indicate the following:

> EU and national law enforcement authorities, organizationally independent, but in a relationship characterized by decisional interdependence, operating in a functional EU territory, wherein they obtain, transmit and use information for punitive purposes, through combinations of procedures and structures, for the attainment of common EU goals.

Now that – for the purposes of this work – a working definition of composite enforcement procedures has been provided, in the next section I briefly point out the different elements of the SSM legal framework which support my argument that the SSM can be seen as a composite system of prudential law enforcement.

2.4 The SSM as a composite system of prudential law enforcement

Banking supervision in the EU, which is the case study of this research, has followed the same trend of Europeanization as other policy areas.[68] In 2013, the EU legislator created a Banking Union.[69] Cornerstone of the Banking Union is single supervision, carried out under a Single Supervisory Mechanism ("SSM"), which constitutes an integrated system of banking supervision, composed of the ECB and the national central banks of the euro area Member States.

According to the SSM Regulation (Article 1), the Council has conferred upon the ECB specific tasks in relation to the prudential supervision of the euro area credit institutions. These specific tasks are

[62] Case C- 617/10 *Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 21
[63] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107
[64] SSM Regulation, art 9
[65] SSM Regulation, art 12(5)
[66] SSM Regulation, art 18(5)
[67] This definition departs from the research previously undertaken by Hoffman 2009 (n 31), Eliantonio 2015 (n 31) and Hofmann, Rowe and Türk (n 17)
[68] Scholten and Ottow 2014 (n 1)
[69] European Commission, "Banking and Finance – Banking Union" (2015) http://ec.europa.eu/finance/general-policy/banking-union/index_en.htm accessed 14 December 2021

elaborated upon in the next chapter (III). For the purposes of this section, it is important to note that single supervision is roughly arranged as follows: the credit institutions[70] of the 19 participating EU Member States are classified either as "significant" (SIs)[71] or as "less significant" (LSIs). The ECB exercises day-to-day supervision over SIs, while the NCAs retain daily oversight over the supervision of LSIs. However, the ECB may at any time decide to assume direct supervision of a LSI, if it deems necessary,[72] given its exclusive competence and the fact that – according to the SSM Regulation – it is responsible for the effective and consistent functioning of the SSM.[73]

The law applied within the SSM is a blend of EU and national legislation, as well as hard law and soft law. While certain substantive requirements have been laid in EU Regulations, the vast majority of the applicable substantive law is to be found in the national transpositions of EU Directives and in regulatory and technical standards.[74]

For the realization of the SSM, a number of integrated operational structures have been instituted by the ECB on the basis of ECB Regulation 468/2014 (SSM Framework Regulation). Examples of such integrated operational structures are the joint supervisory teams (JSTs)[75] and on-site inspection teams (OSITs).[76] JSTs are teams responsible for the day-to-day supervision of SIs and are composed of ECB and NCA staff members. OSITs have a similar composition with JSTs, but they have been designed specifically for carrying out on-site inspections.[77] Significant information-gathering powers are vested both in JSTs and OSITs, such as the powers to request information, to take oral statements and to inspect business premises. Furthermore, the ECB is competent to instruct NCAs to make use of national powers that the ECB does not in itself possess.[78] The EU legal framework also provides that NCAs are required to offer assistance to the ECB, in accordance with their national law, if a supervised entity opposes an inspection. Such assistance includes the sealing of business premises, books, and records.[79]

In addition to the composite structures which are active in the stage of the obtainment of information, in the next phase of the enforcement cycle, namely the phase in which the obtained information is transferred to another legal order, the legal framework establishes general and specific obligations for

[70] Even though "credit institutions" and "banks" are not one and the same, I will be referring to "credit institutions" and "banks" interchangeably. The interested reader is encouraged to read EBA's opinion and concomitant Report to the European Commission on matters relating to the perimeter of credit institution; European Banking Authority, "Opinion of the European Banking Authority on matters relating to the perimeter of credit institutions" (EBA/Op/2014/12, 27 November 2014) < https://eba.europa.eu/sites/default/documents/files/documents/10180/657547/a7bf5c46-2b80-4286-8771-d14a22c87354/EBA-Op-2014-12%20%28Opinion%20on%20perimeter%20of%20credit%20institution%29.pdf> accessed 16 July 2021

[71] In 1 November 2021, the ECB was directly supervision 115 significant credit institutions; European Central Bank, "List of supervised banks" (2021) <https://www.bankingsupervision.europa.eu/banking/list/html/index.en.html> accessed 14 December 2021

[72] SSM Regulation, art 6(5)(b)

[73] SSM Regulation, art 6(1)

[74] Asen Lefterov, "The Single Rulebook: legal issues and relevance in the SSM context" (*ECB Legal Working Paper Series*, 2015) < https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp15.en.pdf> accessed 14 December 2021; Giovanni Bassani, *The Legal Framework Applicable to the Single Supervisory Mechanism: Tapestry or Patchwork?* (Kluwer Law International, 2019)

[75] SSM Framework Regulation, art 3

[76] SSM Framework Regulation, art 144

[77] European Central Bank, "Guide to on-site inspections and internal model investigations" (September 2018) < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.osi_guide201809.en.pdf?49b4c0998c62d4ab6f31a4733c7ea518> accessed 16 July 2021

[78] SSM Regulation, art 6(3) and art 9(1)

[79] SSM Regulation, art 12(5)

mutual exchanges of information between the ECB and its national counterparts.[80] In the "use" phase, i.e., the phase in which information may be used for sanctioning, the ECB is enabled – after its own investigation has been terminated, but if the EU supervisor is not competent to sanction directly – to request from an NCA the opening of sanctioning proceedings.[81]

It is worth mentioning that the ECB may also transmit criminally relevant information to national legal orders. For instance, when the ECB suspects that a criminal offense may have been committed, "it shall request the relevant NCA to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law."[82] This provision highlights the potential ramification that composite SSM enforcement procedures may have for the legal position of supervised persons in the context national criminal law enforcement proceedings.[83]

The aforementioned (rough) sketch of the interactions between the ECB and the NCAs demonstrates that there are good reasons for arguing that the SSM comprises a truly composite system of banking supervision and enforcement: both the ECB and NCAs share a common goal, namely financial stability.[84] They obtain, transfer, and use information on a functional territory, which comprises the different legal orders of the 19 participating Member States. As a result, what happens in one legal order has direct implications in another. At the same time, in the absence of a common EU code of procedure, enforcement powers, legal safeguards and the organization of judicial control are scattered around the 19 different legal orders, thereby bringing to the fore important questions regarding the extent to which fundamental rights protection in such a composite landscape is complied with.

This dissertation aims to assess the extent to which fundamental rights are adequately protected in the composite enforcement procedures that take place under the auspices of the ECB. In that respect, now that I have explained what composite procedures are and why the SSM can be seen as a composite system of law enforcement, the next logical step consists of looking into the concept of fundamental rights, through the prism of composite law enforcement. This is the core of the analysis in the next section.

3. Protection of fundamental rights through the lens of composite enforcement procedures

Fundamental rights comprise the normative framework of this dissertation. Therefore, an understanding of the complex EU landscape, in which different sources of protection are simultaneously applicable, as well as the nexus between these distinct legal sources is of paramount importance. Which fundamental rights are of relevance in the context of SSM investigations? Which rights influence national proceedings that follow up on EU ones? Which fundamental rights' catalogs bind the EU and national law enforcement authorities and the concomitant Courts? What is the notion of a criminal charge? In which ways do fundamental rights accomplish their protective function in punitive enforcement? And what questions follow for the remaining chapters if one looks at the essence of fundamental rights through the lens of composite law enforcement? These issues are scrutinized henceforth.

[80] Argyro Karagianni, Miroslava Scholten and Michele Simonato 2018, "EU Vertical Report," in Simonato, Luchtman and Vervaele (n 36) 23 et seq
[81] SSM Regulation, art 18(5)
[82] SSM Framework Regulation, art 136
[83] See also, Silvia Allegrezza, "The Single Supervisory Mechanism: Institutional design, punitive powers and the interplay with criminal law" in Silvia Allegrezza (ed), *The enforcement dimension of the Single Supervisory Mechanism* (Wolters Kluwer Italia 2020) 3-46
[84] Gianni Lo Schiavo, *The role of financial stability in EU law and policy* (Kluwer Law International 2016)

3.1 The landscape of fundamental rights protection in the EU

Fundamental rights protection in the EU Member States is erected upon three levels: the national, the international, and the EU. At the national level, fundamental rights are typically safeguarded by national Constitutions. A Constitution has been defined as "a higher law that can be amended only by a complex process of constitutional revision."[85] That is to say that – within the Member State level – national Constitutions are generally granted the status of the hierarchically supreme source of rights. In the aftermath of World War II, the majority of the EU Member States underwent a process of constitutionalization.[86] Provisions on the protection of privacy[87] are to be found in all national Constitutions. Most texts stipulate that no home search shall be made except when and as specified by law and following a judicial warrant. Certain Constitutional texts make explicit reference to safeguards of the defense, such as legal assistance, the adversarial principle, the right to be heard, and more.[88] Additionally, Constitutions typically contain provisions on the right to have access to a court,[89] on judicial independence,[90] and on jurisdictional rules.[91]

The second layer of fundamental rights protection in the EU Member States stems from the international (and reginal) levels. On the international level, we can find the International Covenant on Civil and Political Rights[92] and the Universal Declaration of Human Rights.[93] On the regional level, the European Convention of Human Rights ("ECHR"). Similar to the drafting of national Constitutional texts, the drafting of the ECHR was essentially triggered by the end of World War II. All EU Member States have signed and are bound by the ECHR. [94]

But what is the influence of the ECHR on national legal systems? Signatory States generally enjoy discretion to organize their domestic rules and procedures in the way they seem fit, as long as their legal systems abide by ECHR standards; a typical example of such discretion[95] is manifested in the case law of the European Court of Human Rights ("ECtHR"), which is concerned with the admissibility of unlawfully obtained evidence. Strasbourg has stressed in numerous occasions that its role is not to examine whether unlawfully obtained evidence can be admissible in domestic court proceedings, but

[85] Federico Fabbrini, *Fundamental Rights in Europe – Challenges and Transformations in Comparative Perspective* (OUP 2014) 7
[86] Christian Joerges, "Introduction to the Special Issue: Confronting Memories: European Bitter Experiences and the Constitutionalization Process: Constructing Europe in the Shadow of Its Pasts" (2005) 6 German Law Journal 245
[87] See *inter alia* Italian Constitution, art 14; German Basic Law, art 10; Spanish Constitution, Section 18; Greek Constitution, art 9(1); Portuguese Constitution, art. 26(1)(2)
[88] For example, Portuguese Constitution, art 32; German Basic Law, Section 24(2)
[89] For example, German Basic Law, Section 24(1)
[90] For example, Greek Constitution, art 84
[91] For example, Greek Constitution, art 93
[92] United Nations, "International Covenant on Civil and Political Rights" (1976) < https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 16 July 2021
[93] United Nations, "Universal Declaration of Human Rights" (1948) < https://www.un.org/sites/un2.un.org/files/udhr.pdf> accessed 16 July 2021
[94] See *inter alia* Steven Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (Cambridge University Press 2006); David John Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (OUP 2009); Pieter van Dijk, Godefridus van Hoof, Arjen van Rijn, Leo Zwaak (eds), *Theory and Practice of the European Convention of Human Rights* (5th edn, Intersentia 2018)
[95] See *inter alia* Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002); Michael Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 International & Comparative Law Quarterly 638

"whether the proceedings as a whole, including the way in which the evidence was obtained, were fair."[96] Naturally, the fact the States enjoy a margin of discretion as to how they are going to comply with obligations stemming from the ECHR constitutes a manifestation of their *interna*l sovereignty.[97] After all, CoE States do not comprise a distinct legal order or a Federation of nation-states.

Notwithstanding the aforementioned discretion of CoE States, it has to be noted that the ECHR does impose certain "outer limits" within which States can exercise their sovereignty. For example, laws must always provide for legal certainty regarding the scope of citizens' rights and duties.[98] A second example of a universal concept, which States have to observe, but in a way they see fit, pertains to the concept of the "fairness of the proceedings as whole." Strasbourg's pivotal concern is an assessment of the overall fairness of criminal proceedings. Indeed, the ECtHR is not willing to engage in "*an isolated consideration of one particular aspect or one particular incident*."[99] As a result, States must always ensure that proceedings as a whole are fair, though they do remain free to determine the specificities in order to ultimately secure procedural fairness. Ultimately, signatory States are always subjected to the judicial supervision of the ECtHR. In that respect, in the words of Torres Perez, "the ECtHR has created *a quasi*-constitutional order of human rights protection in Europe."[100] The EU as a single legal order has not acceded to the ECHR, as that would undermine the specific characteristics and the autonomy of EU law.[101]

The creation of the EEC did not foresee a mechanism of fundamental rights protection. That is not surprising, as the economic and political rationales underpinning the EEC project, left little room for including in the foundational Treaties a human rights dimension. Thus, the development of fundamental rights protection in the EU followed a rather unorthodox path, in the sense that fundamental rights commenced in the jurisprudence of the CJEU as general principles of law, which are "common in the Constitutional traditions of the Member States."[102] One could arguably summarize the process as an evolution from general principles of EU law toward written fundamental rights in the early 00s.[103] For the CJEU, the most important vehicle for developing its general principles and – as a corollary – its fundamental rights related case law, has been the procedures pertaining to EU competition law enforcement, carried out by the EU Commission. Procedural matters, such as the principle of good

[96] *Edwards* v *the United Kingdom* App no. 13071/87 (ECtHR, 16 December 1992) para 34; *Mantovanelli* v *France* App no *21497/93* (ECtHR, 18 March 1997) para 34; S*chenk* v *Switzerland* App no. 00010862/84 (ECtHR,12 July 1988) para 46

[97] Ronald A. Brand, "External sovereignty and international law" (1999) 18 *Fordham International Law Journal* 1685, 1689

[98] Michiel Luchtman, "Transnational Investigations and Compatible Procedural Safeguards" in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart Publishing 2017) 193

[99] European Court of Human Rights, "Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial" *(*August 2020) 7 https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf accessed 7 January 2021

[100] Aida Torres Perez, *Conflicts of Rights in the European Union* (OUP 2009) 31

[101] Opinion C-2/13, *Accession of the Union to the ECHR* [2014] ECLI:EU:C:2014:2454, para 258

[102] For example, Case C-11/70 *Internationale Handelsgesellschaf* [1970] ECLI:EU:C:1970:114

[103] *See inter alia*: Joseph Weiler, "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities" (1986) Washington Law Review 61; Takis Tridimas, *The General Principles of EU Law*, (2nd edn, OUP 2007); Alexander Türk, "Administrative Law and Human Rights" in Sionaidh Douglas-Scott and Nicholas Hatzis, *Research Handbook on EU law and human rights* (Edward Elgar 2017) 121 et seq

administration[104] and the inviolability of the home[105] have thus been clarified over the decades. In 2009, when the Lisbon Treaty came into force, the Charter of Fundamental Rights of the European Union (CFR) became legally binding and has since acquired the same value as the Treaties.

Concerning its field of application, CFR provisions are addressed to Union institutions, bodies, offices and agencies as well as to the Member States, when the latter implement Union law.[106] The content of the term "implementation" does not follow from the CFR text in a straightforward manner. However, following seminal decisions of the CJEU and particularly the *Åkerberg Fransson* case,[107] it has become clear that when national legislation falls within the scope of EU law, the rights guaranteed by the CFR must be observed.[108] A few situations under which national legislation falls within the scope of Union law are the following: a) when a substantive norm of EU law is applicable to the facts of a given case,[109] b) when EU law requires Member States to ensure effective enforcement by means of criminal or administrative sanctions,[110] and c) when national legal orders adjudicate on rights and obligations stemming from Union law.[111]

While the EU has not acceded to the ECHR, it is worth mentioning that according to Article 52(3) CFR,

> "Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive protection."[112]

Against this background, the relationship between the CFR and the ECHR could be encapsulated as follows. The CFR observes the ECHR rights as minimum standards. More extensive protection can be offered. However, as it follows from the *Bosphorus* v *Ireland* case,[113] when a State belongs to an international organization such as the EU, if the EU offers equivalent protection, it is presumed that a State has not departed from Convention obligations, especially if it does nothing more than implementing a legal obligation stemming from the EU.[114] From the *Bosphorus* judgment, as well as from opinion 2/13, it clearly follows that the CJEU and national Courts are the only competent Courts to supervise the application of the CFR in the implementation of EU law. Strasbourg will not intervene in domestic cases whose subject matter relates to the implementation of Union law; however, ECHR standards should be observed as minimum standards.

The CFR undoubtedly applies on the vertical axis of EU law enforcement, that is, whenever the ECB exercises direct enforcement powers vis-à-vis credit institutions. As far as NCAs and national criminal enforcement agencies are concerned, the CFR also applies to their actions, by virtue of the fact that

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[104] For example: Case 17/74 *Transocean Marine Paint Association* v *Commission of the European Communities* [1974] ECLI:EU:C:1974:106
[105] Case C-46/87 *Hoechst* v *Commission* [1989] ECLI:EU:C:1989:337
[106] CFR, art 51(1)
[107] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105
[108] Ibid, para 21
[109] Daniel Sarmiento, "Who's afraid of the Charter? The Court of Justice, national courts, and the new framework of fundamental rights protection in Europe" (2013) 50 Common Market Law Review 1267, 1279
[110] Ibid, 1281
[111] Ibid
[112] CFR, art 52(3)
[113] *Bosphorus* v *Ireland* App no 45036/98 (ECtHR, 30 June 2005)
[114] Ibid, para 156

prudential legislation and its enforcement, through both administrative and criminal law, fall within the scope of Union law.[115] The critical question though is the extent to which national law can offer higher protection than that offered by Union (if offered). The answer to that question depends on whether in that particular policy area fundamental rights have been exhaustively regulated by the EU legislature and to what extent potentially higher national standards would undermine the primacy, unity, and effectiveness of EU law.[116]

Now that the (complex) relationship between the different sources of fundamental rights protection has been clarified, the next section looks into the concept of "punitive sanction" and reiterates which specific fundamental rights are of paramount importance in the context of punitive administrative investigations.

3.2 Fundamental rights in enforcement procedures

An important tool in the toolbox of every supervisory authority is the power to impose administrative measures and punitive sanctions. Given that investigations preceding the imposition of sanctions are generally costly,[117] heavy penalties will typically be employed only when compliance-based approaches have failed.[118] Notwithstanding the fact that sanctions are generally utilized only as a mechanism of last resort, traditionally, they do play an important role in banking supervision. It therefore comes as no surprise that far-reaching sanctioning powers have been vested in the ECB[119] and its national counterparts.[120] SSM authorities operate on the basis of administrative law and therefore hefty administrative sanctions can be imposed upon the conclusion of (punitive) administrative investigations. However, the severity of certain penalties may be such as to demand that investigations carried out for the purpose of enforcing economic law must observe criminal law safeguards.[121]

At this juncture, reference to the notion of "criminal charge" shall be made, as criminal law safeguards are generally afforded only in proceedings that are criminal/of a criminal nature. In the ECHR, the meaning of the term "criminal charge" (hereafter also "punitive" charge) was clarified already in the 1970s. In the *Engel* v *Netherlands* case,[122] the ECtHR came up with three criteria for assessing whether an administrative sanction can qualify as being criminal in nature: a) the legal classification of the offense under national law; b) the nature of the offense; and c) the severity and purpose of the imposed penalty. The first criterion is merely a starting point, while that other two can either be applied cumulatively or alternatively.[123]

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[115] CRD IV, art 65
[116] Case C-399/1 *Melloni* [2013] ECLI:EU:C:2013:107, paras 58-59
[117] Ian Ayres and John Braithwaite, *Transcending the Deregulation Debate* (OUP 1992)19
[118] See Dalvinder Singh, "The Centralisation of European Financial Regulation and Supervision: Is There a Need for a Single Enforcement Handbook?" (2015) 16 European Business and Organization Law Review 439, 450 et seq
[119] SSM Regulation, art 18
[120] For a comparative overview of the sanctioning powers of selected EU banking supervisory authorities, see Allegrezza 2020 (n 83)
[121] Marc Veenbrink, *Criminal Law Principles and the Enforcement of EU and National Competition Law – A Silent Takeover?* (Kluwer Law International 2020) 3-6; Giulia Lasagni, *Banking Supervision and Criminal Investigation Comparing the EU and US Experiences* (Springer 2019) 186 et seq; Raffaele D'Ambrosio, "Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings" (2013) 74 Banca d'Italia Quaderni di Ricerca Giuridica della Consulenza Legale 23-24
[122] *Engel and Others* v *The Netherlands* App nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR 8 June 1976)
[123] *Jussila* v *Finland* App no 73053/01 (ECtHR 23 November 2006) paras 30-31

As far as the EU legal order is concerned, the CJEU, later on, followed the approach of the ECtHR. In the landmark *Bonda* case,[124] even though the Court did not find the specific administrative measure in that particular case to be of a criminal nature, in reaching its conclusion, it cited the *Engel* case.[125] Therefore, in the EU legal order, the autonomous meaning of a "criminal charge" concurs with the interpretation given by the ECtHR.

Do SSM sanctions qualify as being criminal in nature? According to the prevailing view in literature,[126] the pecuniary administrative fines that can be imposed by SSM authorities are so severe that they may indeed qualify as being criminal in nature. Presuming that this is indeed the case – something which is further analyzed in the subsequent chapter – the logical corollary of this is that fair trial guarantees and certain criminal safeguards must also apply to SSM administrative investigations that may lead to the imposition of a pecuniary administrative fine or to the imposition of a criminal sanction in the strict sense by national criminal law enforcement authorities.

In the next section, the main rationales underpinning the fundamental rights studied here are scrutinized. A number of questions are subsequently raised that ensue when one looks at the essence of the (here studied) fundamental rights through the prism of composite enforcement procedures.

3.3 Fundamental rights in composite enforcement procedures: a set of pertinent questions

3.3.1 Introduction

For effectively ensuring compliance with the law, it is critical that the State vests in supervisory agencies a wide range of enforcement powers. At the same time, overly intrusive powers can significantly impinge upon persons' fundamental rights. While certain interferences are often inevitable and at times even necessary, particularly in light of the objectives of effective law enforcement, the law is brought into play in order to prevent arbitrary use of public power: "*no modern system of government could function if the administration had to be conducted in all circumstances according to fixed rules. There must frequently be a degree of flexibility supplied by administrative discretion, but this discretion is not arbitrary in nature; it must be exercised in good faith and within the limits set by the legislature."*[127] In other words, the legislature must ensure that the necessary discretion vested in the executive does not amount to unfettered discretion, but to legally controlled discretion.

In the course of the information-gathering phase of an enforcement procedure, supervisory authorities regularly request information. They may also decide to "open the door," that is, to carry out on-site inspections. On-site inspections and information requests interfere with the inviolability of the home and of correspondence, elements of the right to privacy. Thus, at that stage, respect for the right to privacy is critical and particularly the control of the proportionality of the inspection and of other potentially coercive measures.[128] Once the "door has been opened" or access to correspondence has been obtained, the rights of the defense come into play to ensure a fair procedure. Finally, if an authority imposes a sanction based on materials gathered in earlier investigations, in violation of fundamental rights, the right to an effective remedy is the only "weapon" left to private parties. Assuming that the

[124] Case C- 489/10 *Bonda* [2012] ECLI:EU:C:2012:319
[125] Ibid, para 37
[126] Allegrezza 2020 (n 83) 26-27; Lasagni 2019 (n 121) 192; D'Ambrosio (n 121) 26-27.
[127] Arthur Goodhart, "The rule of law and absolute sovereignty" (1958) 106 University of Pennsylvania Law *Review* 943, 956
[128] Rob Widdershoven and Paul Craig, "Pertinent issues of judicial accountability in EU shared enforcement" in Scholten and Luchtman 2017 (n 1) 341

breach can lead to two potential sanctions, both of "criminal in nature," respect for the *ne bis in idem* principle already in the stage of investigation, by authorities with overlapping competences, is essential for ensuring that the concerned persons have legal certainty that they will not be prosecuted twice for the same act, facts of offense.

The below sections look into the key ideas underpinning the right to privacy, the rights of the defense, the right to an effective remedy and particularly its "access to a court" component, and the *ne bis in idem* principle in more detail. For each fundamental right, a number of questions that come to the fore, if one looks at it through the lens of composite enforcement procedures, are also raised.

3.3.2 The right to privacy through the lens of composite enforcement procedures

The right to privacy (Article 7 CFR/Article 8 ECHR) holds that every person has the right to respect for his private and family life, his home and correspondence. There is a well-known statement, coined in the sixteenth century, that aptly epitomizes the essence of the fundamental right: "*A man's home is his castle*."[129] That is to say, the right to privacy grants (natural and legal) persons a safe space of their own, within which they can freely develop and carry out their personal and professional activities. However, owing to the fact that law enforcement authorities often need to gather information in order to establish violations of the law, limitations to the right can occur through *inter alia* the use of investigative powers. For instance, the power to carry out on-site inspections in business and/or private premises is often vested in administrative authorities,[130] while the power to perform search & seizure procedures is typically vested in criminal enforcement agencies. Albeit both investigative techniques interfere with the right to privacy, the focus here is on the administrative side, namely on-site inspections or "dawn raids"[131] and their potential influence on future punitive proceedings, be they administrative or criminal.

In the context of investigations performed by administrative authorities, there are generally two ways in which the exercise of enforcement powers will interfere with Articles 7 CFR/8 ECHR. The first way is when the authority wishes to enter business or private premises. Such entry interferes with the inviolability of the home element of the right to privacy.[132] It should be noted that protection for the home extends to both natural and legal persons.[133] Once entry has been secured, the very gathering of information containing confidential or privileged correspondence, is an act that might interfere with employee's confidentiality of correspondence. At the same time, (off-site) information requests can also interfere with the right to privacy, particularly if the requested materials contain information that can be termed as private.

To assess whether the right to privacy is adequately protected in composite SSM enforcement procedures, the content of the right to privacy and the ways in which it accomplishes its protective

[129] Thomas Y Davies, "Recovering the Original Fourth Amendment" (1999) 98 *Michigan Law Review* 547, 642.
[130] It is worth noting that the while the rule of thumb is that administrative authorities can only enter business premises, there are situations in which they can also – subject to additional strict safeguards – enter private premises, such as land, means of transport, and private homes. See Regulation 1/2003, art 21
[131] van Dijk, Van Hoof, Van Rijn, Zwaak (n 94*)*, 720 et seq; see also Marta Michalek, *Right to Defence in EU Competition Law: The Case of Inspections* (Centre of Antitrust and Regulatory Studies 2015)
[132] Maurizia De Bellis, "Multi- level Administration, Inspections and Fundamental Rights: Is Judicial Protection Full and Effective?" (2021) 22 German Law Journal 416, 417
[133] *Société Colas Est and Others* v. *France* App no 37971/97 (ECtHR 16 April 2002); Case C-46/87 *Hoechst* v *Commission* [1989] ECLI:EU:C:1989:337; Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603, para 29; Case T- 135/09 *Nexans France and Nexans* v *Commission* [2012] ECLI:EU:T:2012:596, para 40

function will need to be explained. First of all, the right to privacy is not an absolute right, meaning that limitations on its applicability are possible, as long as they cumulatively meet four criteria: they are in accordance with the law, they serve a legitimate aim, and they are necessary and proportionate.[134] A limitation on the right to privacy is in accordance with law if it is sufficiently precise, accessible, and foreseeable. It is not necessary that persons always have absolute certainty about the precise content of their right.[135]

From the foregoing discussion, it follows that one way in which the fundamental right accomplishes its safeguarding function is the following: it offers (a degree of) legal certainty as to the content of one's privacy, including – albeit in broad strokes – the situations under which limitations to one's right may occur. Limitations will not be deemed arbitrary as long as persons subjected to limitations are offered a (reasonable) degree of legal certainty about the applicability of such limitations.

The second way in which the right to privacy casts a safety net over one person's private sphere is by offering legal protection against disproportionate or arbitrary intervention in one's private sphere. In the words of the ECtHR, "*a law which confers discretion must indicate the scope of that discretion*."[136] The law must therefore provide for mechanisms which ensure that public authorities can be held into account (by Courts) if they happen to abuse discretionary powers.[137] As such, the legal protection dimension of the right to privacy obliges the State to define with reasonable clarity the scope and manner of the exercise of discretion,[138] or, in other words, it creates an obligation toward the State to ensure that "*the executive or judiciary are not allowed to make or change the rules of the game as they go along*."[139] The latter can be verified by a Court, either *ex ante* or *ex post.*

The more severe the interference with the right to privacy, the stricter the procedural safeguards that must be afforded to the persons concerned.[140] The margin of discretion left by the ECHR to signatory States implies that there is quite some leeway in laying down procedural safeguards which comply with the right to privacy and which ensure legal protection. While State A may demand that law enforcement authorities must apply for a judicial warrant before carrying out an on-site inspection, State B may have chosen to offset the lack of *ex ante* legal control by testing the proportionality of the inspection though *ex post* full judicial review. Either way, the legal protection function of the right to privacy demands that control on whether discretion has stayed within the legally appropriate limits is somehow provided, either *ex ante* or *ex post*.[141]

To sum up, in the context of the right to privacy, legal certainty is ensured when persons have (a degree of) legal certainty as to the content of their privacy. Legal protection is ensured when a Court controls – *ex ante* or *ex post* – whether the executive exceed their discretion or not.

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[134] CFR, art 7 and art 52(1); ECHR, art 8(2)
[135] *Silver and Others* v *United Kingdom* App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECtHR 25 March 1983) para 88
[136] *Malone* v *UK* App no 8691/79 (ECtHR 2 August 1984)
[137] Michiel Luchtman, *Transnationale rechtshandhaving-Over fundamentele rechten in de Europese strafrechtelijke samenwerking* (Boom juridisch 2017) 39
[138] *Kruslin* v *France* App no 11801/85 (ECtHR 24 April 1990) para 35
[139] Michiel Luchtman, "Principles of European Criminal Law: Jurisdiction, Choice of Forum, and the Legality Principle in the Area of Freedom, Security, and Justice" (2012) 20 European Review of Private Law 347, 351
[140] van Dijk, van Hoof, van Rijn, Zwaak (n 94) 745-746; *Colas Est* (n 133) para 48
[141] Michiel Luchtman and John Vervaele, "European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)" (2014) 10 Utrecht Law Review 132, 143

Have the content and the protective functions of the right to privacy acquired a unique meaning in the context of composite law enforcement proceedings? With respect to the legal certainty dimension, if we couple the concept of composite law enforcement with the way in which the right to privacy traditionally accomplishes its protective functions within one State, a number of pertinent questions will inevitably come to the fore. Assuming that a credit institution operates through branches in multiple Member States, can the same set of information be obtained by different SSM authorities, in different legal orders, on the basis of different sets of powers? If so, are there rules in place for the determination of the applicable legal order? To make it even more concrete, can information that is considered private in the Netherlands be transferred to the Greek legal order, in which the reasonable expectation of what is termed as "private" may differ significantly? For example, let us imagine that the NCA of Member State A can forcefully open drawers on-site, while such a power is not vested in the NCA of Member State B. Can the same information end up in Member State B and – if so – how can supervised persons get a reasonable expectation of their privacy?

In light of the legal protection dimension of the right to privacy, an additional set of questions can be raised. Assuming that in the aforementioned scenario the same information can indeed be gathered by multiple SSM authorities, under different conditions and standards, and subsequently be transmitted to another legal order, and presuming that there are no rules in place to regulate the choice for the applicable law, how can protection against the excess of executive discretion be sought? How does the margin of discretion that individual States retain in choosing either for *ex ante* or for *ex post* judicial control of the proportionality of on-site inspections play out in a composite landscape? What if information is gathered in legal order A, which does not foresee *ex ante* legal control of inspection decisions, and ends up for sanctioning purposes in legal order B? Can the court of Member State B, which may be called upon to offer legal redress, test the proportionality of an inspection that took place in another legal order *ex post*?

As can be seen, a myriad of relevant questions ensue, all of which are concerned not only with vertical relationships between the ECB and individual Member States and the potential differences between EU and national laws, but also with diagonal procedures and therefore with differences in the legal systems of national legal orders. The questions that were raised above go hand in hand with the concepts of legal certainty (foreseeability) and of legal protection.

3.3.3 The rights of the defense through the lens of composite enforcement procedures

3.3.3.1 Introduction

Several distinct rights fall under the term "rights of the defense."[142] Access to a lawyer, the legal professional privilege, the privilege against self-incrimination, the obligation to state reasons, the right to have access to the file, and the right to be heard are all examples of defense rights which function as tools for ensuring procedural fairness. Particularly in cases of determination of a punitive administrative or a criminal sanction, the rights of the defense must be granted already at the investigative phase, because failure to do so can undermine the fairness of the proceedings as a whole.[143] Of course, not only must the rights of the defense be granted *in abstacto*, but the person subject to punitive proceedings

[142] See Piero Leanza, Ondrej Pridal, *The Right to a Fair Trial – Article 6 of the European Convention on Human Rights* (Kluwer Law International 2014)
[143] *Imbrioscia* v *Switzerland* App no 13972/88 (ECtHR 24 November 1993) para. 36*; Berlinski* v. *Poland* App nos 27715/95 and 30209/96 (ECtHR 20 June 2002) para 75; S*habelnik* v *Ukraine* App no 16404/03 (ECtHR 19 February 2009) para 52

shall also be able to effectuate his or her defense rights. This is the "procedural fairness" dimension of defense rights.

At the same time, once involved in a procedure, a person must be able to know what his rights and obligations are, so that he can adjust his defense strategy accordingly.[144] This is the "legal certainty"[145] dimension of the rights of the defense. In other words, in the context of the rights of the defense, legal certainty means "*that legal persons have the opportunity to affirm their legal situation in a court procedure according to a predetermined set of procedural rules*."[146] Consequently, defense rights' related legal certainty does not promise that the concerned person has utmost legal certainty about their precise content of his defense rights before he is involved in a punitive proceeding. Rather, once involved in a procedure – and thus not when committing an offense – a person must be able to determine his procedural position.

To illustrate how the rights of the defense ensure legal certainty and procedural fairness and how they offer legal protection, I will first discuss the case of the legal professional privilege (LPP) in order to exemplify the types of legal certainty-related questions that come to the fore once LPP is seen through the prism of composite enforcement procedures. Thereafter, I will discuss the example of the privilege against self-incrimination in order to exemplify the types of procedural fairness and legal protection-related questions that ensure once the privilege against self- incrimination is seen through the lens of composite enforcement procedures.

3.3.3.2 Legal professional privilege in composite enforcement procedures

The legal professional privilege (LPP) or lawyer-client privilege is a defense right that protects the confidentiality of communications between a lawyer and his client. It usually prevents law enforcement authorities from having access to certain communication between a lawyer and his client, while it can also have a bearing on the (in)admissibility – in legal proceedings – of evidence obtained in breach of that right.[147] The LPP applies not only to proceedings that may lead to the imposition of a sanction of a criminal nature, but it more generally applies to all administrative sanctions, as well as those that are not criminal in nature.[148]

Depending on whether legal systems belong to civil or common law traditions, LPP is often called "professional secrecy," such as in France, while in common law jurisdictions the right can only be invoked by the client and is often called "professional privilege."[149] Irrespective however of legal traditions, the underlying idea of protecting LPP is closely related to the fundamental role that lawyers play in a democratic society, that of defending litigants. The relationship between a lawyer and his clients is based on trust. If confidentiality of communications was curtailed, this would seriously

[144] Michiel Luchtman 2017 (n 137) 38
[145] This is a term which is used by Paunio to crystallise Jurgen Habermas' "procedure-dependent certainty of law." See Elina Paunio, "Beyond Predictability—Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order" (2009) 10 German Law Journal 1469, 1474-1475
[146] Ibid, 1474
[147] Eric Gippini-Fournier, "Legal professional privilege in competition proceedings before the Commission: Beyond the cursory glance" (2004) 28 Fordham International Law Journal 967, 976
[148] Rob Widdershoven, "Administrative Enforcement," in Jan Jans, Sascha Prechal, Rob Widdershoven (eds), *Europeanisation of public law* (Europa Law Publishing 2015), Section 3.3.3
[149] Taru Spronken, Jan Fermon, "Protection of Attorney-Client Privilege in Europe" (2008) 27 Penn State International Law Review 439

undermine trust and as a corollary effective defense.[150] Effective defense and trust between the client and his lawyer are therefore two of the pivotal interests that LPP seeks to protect. Oftentimes, LPP is additionally linked to the client's right to privacy.[151] Finally, it is important to highlight that LPP is closely related to the privilege against self-incrimination. In that respect, it has rightly been argued that "*unconstrained access by the lawyer to incriminating information in the possession of the clients is, in reality, what the privilege seeks to protect*."[152] Indeed, if the client could not be certain that information shared with his lawyer will remain confidential, his privilege against self-incrimination would then become illusory.

As already explained, legal certainty is concerned with "the certainty that legal persons have the opportunity to affirm their legal situation in a court procedure according to a predetermined set of procedural rules."[153] Procedures that may lead to the imposition of a punitive penalty must therefore allow the persons involved to foresee (legal certainty) the procedures they will face along the way, as well as their rights and duties in the context of these procedures, which in turn enables them to orchestrate an effective defense strategy.[154] Within a single Member State, that does not appear to be problematic. How is the legal certainty function of defense rights protected in composite enforcement proceedings? Numerous questions can be raised in that respect.[155]

EU law and national laws may set different standards with respect to the protection of procedural safeguards, such as LPP. At the same time, EU enforcement proceedings are increasingly a composite of EU and national elements. If EU investigations can lead to national punitive sanctions, how can procedural safeguards be effectuated in such a composite landscape? More specifically, how is LPP to be protected at the interface of different legal orders? To make my point even more concrete, departing from the premise that the SSM comprises a composite system of law enforcement, what if information was gathered by the ECB, on the basis of Union powers, and was subsequently introduced as evidence for sanctioning, in a legal order that provides for higher protection? From a legal protection point of view, how should national Courts, potentially reviewing a final national decision deal with evidence gathered on the basis of divergent procedural standards? More generally, in both vertical and diagonal procedures, are supervised persons enabled to challenge the legality of SSM actions in cases where evidence was gathered abroad, on the basis of divergent procedural standards and/or different sets of powers?

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[150] See Geoffrey Hazard, "An historical perspective on the attorney-client privilege" (1978) 66 California Law Review 1061; Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECLI:EU:C:2010:512 (*Akzo Akcros*), para 87; *S* v *Switzerland* App nos 12629/87 and 13965/88 (ECtHR 28 November 1991) para 48

[151] On why this view may not be convincing, see "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement" (1977) 91 Harvard Law Review 464, 483

[152] Gippini-Fournier (n 147) 1002

[153] Elina Paunio, "Beyond Predictability-Reflections on legal Certainty and the Discourse Theory of Law in the EU Legal Order" (2009) 10 German Law Journal 1469, 1474

[154] Michiel Luchtman 2017 (n 137) 38

[155] These questions have also been raised more generally in Michiel Luchtman, Argyro Karagianni and Koen Bovend'Eerdt, "EU administrative investigations and the use of their results as evidence in national punitive proceedings" in Fabio Giuffrida and Katalin Ligeti (eds) *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (ADCRIM Report, University of Luxembourg 2019) 13-16 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021. They have also been raised more specifically in respect of the particular setting of the SSM in Argyro Karagianni, "How to ensure defense rights in the composite SSM-setting?" (EU Law Enforcement Blogspot, December 2019) < https://eulawenforcement.com/?author=5> accessed 16 July 2021

These questions may not *prima facie* seem novel. After all, they have been examined already by the CJEU, in the seminal *Akzo Akcros* case,[156] which I shall discuss below.

In the UK, in-house legal counsels are covered by the protective scope of the LPP, while under EU law they are not.[157] In 2003, the EU Commission carried out a dawn raid at the premises of Akzo, in England. The EU Commission applied the EU standard of LPP. Akzo complained, arguing that it is unacceptable that the fate of the same internal document should depend on whether it is the UK competition authority or the EU Commission the authority that attempts to seize it. The undertaking therefore claimed before the CJEU that this was contrary to the principle of legal certainty, which demands *inter alia* that "*rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them*."[158] In other words, the CJEU was essentially asked whether the fact that EU and national laws apply different standards in their respective spheres of application gives rise to a legal certainty problem, in light of the principle of (procedural) legal certainty.

Both the Court and the Advocate General responded in the negative. According to the Advocate General, the principle of legal certainty and the rights of the defense do not require that EU and national law should ensure the same level of protection. National legal principles and national fundamental rights protection may not extend beyond national spheres of competence.[159] Even though it is indeed inconvenient for the persons involved, that discrepancy between EU and national law stems from the division of powers between the EU and the Member States in antitrust law. Enforcement of national competition law and of Articles 101 and 102 TFEU comprise two distinct spheres of competence and thus rules on defense rights may vary according to that division of powers.[160] The Court furthermore added that since 1982, it is clear to economic undertakings that in antitrust investigations carried out for the enforcement of EU competition law, companies cannot invoke the secrecy of the correspondence between the company and its internal lawyers.[161]

Indeed, as stated earlier, these questions and the answers to them are far from novel, but only if one perceives the ECB, NCAs and national judicial authorities as being institutionally separated. Here, on the other hand, we are faced with a new reality, in which banking supervision proceedings are composite of EU and national elements, and hence a segregation of the different actors' actions is not possible anymore. For that reason, questions on how to ensure legal certainty and on how to deal with divergent procedural standards at the interface of different legal orders and areas of law (administrative-criminal), bounce back. While in a single legal order there will be no issue of legal uncertainty, as is the case in the domain of antitrust law enforcement, in a composite system of law enforcement, issues of legal certainty will revive. That is so because assuming that a credit institution seeks advice from a lawyer, but they are not certain whether EU or national law determines the composite procedure in its entirety, that is a problem of legal certainty.

[156] *Akzo Akcros* (n 150)
[157] Case 155/79 *AM & S Europe Limited* v *Commission of the European Communities* [1982] ECLI:EU:C:1982:157, paras 21 and 24
[158] Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v *European Commission* [2010] ECLI:EU:C:2010:229, Opinion of AG Kokott, para 124
[159] Ibid., para 133
[160] *Akzo Akcros* (n 150) para 102
[161] This follows from the case *AM & S Europe Limited* v *Commission of the European Communities* (n 157)

3.3.4.3 Privilege against self-incrimination in composite enforcement procedures

The privilege against self-incrimination (PSI), also known as *nemo tenetur seipsum accusare*, is part of the rights of the defense and it prohibits law enforcement authorities from using improper compulsion against a person to produce information or evidence that would incriminate him or her.[162] Ensuring therefore respect for the privilege against self-incrimination is conducive to avoiding miscarriages of justice and to guaranteeing the aims contained in the right to a fair trial.[163] The privilege against self-incrimination is based on the principle that judicial organs should be able to prove a case without the suspect's help.[164] Within the sphere of punitive administrative law and criminal law enforcement, the privilege is at risk of being violated when the supervisory authorities exert (improper) compulsion upon the investigated parties.[165] Conversely, in the absence of improper compulsion, the privilege against self-incrimination is not at stake. Furthermore, the privilege against self-incrimination extends only to so-called will-dependent information, such as oral statements and more generally subjective judgments. Information that can be acquired through the use of compulsion and which exists independently of the will of the accused, such as existing documents or data obtained pursuant to a formal decision or a judicial warrant, in principle does not therefore fall within the protective scope of the privilege against self-incrimination.[166]

In combinations of proceedings by law enforcement authorities, there are generally two scenarios in which privilege against self-incrimination protection may be compromised. First, when there is a punitive investigation that follows up on a non-punitive one. The privilege against self-incrimination can then be jeopardized if evidence obtained in the non-punitive investigation, where persons are always under an obligation to cooperate, is used, in an incriminating way, in a subsequent punitive procedure.[167] Second, a non-punitive investigation runs in parallel with a punitive investigation, but legislation does not forbid the use as evidence, in the punitive procedure, of the information gathered by the authorities in the non-punitive procedure, thereby destroying the very essence of the privilege against self-incrimination.[168] As can be seen, in both scenarios, the same facts and the same information can be relevant for different purposes, proceedings, and even authorities. This is particularly the case in jurisdictions where no precedence is given to one procedure over the other, multiple procedures can be conducted simultaneously or sequentially.[169] The same goes for jurisdictions in which one and the same authority is responsible both for the supervision of compliance (non-punitive) and for the punitive investigation.[170] Therefore, it is often the case that, within a State, two or more sets of proceedings can be sufficiently interlinked. Strasbourg takes the view that the domestic legislator ought to coordinate such interlinked proceedings.[171]

[162] *Saunders* v *United Kingdom* App no 19187/91 (ECtHR 17 December 1996), para 68
[163] *John Murray* v *United Kingdom* App no 18731/91 (ECtHR 8 February 1996), para 45
[164] Harris, O'Boyle, Warbrick 2009 (n 94) 259
[165] *John Murray* (n 164) paras 45-47
[166] *Saunders* v *United Kingdom* (n 163) para 69
[167] *Saunders* v *United Kingdom* (n 163)
[168] *Chambaz* v *Switzerland* App no 11663/04 (ECtHR15 April 2012); *Martinnen* v *Finland* App no 19235/03 (ECtHR 21 April 2009)
[169] Luchtman, Karagianni and Bovend'Eerdt 2019 (n 155)
[170] Michiel Luchtman, *Grensoverschrijdende sfeercumulatie: Over de handhavingssamenwerking tussen* financiële, *toezichthouders, fiscale autoriteiten en* justitiële *autoriteiten in EU-verband* (Wolf Legal Publishers 2007) 133-134
[171] See Luchtman, Karagianni and Bovend'Eerdt 2019 (n 155) and the case law discussed there

In the context of the SSM, it should first be determined whether sufficiently interlinked proceedings do take place. If they do, do they take place only at the EU level, or are they scattered across different legal orders and authorities? Second, should the answer to those questions be in the positive, does EU law provide rules to coordinate the two sets of consecutive or parallel proceedings? In an enforcement setting consisting of EU and Member State legal systems, which are not *a priori* designed to fit one another, how are investigated persons able to effectuate their defense rights? How can the privilege against self-incrimination be protected? Are natural and legal persons able to challenge the legality of the ECB or NCA's actions in cases where materials were gathered abroad, in violation of the privilege against self-incrimination (legal protection dimension)? Who bears responsibility for safeguarding the privilege against self-incrimination in a composite law enforcement landscape: is it the EU authority or the NCAs? How does enforcement of prudential legislation by means of criminal law in various Member States fit in that picture? Can public prosecutors use as evidence in national criminal proceedings information gathered by SSM administrative authorities in the monitoring stages of law enforcement, during which credit institutions are under an obligation to cooperate?

3.3.4 The right of access to a court through the lens of composite enforcement procedures

Judicial review – by a court – is one of the mechanisms by which the executive can be held into account.[172] A precondition for effective judicial review is the right of access to a tribunal or a court. [173] A court may need to assess the legality of SSM acts that preceded the adoption of a final punitive decision. Think, for instance, of a formal ECB information request.[174]

The requirements for gaining access to a national court are subject to the principle of procedural autonomy and, as such, defined by the different national laws. As a matter of EU law, in order to gain access to the CJEU, in the first place, an applicant must demonstrate that the act they seek to annul is reviewable.[175] In the second place, they must establish *locus standi*.

With respect to the reviewability criterion, an act has been found to be reviewable if it is "capable of affecting the interests of the applicant by bringing about a distinct change in his legal position."[176] A decision is capable of bringing about a distinct change in the legal position and is thereby reviewable only insofar as it is definitively laying down the position of an EU institution, like the ECB. [177] In this regard, in the *Tillack* case,[178] the Court explained that preparatory measures are not *per se* reviewable.[179] Nevertheless, when a party brings an action for annulment against a measure that finalizes a procedure, then preparatory acts (and potential irregularities therein) may be reviewed as well. [180]

[172] John Bell, "Judicial Review in the Administrative State" in Jurgen de Poorter, Ernst Hirsch Ballin, Saskia Lavrijssen (eds), *Judicial Review of Administrative Discretion in the Administrative State* (M.C. Asser Press 2019) 3-26
[173] There are, of course, many more requirements embedded in the concept of effective judicial review. For instance, the reviewing court must meet a number of institutional requirements; namely, it must be established by law and it must be independent and impartial and it must have full jurisdiction, including the power to alter the amount of fine. See Case C-272/09 P *KME Germany and Others* v *Commission* [2011] ECLI:EU:C:2011:810, para 106; However, these particular elements exceed the dissertation's scope.
[174] SSM Regulation, art 10
[175] Case C-60/81 *IBM* v *Commission* [1981] ECLI:EU:C:1981:264, para 9
[176] Ibid
[177] Ibid, para 10
[178] *Tillack* v *Commission* (n 55)
[179] Ibid, paras 63-64
[180] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law* (OUP 2014) 274

Concerning the establishment of *locus standi*, the addressee of an ECB decision can certainly establish standing before the CJEU. On the other hand, a person seeking to annul an EU act, who is not an addressee of that act, must establish that he or she is directly and individually concerned. [181] This is no easy task,[182] however, as this section is concerned with sketching the main concepts and laying down the assessment framework, I will come back to the details pertaining to reviewability and *locus standi* in Chapter III. For now, it suffices to reiterate that – in the context of composite enforcement procedures and protection of fundamental rights therein– the right of access to a court is ensured when a court is competent to review (and remedy) complaints pertaining to violations of fundamental rights in any phase of a composite enforcement procedure.

A plethora of questions can be raised in relation to the right of access to a court in composite EU law enforcement procedures. Questions stem first and foremost from the fact that adjudicative jurisdiction in the EU is divided between two levels, the EU and the national.[183] Whereas EU law enforcement is characterized by highly sophisticated mechanisms of cooperation, the judicial review of composite enforcement procedures is still arranged vertically, in terms of levels and hierarchy. As a result of that strict division, each court is only competent to review acts and decisions adopted by authorities within that court's jurisdiction. However, the composite nature of the enforcement of certain EU competences and policies questions the perception of judicial review in the EU in terms of levels. The legal reality gives rise to a series of questions with regards to how access to a court can and ought to be ensured in the case of composite law enforcement procedures. Are national Courts willing to assess (at least marginally) the legality of actions of authorities that are not part of their own national legal order and remedy violations of rights, for instance by excluding evidence obtained in another legal order in violation of fundamental rights? Is the CJEU willing to review the national, preparatory segments of a composite enforcement procedure and, if so, on the basis of which standards will such a review take place – EU or national standards?

3.3.5 The *ne bis in idem* principle through the lens of composite enforcement procedures

Also known as the prohibition against double jeopardy, the *ne bis in idem* principle limits the possibility of a person being prosecuted twice (or more than twice) for the same act, offense, or facts. While it has been argued that the principle reinforces the notion of *res judicata*,[184] other commentators[185] are of the opinion that *res judicata* mostly serves the credibility of the justice system in a given jurisdiction. Be it as it may, it is generally acceptable that the *ne bis in idem* generally accomplishes its safeguarding function by offering legal certainty. In other words, the principle seeks to ensure that a person knows that he will not be prosecuted and/or punished again for the same conduct after a final judgment has been delivered.[186] The threshold of legal certainty consists of that persons must be confident that after

[181] Case 25/62 *Plaumann* v *Commission* [1963] ECLI:EU:C:1963:17, paras 106-107
[182] Alexander Türk, *Judicial Review in EU Law* (Edward Elgar 2009) 9
[183] See Eliantonio 2015 (n 31); Herwig C.H. Hofmann and Morgane Tidghi, "Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks" (2014) 20 European Public Law 147; Herwig Hofmann, "Composite Decision Making Procedures in the EU Administrative Law" in Herwig Hofmann and Alexander Türk (eds), *Legal Challenges in EU Administrative Law: The Move to an Integrated Administration* (Edward Elgar 2009); Herwig C. H. Hofmann and Alexander Türk, "The Development of Integrated Administration in the EU and its Consequences" (2007) 13 European Law Journal 253
[184] Bas van Bockel, *The ne bis in idem principle in EU law* (Wolters Kluwer 2010)
[185] Juliette Lelieur, "Transnationalising *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty" (2013) 9 Utrecht Law Review 198
[186] Case C-436/04 *van Esbroeck* [2006] ECLI:EU:C:2006:165, Opinion of AG Ruiz-Jarabo Colomer, para 19

a final judgment – on the question of prosecution – has been passed, they cannot be prosecuted/sanctioned again for the same act/facts/offense.[187]

Legal certainty is thus the legal interest which is at the core of the *ne bis in idem* prohibition. Within the EU legal order, *ne bis in idem* is arguably one of the most well-developed fundamental rights seeing that in the AFSJ, its transnational scope of application has been repeatedly recognized by the Union, as well as by national Courts.[188] However, less clear is its precise content in economic law, as well as in vertical relationships between the EU and national legal orders. In other words, how the notion of legal certainty, through which *ne bis in idem* accomplishes its protective function, plays out in composite EU law enforcement and in the enforcement of banking supervision law, is an issue that has not yet been answered by the CJEU.

Against this backdrop, a number of questions can be raised with regards to how *ne bis in idem* protection can be accommodated in composite law enforcement procedures. For example, are national authorities aware of their composite mandate and the fact that decisions taken in order legal order can affect the legal position of individuals and the choices of other authorities in other legal orders?[189] Are mechanisms to coordinate different sets of proceedings present? Is excessive sanctioning in a composite setting acknowledged and prevented in the current legal framework of the SSM? How can persons subjected to ECB supervision have legal certainty that they will not be prosecuted or sanctioned more than once for the same act, offense, or facts? Last but not least, what is the content of the *ne bis in idem* prohibition in the specific case of the Single Supervisory Mechanism?

3.4 Intermediate Conclusion

To summarize, the right to privacy, the rights of the defense, the *ne bis in idem* principle and the right of access to a Court comprise the evaluative framework of this dissertation. At a *meta* level, I aim to assess the extent to which legal certainty, legal protection, and procedural fairness are safeguarded in composite SSM enforcement procedures.

4 Constitutional framework surrounding composite enforcement procedures and repercussions for the protection of fundamental rights

4.1 Introduction

Before moving on to the investigative part of this dissertation, the general principles of EU law that currently govern the interactions between the different legal orders and the protection of fundamental rights therein, merit some attention. In other words, what does the current constitutional framework say about vertical and diagonal enforcement procedures? Do the current general principles of EU law[190] give sufficient answers to the various fundamental rights questions that I posed in the previous section?

[187] Michiel Luchtman, "Transnational Law Enforcement in the European Union and the Ne Bis In Idem Principle" (2011) 4 Review of European Administrative Law 5, 8
[188] John Vervaele, "Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?" (2013) 9 Utrecht Law Review 211
[189] Michiel Luchtman, "The ECJ's recent case law on ne bis in idem: Implications for law enforcement in a shared legal order" (2018) 55 Common Market Law Review 1717, 1741 et seq
[190] I use "constitutional principles" and "general principles of EU law" interchangeably. In doing so, I am influenced by Tridimas, who argues that "(…) the general principles [of EU law] embody constitutional values (…)," Tridimas 2007 (n 103) 19

4.2 General principles of EU constitutional law applicable to the enforcement of Union law

The first step in answering the questions posed in the end of the previous section consists of articulating which general principles of EU law, out of the many,[191] are relevant for vertical and diagonal enforcement procedures. The primacy of EU law is without a doubt the starting point of answering any question that touches upon the relationship between the EU and national legal orders. In a nutshell, it implies that EU should be given precedence over any conflicting norm stemming from national law.[192]

When it comes to enforcement of Union law by Member States, in the first place, Member States and national law enforcement organs must adhere to the principles of effectiveness and equivalence. In essence, these two principles delimit the actions of national authorities (and Courts) when enforcing EU norms.[193] Equivalence holds that, in the absence of EU rules regulating a certain matter, it is for the Member State to designate such rules, which cannot be less favorable than those relating to similar actions of a domestic nature.[194] For example, assuming that EU law has not regulated the admissibility in national proceedings of evidence gathered by ELEAs, the principle of equivalence would demand that EU evidence is treated in an equivalent way as evidence originating from national administrative organs.

The principle of effectiveness holds that domestic rules must be framed in a way that does not "make it practically impossible or excessively difficult to attain the objectives pursued by Community law."[195] While the national procedures for the enforcement of EU law remain within the discretion of the Member State, penalties imposed for such violations must in any case be effective, proportionate, and dissuasive.[196]

Another significant principle that governs the relationship between the EU and the different legal orders is the principle of sincere cooperation, which holds that the Union and the Member States shall assist each other in carrying out the tasks that flow from the Treaties. To that end, Member States shall take all the appropriate measures to ensure the fulfillment of their obligations stemming from the Treaties or resulting from the acts of Union institutions.[197] It is important to note at this point that the principle of sincere cooperation underpins not only the cooperation between administrative authorities, but also the cooperation between administrative authorities, such as the ECB and DG Competition, and national judicial authorities dealing with infringements of Union rules.[198] That is of particular importance in light of the fact that – as discussed previously – ELEA's tasks – may often overlap with/add complications to *stricto sensu* criminal enforcement. As a corollary, ELEAs may at times need to liaise with national criminal enforcement agencies to coordinate their enforcement responses.

From the foregoing discussion, it becomes evident that, while the rule of thumb is Member States' procedural and enforcement autonomy, this is just a starting point; domestic legal systems must adhere

[191] Ibid
[192] Case C-6/64 *Costa* v *E.N.E.L.* [1964] ECLI:EU:C:1964:66
[193] Sascha Prechal and Rob Widdershoven, "Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection" (2011) 4 Review of European Administrative Law 31
[194] Case C-33/76-*Rewe v Landwirtschaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188, para 5
[195] Case C-387/02 *Berlusconi and Others* [2005] ECLI:EU:C:2005:270, Opinion of AG Kokott, para 84
[196] Case C-68/88 *Commission* v *Greece* [1989] ECLI:EU:C:1989:339, para 24 ("Greek Maize")
[197] TEU, art 4(3); see also Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014)
[198] Case T-353/94 *Postbank NV* v *Commission of the European Communities* [1996] ECLI:EU:T:1996:119, para 64

to the general principle of sincere cooperation (Article 4(3) TEU) and are therefore bound by the requirements of equivalence, effectiveness, dissuasiveness and proportionality.

4.3 Preliminary ruling proceedings

EU and national law enforcement authorities are not the only players that play a role in the enforcement of Union rules. Given that individuals must be able to enforce Union rights before national Courts,[199] Courts play an instrumental role in the enforcement of Union law and in offering legal protection. In the EU, the jurisdiction to adjudicate follows a dualistic system:[200] decisions taken by EU organs fall under the jurisdiction of the CJEU, while decisions taken by national authorities are subject to the review of the competent national Courts.

The CJEU is competent to review the legality of the acts of EU institutions.[201] An action for annulment can be brought before the CJEU either by the addressee of a Union acts or by those who can establish direct and individual concern.[202] However, seeing as the enforcement of Union law is often taking place at the national level, national Courts have an equally important role to play: "national Courts act as judges *du droit commun*, whose task is to ensure that EU law is given proper effect in the Member States."[203] Within that context, national judges may often need guidance concerning the interpretation of Union law[204] and the validity and interpretation of binding and non-binding EU acts.[205] Should a national judge require such guidance he should make use of the preliminary ruling procedure, which is foreseen in Article 267 TFEU and refer a question to the CJEU.

Seeing as the preliminary ruling proceedings are available only to national Courts vis-à-vis the CJEU, it becomes apparent that the here discussed tool is certainly useful for vertical composite enforcement proceedings that commence at the Union level and end with a decision by an NCA. However, a similar mechanism concerning horizontal and/or diagonal relationships does not currently exist. In that respect, assuming that a national court reviewing a final decision must assess the legality of actions that took place under the responsibility of another Member State, there is no possibility of referring a question to another national court.

4.4 The role allocated to fundamental rights in the current EU narrative: a tale of mutual trust and a presumption of equivalence

The preliminary ruling procedure provides guidance to national Courts with respect to the effective enforcement of Union law. At the same time, the principles of primacy and effectiveness of EU law,

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[199] Case 222/84 *Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:206, para 180; Case C-97/91 *Oleificio Borelli SpA* v *Commission of the European Communities* [1992] ECLI:EU:C:1992:491, para 14; Case C-402/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461, para 335; Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd* v *Justitiekanslern* [2007] ECLI:EU:C:2007:163

[200] Eliantonio 2015 (n 31) 66-67

[201] TFEU, art 263(1); more specifically, the General Court (GC) reviews such acts in first instance and the Court of Justice (ECJ) in appeal

[202] TFEU, art 263(4)

[203] Sascha Prechal and Rob Widdershoven, "Principle of effective judicial protection" in Miroslava Scholten and Alex Brenninkmeijer, *Controlling EU Agencies – The rule of law in a Multi-jurisdictional legal order* (Edward Elgar 2020) 81

[204] TFEU, art 267(a)

[205] TFEU, art 267(b)

the principle of equivalence and the principle of sincere cooperation inform the multilevel enforcement of Union law. But how does fundamental rights protection fit in that picture?

An inquiry into case law shows that if one wants to understand how fundamental rights considerations, in the context of (multilevel) enforcement of EU law, are currently approached, he or she will have to begin by studying case law concerned with enforcement cooperation in the Area of Freedom, Security, and Justice (AFSJ). According to the CJEU, the principle of mutual trust demands that "*particularly as regards the area of freedom, security, and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law"*[206]

As it can be seen, the idea – or rather presumption – underpinning mutual trust is that each Member State shares with the rest a set of common values and a common cultural heritage, on which the EU is founded.[207] In turn, that may in principle imply that Courts – EU and national – potentially reviewing final decisions adopted (partially or wholly) on the basis of foreign input,[208] may be required to presume that fundamental rights were respected in an equivalent manner also in the legal order that gathered the information. An implicit obligation to accept procedural differences between Member States seems thus to be the rationale underpinning the principle of mutual trust.

In the enforcement of public economic law, the picture portrayed by the CJEU in the AFSJ, manifests itself in the competence area of EU competition law enforcement. Regulation 1/2003[209] introduces the principle of equivalent protection (of defense rights),[210] which, in essence, means that level of fundamental rights in the distinct legal orders involved in the enforcement of EU competition law, must be considered sufficiently equivalent. The EU legislator has thus explicitly included a recital in Regulation 1/2003 which reads that "the rights of defense enjoyed by undertakings in the various legal systems can be considered as sufficiently equivalent."[211]

The raison d'être of the presumption of equivalent protection of fundamental rights and of its "sister" term,[212] mutual trust, is to make enforcement cooperation possible. How do these concepts achieve that? By precluding differences in fundamental rights standards from hindering vertical, horizontal and diagonal enforcement cooperation, unless particularly flagrant violations of fundamental rights have occurred, in which case the presumption of mutual trust (and presumably the presumption of

[206] Case C 216/18 *PPU* [2018] ECLI:EU:C:2018:586, para 36
[207] Giandomenico Majone, "Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market" (1995) EUI Working Paper RSC 95/1, 15 < https://cadmus.eui.eu/bitstream/handle/1814/1376/EUI_RSC_1991_01.pdf?sequence=1&isAllowed=y> accessed 21 December 2021
[208] By the term "foreign input," I refer to materials gathered by NCAs in a national legal order other than the sanctioning legal order, on the basis of national investigative powers. On the other hand, the term "EU input" is meant to indicate materials gathered on the basis of powers laid down in the SSM Regulation.
[209] 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 [2003] OJ L 1/1
[210] The term "equivalent protection of fundamental rights" used here should not be confused with the principle of equivalence which was developed in the *Rewe* judgment (see *infra*, Section 4.2)
[211] Regulation 1/2003, recital 16
[212] For an analysis of the relationship between equivalence and mutual trust, see Auke Willems, "Mutual Trust as a Term of Art in EU Criminal Law: Revealing Its Hybrid Character" (2016) 9 European Journal of Legal Studies 211, 245-246

equivalence) may be rebutted.[213] In other words, the vision of equivalence, which is primarily evident in the internal market, and the vision of mutual trust, which is particularly evident in the AFSJ, close the gap between divergent legal systems. An additional function served by these two almost identical concepts is that of offering guidance to the Courts that will ultimately be called upon to offer legal redress, by imposing on those Courts an obligation to disregard (procedural) differences, by perceiving EU legal systems as providing for a sufficiently equivalent level of fundamental rights protection.[214]

Even though the importance of equivalence and of mutual trust is indisputable, on the other hand, as has rightly been noted, to simply advocate that the protection of fundamental rights in the EU is sufficiently equivalent does not necessarily make it equivalent.[215] Such an argument is in fact supported by a number of recent legislative efforts, notably in the area of EU competition law and in the AFSJ, which attempt to bolster procedural rights across the EU, by establishing a common set of minimum rules.

More specifically, in the enforcement of EU competition law, Directive 2019/1 ("Directive ECN+")[216] aims to foster the equivalence of national legal systems through the establishment of minimum[217] common investigative powers of competition authorities and of the afforded procedural safeguards.[218] In the AFSJ, Directive 2016/343,[219] for instance, aims at establishing a common set of minimum rules on the protection of procedural rights in *stricto sensu* criminal proceedings, while it also intends to "strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. Such common minimum rules may also remove obstacles to the free movement of citizens throughout the territory of the Member States."[220] It could be argued that, in essence, both legislative instruments indirectly recognize that merely promulgating

[213] Sascha Prechal, "Mutual Trust Before the Court of Justice of the European Union" (2017) 2 European Papers 75

[214] Luchtman, Karagianni, Bovend'Eerdt 2019 (n 155) 17

[215] Valsamis Mitsilegas, "The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice" (2015) 6 New Journal of European Criminal Law 457, 472

[216] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] PE/42/2018/REV/1 OJ L 11/3 ("ECN+ Directive")

[217] "The exercise of the powers, conferred by this Directive on NCAs, including the investigative powers, should be subject to appropriate safeguards which at least comply with the general principles of Union law and the Charter of Fundamental Rights of the European Union, in accordance with the case law of the Court of Justice of the European Union, in particular in the context of proceedings which could give rise to the imposition of penalties. These safeguards include the right to good administration and the respect of undertakings' rights of defence (…)," ECN+ Directive, Recital 14. See also Directive ECN+, Recital 29: "National administrative competition authorities should have effective powers of investigation to detect any agreement, decision or concerted practice prohibited by Article 101 TFEU or any abuse of a dominant position prohibited by Article 102 TFEU at any stage of the proceedings before them (…) Granting such effective investigative powers to all national administrative competition authorities should ensure that they are in a position to assist each other effectively when requested to carry out an inspection or any other fact-finding measure on their own territory on behalf of and for the account of another NCA pursuant to Article 22 of Regulation (EC) No 1/2003"

[218] See, critically, Rea, Marialaura, "New Scenarios of the Right of Defence Following Directive 1/2019" (2019) 12 Yearbook of Antitrust and Regulatory Studies 11; Maciej Bernatt, Marco Botta, and Alexandr Svetlicinii, "The Right of Defense in the Decentralized System of EU Competition Law Enforcement. A Call for Harmonization from Central and Eastern Europe" (2018) 41 World Competition 309

[219] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65

[220] Ibid, recital 10

that in the EU fundamental rights are protected in an equivalent is not, as such, enough, and more needs to be done.

Even more so, where procedures are composite, meaning that different (potentially conflicting) fundamental rights standards apply to different segments of a composite procedure, it is highly unlikely that mutual trust and the principle of equivalent protection can give answers to problems of legal certainty, procedural fairness, and legal protection. By means of an example, what if information was obtained by the ECB on the basis of the EU LLP principle and is now used for punitive sanctioning by an NCA, in a Member State that provides for higher protection? A different example: what if the French NCA obtains information applying the French privilege against self-incrimination standard and that information is used by the German NCA for punitive sanctioning, but in Germany a higher privilege against self-incrimination standard is generally applicable? So far, answers to those specific (vertical and diagonal) composite questions do not exist. A possibly relevant case is the *Melloni* case;[221] there, the CJEU was concerned with the question whether national constitutional provisions, providing for higher fundamental rights protection than the level deriving from Union law,[222] can be accorded priority over the application of EU law. The CJEU responded in the following way: "*national authorities and Courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity, and effectiveness of EU law are not thereby compromised*."[223]

How does the *Melloni* doctrine shape and influence composite law enforcement proceedings and the complete protection of fundamental rights therein? What does *Melloni* mean, particularly for those composite enforcement procedures that commence at the EU level or in a Member State and end with sanction of a criminal nature, imposed by the NCA of another Member State? More specifically, what if the application of national (procedural) law, providing for a higher level of fundamental rights protection, in relation to the standards of the "gathering" legal order, clashes with the *effet utile* of Union law?

At first sight, it could mean the following: where national authorities implement Union law, for instance NCAs and national judicial authorities enforcing EU prudential legislation, and EU law guarantees already a minimum level of fundamental rights protection, those national authorities cannot apply their potentially higher fundamental rights standards. However, it shall be emphasized that the *Melloni* case was concerned specifically with the European Arrest Warrant (EAW). As has rightly been pointed out in this respect,[224] *Melloni* tells us that when EU law *harmonizes* fundamental rights in a certain policy domain, in an *exhaustive* way, only then are national authorities no longer permitted to apply higher standards of – for instance – defense rights. That said, as long as the EU legislator has not yet exhaustively harmonized fundamental rights in the specific domain of banking supervision, it is not so

[221] Case C-399/11 *Stefano Melloni* v *Ministerio Fiscal* [2013] ECLI:EU:C:2013:107 (*Melloni*)
[222] In *Melloni* which concerned the execution of a European Arrest Warrant, the critical question was "whether Article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution," Melloni (n 221), para 55
[223] Melloni (n 221), para 60
[224] Vanessa Franssen, "Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights' Protection" (European Law Blog 2014) < https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/> accessed 21 December 2021

clear whether in composite procedures, NCAs executing the national segments of a composite procedure can or cannot apply higher national fundamental standards.

Be it as it may, *Melloni* is still a landmark case and of significant relevance as it demonstrates the value that the CJEU attaches to the principles of primacy, unity, and effectiveness of EU law.

5 Intermediate conclusion

In this chapter, I first conceptualized composite enforcement procedures and provided a working definition. In the second part, I laid down my assessment framework, by introducing the different rationales underpinning fundamental rights and the different ways in which the here studied fundamental rights cast their safety net over credit institutions and their employees. A number of questions that ensue, if one looks at fundamental rights' function through the lens of composite enforcement procedures, were raised. Finally, I discussed the current constitutional framework surrounding EU composite enforcement procedures and reached the conclusion that it does not give sufficient answers that fit composite enforcement procedures and the protection of fundamental rights therein.

The next chapter, Chapter III, provides an in-depth analysis of the EU/ECB legal framework. The discussion revolves primarily around the ECB's tasks and powers, the different instances in which the ECB law interacts with national law(s) and the modalities that govern such interaction and the fundamental rights standards that are evident in the EU legal framework

Chapter III: Enforcement of prudential banking legislation: The EU-level legal framework

1. Introduction

The first aim of this chapter is to identify the various *modi operandi* between the EU and national levels and to scrutinize which of the powers and tasks entrusted to the SSM actors have their legal basis on EU law and which powers point back to national law. The second aim of the chapter is to inquire into how the fundamental rights which are studied in this work are currently integrated in the EU legal framework.

To that end, in the first part, the SSM is put in context: the origins and the development of the SSM, the objectives of banking supervision and the applicable substantive and procedural law are discussed. Thereafter, the focus shifts to examining the institutional design of the SSM, by exploring the position of the ECB and NCAs, the division of competences among them, as well as the position of national criminal enforcement agencies within the broader picture of the enforcement of prudential legislation. From there onwards, the analysis is structured along the following phases: the information-gathering phase, in other words, an analysis is provided as to how the EU-legal framework regulates the obtainment of operational information by SSM authorities. Particular attention is therefore paid to the monitoring and investigative powers vested in the ECB's operating structures, the applicable safeguards and the available remedies. The possibilities of information transfers by the structure which obtains information to other ECB units and or/legal orders are scrutinized. This is a necessary step, which shall inquire into the question of how the EU legal framework regulates choices as to where information is to end up and which limits it imposes to such transfers. The last section seeks to answer the question of what possibilities and limits (if any) EU law imposes on the use in EU or national punitive proceedings of information obtained by an SSM authority.

2. The origins of the Single Supervisory Mechanism (SSM)

2.1 The road toward the creation of the SSM

Before the formal launch of the SSM in November 2014, banking supervision law in the EU was enforced indirectly. The prudential oversight of banks was entrusted to independent national central banks.[1] Commentators have noted that national supervision often led to "regulatory arbitrage,"[2] a term used to denote a situation in which credit institutions take advantage of loopholes in the different regulatory frameworks, with a view to circumventing unfavorable rules.

[1] Christos Gortsos, *The Single Supervisory Mechanism (SSM): Legal aspects of the first pillar of the European Banking Union*, (Nomiki Bibliothiki 2015) 124-125; Gianni Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Kluwer Law International 2017) 194 et seq

[2] Danny Busch and Guido Ferrarini, "A Banking Union for a Divided Europe: An Introduction" in Danny Busch and Guido Ferrarini (eds), *European Banking Union* (OUP 2015) 9

A number of banking crises, notably the Irish housing bubble of 2008,[3] as well the Greek and Portuguese sovereign debt crises, posed serious threats to the financial stability of the Eurozone.[4] An important turning point in history took place in November 2008, when the EU Commission mandated an expert group, to examine the causes of the crisis and to bring forward proposals for establishing an "efficient, integrated and sustainable European system of supervision."[5] The results of this study ("The de Larosière report") were published in March 2009 and they arguably jumpstarted several subsequent reforms in the EU financial markets sector.

In 2012, the EU Commission proposed the establishment of the SSM.[6] Shortly after, the EU Council and the EU Parliament reached a political agreement on the aforementioned proposal.[7] As a result, since 2014, prudential supervision is conducted under the auspices of the ECB, which "shall carry out its tasks within a Single Supervisory Mechanism (SSM) composed of the ECB and national competent authorities."[8] The SSM is one of the three pillars of the EU's Banking Union.[9] Together with the other two pillars, namely single resolution and the European deposit insurance scheme, it is envisaged that this new framework will foster financial stability in the EU. As posited by Baglioni,[10] the reasons as to why the EU decided to create the Banking Union can generally be summarized as follows: the Banking Union was thought to reduce the fiscal costs of bailing out banks; it was expected to put an end on the vicious circle between banking risks and sovereign debts and it was envisaged to lead in increased supervisory convergence.

3. On the objectives of banking regulation and supervision

Before discussing the institutional design of the SSM, it is important to briefly look into the objectives of banking regulation and supervision. Understanding the rationales that underpin them is essential for two reasons: first, given that banking crises can easily spread from one Member State to the Union as a whole and even beyond,[11] the need for a Europeanized system of supervising credit institutions comes to the fore, as well as the fact that intense cooperation and coordination between authorities entrusted with banking supervision tasks is a *conditio sine qua non* for the prevention of future crises. Second, understanding the nature of banking supervision is essential, as the reader will immediately understand that in the majority of the cases, cooperation is in the interest of both supervisors and supervisees, in contrast with other policy domains and competences which are detection/investigation-driven and the relationship between the supervisor and the industry are not based on cooperation. In that respect, in

[3] Cindy Moons and Kevin Hellinckx, "Did monetary policy fuel the housing bubble? An application to Ireland" (2019) 2 Journal of Policy Modeling 294
[4] For a discussion on the relationship between sovereign debt and banking crises, see Tobias Tröger, "Organizational choices of banks and the effective supervision of transnational financial institutions" (2012) 48 Texas International Law Journal 178, 186 et seq
[5] The de Larosière Group, "Report of The High level group on financial supervision in the EU" (February 2009) < http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf> accessed 13 July 2021 ("De Larosière report")
[6] European Commission, "Commission proposes new ECB powers for banking supervision as part of a banking union" (Press Release, 12 September 2012) < https://ec.europa.eu/commission/presscorner/detail/en/IP_12_953> accessed 26 January 2021
[7] European Commission, "European Parliament and Council back Commission's proposal for a Single Resolution Mechanism: a major step towards completing the banking union" (Statement, 20 March 2014) < https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_14_77> accessed 26 January 2021
[8] SSM Regulation, art 6(1)
[9] European Commission, "Banking Union" <http://ec.europa.eu/finance/general-policy/banking-union/index_en.htm.> accessed 27 July 2021
[10] Angelo Baglioni, *The European Banking Union – A Critical Assessment* (Palgrave Macmillan 2016) 7
[11] Katarzyna Sum, *Post-Crisis Banking Regulation in the European Union* (Palgrave Macmillan 2016) 9

the domain of banking supervision, sanctions will be the exception, rather than the rule, something which is important to keep in mind, particularly in view of the legal design goal of this dissertation.

Regulation in general – and therefore banking regulation in particular – can be understood as government intervention, which aims at controlling the behavior of private undertakings. The classic reason for having regulation in place relates to the need to deal with monopoly power.[12] When it comes to regulating the banking sector, which falls under the more specific category of economic regulation, government intervention does not aim only at dealing with monopolistic power, but primarily at addressing market failures to enhance (financial) stability.[13] As it follows from the relevant literature,[14] market failures in the sector for financial services manifest themselves in three ways:

a) information asymmetry: bank customers are not as informed as financial institutions are, and the latter tend to have a high appetite for risk. In case of failure, a large part of the losses is passed on to the depositors. In this regard, banking supervision is essential in that it seeks to protect consumers vis-à-vis such information asymmetry by overseeing the safety and soundness of supervised credit institutions (and obliging them to report/reveal information/enhance transparency);
b) externalities/systemic risks: failure of a single institution can generate spillover effects,[15] which affect systemic stability. Systemic supervision seeks to minimize spillover effects;
c) credit institutions may abuse market power/dominant position. In this case, competition policy seeks to protect consumers against monopolistic and/or oligopolistic behavior. While point (c) is very significant indeed, it must be noted that it falls outside the scope of the SSM, as do the policy areas of consumer protection and anti-money laundering.[16]

There is a plethora of methods that are deployed for regulating – and thereby supervising – the conduct of credit institutions. Sum[17] mentions in this respect: entry and ownership regulations, capital requirements, restrictions on bank activities, auditing requirements, and private monitoring, liquidity requirements and deposit insurance schemes. The regulatory framework that the ECB has to oversee and enforce pertains mostly to entry regulations, such as banking authorizations, liquidity requirements, and restrictions on bank activities.

When it comes to supervising credit institutions, supervision mostly aims at trading off the aforesaid information asymmetry and at preventing systemic risks and negative externalities.[18] It can thus be concluded that the pivotal objective of banking supervision is the *prudential* objective. According to the Oxford dictionary, prudential means "involving or showing care and forethought, especially in

[12] See *inter alia* Kip Viscusi, Joseph Harrington, and John Vernon, *Economics of Regulation and Antitrust* (4th ed, MIT Pressbooks 2005)
[13] In economic theory, the term "market failure" denotes a non-perfectly competitive market. Reasons behind market failures are market power, externalities, public goods and asymmetric information. See Cento Veljanovski, "Economic Approaches to Regulation" in Robert Baldwin, Martin Cave, and Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 20-21
[14] *Inter alia* Dirk Schoenmaker, "Financial Supervision in the EU" in: Gerard Capri (ed.), *Handbook of Safeguarding Global Financial Stability: Political, Social, Cultural, and Economic Theories and Models* (Elsevier 2013) 355-356; Dragomir 2010 (n 20) 38 et seq
[15] See more on this Michael Burda, "How to avoid contagion and spillover effects in the euro zone?" in Andreas Dombret and Otto Lucius (eds), *Stability of the Financial System: Illusion or Feasible Concept?* (Edward Elgar 2013)
[16] SSM Regulation, recital 28
[17] Sum 2016 (n 11) 15
[18] Sum 2016 (n 11) 15

business."[19] Indeed, this definition ties in well with the objectives discussed above. Supervision carried out by the ECB is preventive in nature, since its primary objective is to safeguard the soundness of the financial system *ex ante*.[20] For that reason, the ECB has at its disposal a wide array of prudential tools, which range from authorizing banks to ensuring compliance with substantive EU banking supervisory laws, such as capital adequacy requirements and large exposure limits. Having said that the power to impose *ex post* measures, such as recovery and resolution plans, the lender of last resort, and the European deposit insurance scheme have not been entrusted to the ECB, but instead to other bodies.[21]

An important question when it comes to regulating and supervising the banking sector in general is whether both regulatory and oversight powers should be entrusted to the same authority. In the context of the SSM, this is not the case. We see a "decoupling of supervision from regulation;" [22] the ECB has been entrusted with far-reaching supervisory/oversight powers, but with very limited regulatory powers.[23]

Who regulates, then? The European Parliament and the Council legislate and adopt regulatory instruments, after a formal proposal by the EU Commission. The EU Commission can additionally adopt delegated or implementing acts and oversee application of EU baking legislation in the EU Member States. In addition to these players, in 2011, a new agency, namely the European Banking Authority (EBA), was established. The main task of EBA is to contribute to the formulation of a single set of harmonized prudential rules for financial institutions throughout the EU.[24] The EBA is competent to draft regulatory and implementing technical standards. However, according to the EBA Regulation – and to possibly take into account the *Meroni* doctrine – the drafting of technical and implementing standards "shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based."[25] The ECB, as is explained in detail later in the chapter, is in turn entrusted with enforcing – within the contours of its competences – substantive rules.

4. Applicable substantive and procedural law

4.1 Introduction

Even though it is generally perceived that EU banking law comprises a highly harmonized area, this is not entirely precise.[26] "Maximum," "full," or "exhaustive'[27] harmonization are terms that are used interchangeably to denote a situation in which Member States are not offered a margin of discretion when they implement EU law. As also explained below in greater detail, the corpus of EU banking legislation (Single Rulebook) does not lead to maximum harmonization.[28] As rightly posited by

[19] https ://en.oxforddictionaries.com/definition/prudential
[20] Dragomir (n 20) 55
[21] Resolution tasks have been entrusted to the Single Resolution Mechanism. See also Kern, who is of the opinion that the ECB should have been vested with *ex post* powers too: Alexander Kern, "The ECB and Banking Supervision: Building Effective Prudential Supervision?" (2014) 33 Yearbook of European Law 417
[22] Guido Ferrarini, "Cross-border Banking and the SSM" 2 (2015) *European Economy* 57
[23] Giovanni Bassani, *The Legal Framework Applicable to the Single Supervisory Mechanism – Tapestry of Patchwork?* (Kluwer Law International) 156
[24] European Banking Authority, "About Us" < https://www.eba.europa.eu/about-us> accessed 21 July 2021
[25] Regulation EU/1093/2010 of the European Parliament and of the Council of 24 November 2010 Establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331/12, art 10(1)
[26] Lo Schiavo (n 1) 175 et seq
[27] Catherine Barnard and Steve Peers, *European Union Law* (OUP 2017)
[28] On the advantages and disadvantages of having a fully harmonized regulatory framework in the EU banking Union, see Valia Babis, "Single Rulebook for Prudential Regulation of Banks: Mission Accomplished?" (2014)

Lefterov in this connection, the Single Rulebook should better be viewed as "*an approximation of applicable laws*."[29]

Against the foregoing, I first discuss key principles for the supervision of cross-border banks, to the extent that these are relevant for the determination of the applicable substantive and procedural law. Thereafter, I discuss the "Single Rulebook,"[30] a term that denotes that substantive law on prudential supervision that the ECB applies. Finally, I discuss the applicable procedural law, i.e., the pertinent legal instruments which lay down important principles of a procedural nature.

4.2 Supervision of cross-border banks: The European passport regime

The legal instruments that form part of the Single Rulebook contain references to the so-called "competent authorities," which are additionally classified into competent authorities of the *home* Member State and competent authorities of the *host* Member State. Furthermore, the relevant legal instruments also make reference to supervision on a "consolidated" and on an "individual" basis. In light of the dissertation's topic and their potential for the research sub-questions, these terms deserve attention.

The provision of services from banks that fall under the supervision of the SSM may be confined only within the contours of one Member State. However, it may also be the case that a credit institution wishes to engage in cross-border operations, i.e., offer its services abroad.[31] The question that then comes to the fore is which authority is responsible for supervising and enforcing the law vis-à-vis a bank that operates on a cross-border level and – as a corollary – what the applicable substantive and procedural law is.

There are different ways in which a credit institution established in Member State A and licensed in Member State A can gain market access to Member State B. For instance,[32] the credit institution may establish a new legal entity. Alternatively, it may access a foreign market through an existing legal entity. I shall now discuss each of these possibilities in order.

If a group of legal entities established in Member State A wishes to start providing banking services in Member State B by setting up a new legal entity (subsidiary), that new legal entity must apply for a new local banking license in their own name. The new legal entity must furthermore fulfill on its own the minimum conditions for obtaining the license.[33] In this example, the host supervisor, i.e., the supervisor of Member State B is competent to decide on the granting of the authorization and – should they decide to grant a license – they are competent to perform full ongoing supervision vis-à-vis the subsidiary on an individual basis. At the same time, the home supervisory authority, i.e., the supervisor of Member State A, is responsible for supervision on a consolidated basis,[34] i.e., for the whole group.

University of Cambridge Legal Studies Research Paper Series 37/2014 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456642> accessed 23 December 2021

[29] Asen Lefterov, "The Single Rulebook: legal issues and relevance in the SSM context" (*ECB Legal Working Paper Series*, 2015) < https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp15.en.pdf> accessed 14 December 2021,11

[30] Ibid

[31] Ralph de Haas and Neetje van Horen, "Recent Trends in Cross-Border Banking" in Thorsen Beck and Barbara Casu (eds), *The Palgrave Handbook of European Banking* (Palgrave Macmillan 2016)

[32] Roel Theissen, *EU Banking Supervision* (Eleven International Publishing 2013) 201

[33] Roel Theissen, *EU Banking Supervision* (Eleven International Publishing 2013) 197

[34] CRD IV, art 111

Alternatively, a bank can also decide to provide cross-border services without setting up a new subsidiary. They may for instance decide to operate on the territory of Member State B through a branch or by providing cross-border services (Article 56 TFEU).

If a credit institution established in Member State A wishes to operate through a branch in Member State B, it shall notify the competent authorities of its home Member State[35] and provide them with certain information, such as a program of operations, the address of the branch in the host Member State from which documents may be obtained, and the names of the persons who will be managing the branch.[36] The authorities of the host Member State B may indicate the conditions under which "in the interests of the general good those activities shall be carried out in the host Member State."[37] Then, the supervisory authorities of Member State A remain responsible for ongoing supervision, whereas the supervisory authorities of Member State B can carry out ongoing supervision specifically with respect to the branch's liquidity.

Finally, a credit institution established in Member State A may also decide to exercise their freedom to provide cross-border services within the territory of Member State B (Article 56 TFEU). Should that be the case, the credit institution must notify the supervisor of the home Member State (A) and inform them on the activities they intend to carry out.[38] The authorities of the home Member State must notify the authorities of the host Member State (B) within one month.[39]

Essentially, in all of the aforementioned scenarios, credit institutions can provide services on the territory of other Member States on the basis of the "European passport" rule, also known as the "home state control" principle.[40] Where a credit institution offers services abroad, in principle, the home Member State remains responsible for prudential supervision.[41] However, the host Member State may also require compliance with specific provisions of its national law.[42] As a result, the applicable substantive and procedural law in the case of a credit institution engaging in cross-border activities may vary.

It is important to note that if a credit institution is established in a euro area Member State and operates in other euro area Member State(s), after the introduction of the SSM, the ECB comprises both the home and host supervisor and therefore, for the matters that fall within its sphere of competence, the ECB needs to apply the national legislation of the country of establishment (and, where necessary perhaps, also the national legislation of the host Member State).[43]

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[35] CRD IV, art 35(1)
[36] Ibid, art 35(2)
[37] Ibid, art 36(1)
[38] Ibid, art 39(1)
[39] Ibid, art 39(2)
[40] Martijn van Empel, *Financial Services in Europe: An Introductory Overview* (Kluwer Law International 2008) 30; see also CRD IV art 17
[41] CRD IV, art 49(1)
[42] See, *inter alia* CRD IV, Recital 21 and Article 44 which reads that "host Member States may, notwithstanding Articles 40 and 41, exercise the powers conferred on them under this Directive to take appropriate measures to prevent or to punish breaches committed within their territories of the rules they have adopted pursuant to this Directive or in the interests of the general good. This shall include the possibility of preventing offending credit institutions from initiating further transactions within their territories."
[43] Bassani 2019 (n 23) 75

The foregoing discussion is particularly important to the extent that it clarifies how the applicable substantive and procedural law is to be determined. In other words, it becomes clear that when supervising a credit institution, the ECB must apply the substantive law of the Member State of establishment. To the extent that procedural matters have not been regulated by EU law, the ECB may also need to apply national procedural requirements,[44] such as specific time limitations foreseen in national law. Finally, it becomes clear that if the ECB does not have at its disposal direct enforcement powers (see *infra* Section 8.2) and may thus need to address a request to a credit institution to take enforcement action, the request will logically be addressed to the NCA of the Member State of establishment.

Now that the way in which the applicable law is to be determined has been discussed, in the next sections I discuss in which specific legal instruments the applicable law is to be found.

4.3 Substantive law applied by the ECB: elements of the Single Rulebook

The Single Rulebook consists of three so-called "levels" and accompanying legal instruments: Level 1, Level 2, and Level 3 instruments.[45] These are discussed in more detail below.

Level 1 instruments

Level 1 instruments, which are hierarchically superior compared to Level 2 and Level 3 instruments, are EU Regulations and Directives. In the context of the SSM, important Level 1 instruments are Directive 2013/36/EU (CRD IV),[46] the Capital Requirements Regulation (CRR),[47] and the Bank Recovery and Resolution Directive (BRRD).[48] Even though EU Regulations are directly applicable and therefore further transposition at the national level is not required, in the area of banking law this is not always the case. If we take as an example the CRR, a directly applicable EU Regulation, we will see that it contains a number of "options and discretions." According to Recital 34 of the SSM Regulation, "*Where the relevant Union law is composed of Regulations and in areas where […] those Regulations explicitly grant options for Member States, the ECB should also apply the national legislation exercising such options. Such options should be construed as excluding options available only to competent or designated authorities. This is without prejudice to the principle of the primacy of Union law.*"

An example of a discretion contained in the CRR is the provision on "exposures secured by mortgages on immovable property" (Article 124 CRR). Member States and competent authorities are allowed to achieve a certain result within specific limits, specifically, they may set a higher risk weight or stricter criteria than those set out in the CRR. For exposures secured by mortgages on residential property, the competent authority shall set the risk weight at a percentage from 35-150% (Article 124(2)(b) CRR).

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[44] Bassani 2019 (n 23) 77

[45] Lefterov 2015 (n 29) 8 et seq

[46] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338

[47] 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 [2013] OJ L 176/1

[48] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L 173/190

This essentially means that the playing field may not always be as leveled as one would expect. For prudential tasks falling under its competence, the ECB will thus need to apply national options and discretions that are available to the NCAs. It has been noted in that respect that "these options are the 'price' for having the provisions of prudential supervision in a Regulation."[49]

In addition to EU law, the ECB applies also national law.[50] The term "national law" refers to laws/statutes of EU Member States that implement EU Directives, such as Directive CRD IV. The EU authority therefore has to apply 19 national legislations implementing EU Directives that deal with core areas of the substantive law of the Banking Union.

Level 2 instruments

Level 2 acts are Union implementing measures, i.e., Commission-delegated and implementing acts, regulatory and implementing technical standards. An example of a Level 2 instrument is the technical standards on supervisory disclosure, drafted by the EBA.[51] Banks supervised by the SSM should adhere to these technical standards when reporting to the ECB.

Level 3 instruments

Level 3 instruments are soft law instruments, such as guidelines and recommendations, which further specify the rules that are adopted under Levels 2 and 1. For instance, Article 74(1) of Directive 2013/36/EU ("CRD IV") requires institutions to have robust governance arrangements, including a clear organizational structure with well-defined, transparent, and consistent lines of responsibility. According to Article 74(3) CRD IV, the European Banking Authority (EBA) is mandated to develop guidelines in that area. In that respect, EBA's Guidelines on Internal Governance under Directive 2013/36/EU[52] comprises a Level 3 instrument.

4.4 Procedural law applied by the ECB: a patchwork of written and unwritten rules

First and foremost, the ECB is bound by the CFR.[53] In addition to that, it shall observe and apply general principles of EU law, such as legal certainty, the protection of legitimate expectations, the rights of the defense and the proportionality principle.[54] Obviously, EU case law by which these general principles have been established, shall also be taken into account in the course of banking supervision carried out by the ECB.

In addition to these overarching written and unwritten sources, which bind all EU institutions, agencies and bodies, the SSM Regulation constitutes the "umbrella" regulation of the integrated system of banking supervision, since it lays down the competences, the supervisory, the investigative, and the sanctioning powers of the ECB. The SSM Regulation establishes important organs that participate in

[49] Klaus Lackhoff, Single *Supervisory Mechanism – A Practitioner's Guide* (Beck-Hart-Nomos 2017) 96
[50] SSM Regulation, art 4(3)
[51] European Banking Authority, "EBA publishes final amended technical standards on supervisory disclosure" (June 2018) < https://www.eba.europa.eu/eba-publishes-final-amended-technical-standards-on-supervisory-disclosure> accessed 27 July 2021
[52] European Banking Authority, "Guidelines on Internal Governance under Directive 2013/36/EU" (September 2017) < https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1972987/eb859955-614a-4afb-bdcd-aaa664994889/Final%20Guidelines%20on%20Internal%20Governance%20%28EBA-GL-2017-11%29.pdf?retry=1> accessed 21 September 2021
[53] CFR, art 51(1)
[54] Takis Tridimas, *The General Principles of EU Law*, (2nd edn, OUP 2007)

the decision-making process of the SSM, namely the supervisory board (SB),[55] the mediation panel,[56] and the Administrative Board of Review (ABoR).[57]

In accordance with Article 6(7) SSM Regulation, the ECB has adopted a framework for the cooperation within the SSM. This framework is laid down in the SSM Framework Regulation.[58] The SSM Framework Regulation sets out the specific methodology for assessing the significance of supervised entities;[59] the procedures regarding the supervision of significant and of less significant banks;[60] general provisions such as the obligation to exchange information;[61] due process considerations, including the legal representation of concerned parties,[62] the right to be heard,[63] and access to the supervisory file;[64] practical arrangements pertaining to "common procedures," i.e., authorizations and/or withdrawals of authorizations of supervised entities;[65] the role and powers of the investigating unit;[66] and rules and procedures for the impositions of fines and penalties.[67]

A final EU-level legal instrument, which lays down minimum rules concerning the enforcement powers of NCAs, is Directive 2013/36/EU (CRD IV). For example, Article 65 of the CRD IV prescribes that all competent authorities must have such powers as the power to request information from supervised entities,[68] the power to conduct investigations,[69] the power to carry out on-site inspections,[70] and powers to impose administrative penalties and measures.[71]

5. SSM: Institutional design

5.1 Introduction

The SSM does not have a distinct legal personality. In the words of Chiti and Recine, it can be better seen 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."[72] That said, the SSM as such is neither an institution nor an agency. The mechanism is composed of the ECB and of the NCAs the euro area Member States. In turn, the ECB and the NCAs bring along to the composite system of banking supervision their own, separate legal personalities. This explanation is important because it suggests

[55] SSM Regulation, recital 67 and art 26
[56] SSM Regulation, recital 73 and art 25(5)
[57] SSM Regulation, art 24
[58] 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 (ECB/2014/17) [2014] OJ L 141/1 ("SSM Framework Regulation")
[59] SSM Framework Regulation, art 39 et seq
[60] SSM Framework Regulation, art 3 et seq
[61] SSM Framework Regulation, art 21
[62] SSM Framework Regulation, art 27
[63] SSM Framework Regulation, art 31
[64] SSM Framework Regulation, art 32
[65] SSM Framework Regulation, art 73 et seq
[66] SSM Framework Regulation, art 124 et seq
[67] SSM Framework Regulation, art 120 et seq
[68] CRD IV, art 64(3)(a)
[69] CRD IV, art 64(3)(b)
[70] CRD IV, art 64(3)(c)
[71] CRD IV, arts 65 and 66
[72] Edoardo Chiti and Fabio Recine, "The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position" (2018) 24 European Public Law 101, 103

that *final decisions* adopted vis-à-vis a private party cannot be imputed to the SSM; instead, they can be imputed either to the ECB or to the NCAs. To what extent it is always possible to attribute the building blocks of a decision – such as the gathering of a specific legal fact contained in a decision – either to the ECB or to an NCA is another question,[73] which does not always entail a clear-cut answer, as will be shown later in this chapter.

I now turn to looking the main actors of the SSM, namely the ECB, NCAs, and supervised entities in more detail. The role of other authorities within that framework, such as criminal enforcement agencies, is also scrutinized.

5.2 ECB

5.2.1 Legal basis for the conferral of supervisory powers

The establishment of the ECB was foreseen in the Treaty of Maastricht (1992), but it was only in 2007, in the Treaty of Lisbon, that the ECB was formally recognized as an EU institution. The primary mandate of the institution,[74] as follows from the TFEU, is price stability,[75] an objective of monetary policy. By virtue of Article 1 of the SSM Regulation, since 2014, the EU institution is also responsible for "contributing to the safety and soundness of credit institutions and the stability of the financial system within the EU and each Member State." In that respect, since 2014, the ECB carries out monetary policy (price stability mandate) and performs banking supervision (financial stability mandate). This dissertation focuses on the latter task and concomitant mandate.

It is certainly not coincidental that the Council conferred micro-prudential tasks on the ECB instead of setting up a new agency. Bestowing upon the ECB prudential supervisory tasks entailed a clear advantage: the ECB is an EU institution and, as such, it is established by the TFEU. Seeing that the Meroni/Romano doctrines[76] have caused numerous debates regarding "agencification," i.e., the extent to which the EU Commission can delegate tasks to EU regulatory agencies or other external bodies, the main advantage of the ECB is that – being an institution – it does not lack legitimacy. *Meroni* is now considered by many to have become anachronistic;[77] nevertheless, in the aftermath of the *ESMA short selling* case,[78] the margin of discretion that agencies can or should enjoy in discharging supervisory tasks is far from clear. The aforementioned suggests that – from a legitimacy point of view – opting for entrusting supervisory tasks to the ECB is advantageous.

The specific legal basis for the creation of the SSM is Article 127(6) TFEU, which reads as follows: "The Council, acting by means of regulations (…) may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank

[73] Herwig Hofmann, "Decision-making in EU Administrative Law-The Problem of Composite Procedures" (2009) 61 Administrative Law Review 199
[74] See *inter alia* on the institutional design of the ECB and on its tasks: Dermot Hodson, "The European Central Bank: New powers and new institutional theories" in Dermot Hodson and John Peterson (eds), *The Institutions of the European Union* (4th ed, OUP 2017)
[75] TFEU, art 282
[76] Merijn Chamon, "EU agencies: does the Meroni Doctrine make sense?" (2010) 3 Maastricht Journal of European and Comparative Law 281
[77] See Vassilis Hatzopoulos, *Regulating Services in the European Union* (OUP 2015) 325 and literature cited in footnote no 76
[78] Case C- 270/12 *United Kingdom* v *Parliament and Council* [2014] ECLI:EU:C:2014:18

concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings."

Considering the unanimity requirement laid down in this legal provision, Article 127(6) comprises a solid legal basis for attributing such powers to the ECB.[79]

5.2.2 ECB's mandate and tasks

According to the SSM Regulation (Article 1), the Council has conferred upon the ECB *specific* tasks in relation to the prudential supervision of credit institutions. These tasks are listed in Article 4 of the SSM Regulation: the ECB is exclusively competent to carry out the following tasks, in relation to *all* credit institutions established in the euro area: to authorize banks and withdraw authorizations; to act as the competent authority of the home Member State whenever a bank authorized in a euro area Member State wishes to establish a branch or provide cross-border services in a non-euro area State; to ensure compliance of the supervised entities with Union law that imposes prudential requirements on credit institutions in the areas of own fund requirements, securitization, large exposure limits, liquidity, leverage, reporting, and public disclosure of information pertaining to the aforementioned matters; to ensure that banks comply with Union law that imposes requirements in relation to the fitness and properness of bank management, risk management processes, internal control mechanisms, remuneration practices, and effective internal capital adequacy assessment processes; to carry out supervisory reviews, such as the SREP test; and, on the basis of such reviews and tests, to impose on supervised entities additional own funds, publication, liquidity requirements, and other measures.

Tasks not conferred on the ECB – but are nevertheless covered by Union banking law – remain within the competence of NCAs. That being said, defining the scope of the ECB's powers is not as clear cut and requires the combined reading of the Single Rulebook legislations with Articles 4 and 9(1) of the SSM Regulation.[80] In any case, anti-money laundering and consumer protection are competences and policy areas that are clearly excluded from the scope of the ECB's mandate.[81]

5.2.3 The ECB's decision-making process

As it follows from the Statute of the ESCB[82] and from the TFEU,[83] the decision-making body of the ECB is the Governing Council. This organ is composed of the members of the executive board and of the governors of the national central banks of the euro area Member States.

After the adoption of the SSM Regulation, a new body was introduced whose tasks relate only to the banking supervision mandate of the ECB. This body is called the supervisory board ("SB"). The SB is composed of a chair, a vice chair, four representatives of the ECB (who must not have been directly involved with activities pertaining to monetary policy), and one representative of the NCA of each SSM-participating Member State.[84] Thus, all euro area Member States have one representative in the

[79] For the opposite view, see Benedikt Wolfers and Thomas Voland, "Level the playing field: The new supervision of credit institutions by the European Central Bank" (2014) 51 Common Market Law Review 1463
[80] Lefterov 2015 (n 29) 34
[81] SSM Regulation, recital 28
[82] Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank OJ C 202/230 ("Statute of the ESCB") arts 9(3) and 10
[83] TFEU, art 129(1)
[84] SSM Regulation, art 26

SB. The SB's main tasks consist of the preparation of complete draft decisions, which are then submitted to the Governing Council for approval, which implies that the SB is not a decision-making body,[85] despite the fact that it plays a crucial role in banking supervision. Below it is explained how decision-making within the SSM works in practice.

Following submission of a draft decision of the SB to the Governing Council, ECB decisions are adopted on the basis of the so-called "non-objection" procedure. This procedure consists of the following steps: if the Governing Council does not object within a period that does not exceed 10 working days, the ECB decision is deemed to have been adopted. If, however, the Governing Council objects, due to the separation principle,[86] according to which meetings leading to supervisory and monetary decisions should be carried out in strict separation,[87] it may not amend the decision. In that case, it has to justify why it disagrees and return the draft decision to the supervisory board, for a submission of a new draft decision.

A mediation panel is also foreseen in the SSM Regulation. Its task revolves around resolving differences in the views expressed by NCAs concerning an objection of the Governing Council to a draft decision.[88]

The aforementioned process is quite burdensome and time-consuming. In practical terms, the fact that the Governing Council is the only (formal) decision-making body implies that it has to be informed on every single decision, from routine day-to-day decisions to more critical ones. The rationale behind the fact that every ECB decision has to be endorsed by the Governing Council relates to the case law of the CJEU concerning the delegation of discretionary powers to bodies not established by the Treaties.[89] In contrast with the SB, the Governing Council derives its powers from the Treaties. To resolve the slow decision-making process, which was recognized[90] as being one of the biggest challenges for the SSM, in November 2016, the Governing Council of the ECB adopted a decision "on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks."[91] According to Article 4 of this Decision, the Governing Council of the ECB may delegate decision-making powers in relation to banking supervision to heads of units of the ECB. Such a decision must set out clearly the scope to be delegated the conditions on the basis of which such powers may be exercised.

[85] Jakub Gren, "The Eurosystem and the Single Supervisory Mechanism: institutional continuity under constitutional constraints" (2018) *ECB Legal Working Paper Series* no 17, 22 < https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp17.en.pdf> accessed 24 December 2021
[86] SSM Regulation, art 25
[87] Decision of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39) [2014] OJ L 300/57, recital 4
[88] SSM Regulation, art 25(5)
[89] See, Miroslava Scholten and Marloes van Rijsbergen, "The ESMA-short selling case: Erecting a new delegation doctrine in the EU upon the Meroni-Romano remnants" (2014) 41 Legal Issues of Economic Integration 389
[90] European Central Bank, "ECB Annual Report on supervisory activities" (2015) < https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2015.en.html> accessed 28 January 2021
[91] Decision (EU) 2017/933 of the European Central Bank of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40) [2016] OJ L 141/14

5.3 National competent authorities (NCAs)

NCAs constitute the second main actor in the SSM: "A "national competent authority" means a national authority designated by a participating Member State in accordance with 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 (1) and Directive 2013/36/EU."[92] Thus, the SSMR points back to the CRD IV. According to the definition given by the CRD IV, a competent authority is "a public authority or body officially recognized by national law, which is empowered by national law to supervise institutions as part of the supervisory system in operation in the Member State concerned."[93] It is also worth mentioning that according to Article 2(9) of the SSM Framework Regulation, the aforementioned definition is without prejudice "to arrangements under national law which assign certain supervisory tasks to a national central bank (NCB) not designated as an NCA." This essentially means that if – as a matter of national law – more than one national authority carries out tasks that correspond to those of the ECB on the basis of the SSM Regulation, that authority becomes part of the SSM, too.

As to the powers of the NCAs, these are defined in the SSM Regulation and in the CRD IV. The latter, must be implemented in national law.

5.4 Credit institutions (supervised entities)

The entities subject to the supervision of the ECB are credit institutions, which operate in euro area Member States. For defining the term "credit institution," the SSM Regulation points to the Capital Requirements Regulation (CRR).[94] The CRR informs us that "credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account."[95] Notwithstanding the fact that this definition has been included in a directly applicable Regulation, the components of this definition, such as the terms "public" and "deposits and other repayable funds" are not interpreted in a homogeneous way across Member States. In an opinion published in 2014,[96] the European Banking Authority (EBA) recognizes this problem and the potential repercussions for defining the scope of entities subject to the SSM. Be that as it may, in this dissertation I understand as "supervised entities" or "credit institutions" or "banks," the significant credit institutions that are directly supervised by the ECB – 115 at the moment of writing.[97] A list containing the significant institutions is published on the ECB's website annually.

In banking supervision, it is sometimes the case that (administrative and/or criminal) sanctions are imposed on members of the senior management of a bank and thus not only on the legal person.[98] In

[92] SSM Regulation, art 2(2)
[93] Directive 2013/36/EU, art 4(1) point 40
[94] SSM Regulation, art 2(3)
[95] CRR, article 4(1) point 1
[96] European Banking Authority, "Opinion of the European Banking Authority on matters relating to the perimeter of credit institutions", (EBA/Op/2014/12, November 2014) < https://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-12+%28Opinion+on+perimeter+of+credit+institution%29.pdf>. accessed 27 July 2021
[97] ECB, 'List of supervised entities' (November 2021) < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.listofsupervisedentities202112.en.pdf?4736a0caf53f698fa445865a7ee2bc24> accessed 19 January 2022
[98] See *inter alia* Stanislaw Tosza, *Criminal Liability of Managers in Europe* (Hart Publishing 2019)

that sense, bank senior managements[99] are also indirectly subject to the ECB's enforcement powers. As is explained later in the chapter, however, when a breach is committed by a natural person, or whenever a non-pecuniary penalty has to be imposed on a credit institution or a natural person, the ECB does not have direct sanctioning powers; it can however request an NCA to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed.[100] The relevant NCA in turn conducts these proceedings and decides on whether a penalty should be imposed in accordance with applicable national law.

Now that the institutional actors of the SSM have been discussed, it is essential to pay attention to how the tasks that – according to the SSM Regulation – fall within the ECB's exclusive competence have been distributed.

5.5 Division of labor between the ECB and NCAs

The SSM is based on a distinction between significant (SIs) and less significant credit institutions (LSIs). The ECB is responsible for the day-to-day supervision of SIs, while NCAs remain responsible for the day-to-day supervision of LSIs.[101] Significance is determined at a group level and on the basis of a bank's size, its importance for the economy of the EU or a participating Member State, significance of its cross-border activities and the total value of its assets, which shall exceed EUR 30 billion.[102] Irrespectively of whether they meet the abovementioned criteria or not, the three biggest credit institutions of each participating Member State and those for which financial assistant has been received by the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM) are always considered to be significant.[103]As to the specific methodology for determining significance, this is laid down in the SSM Framework Regulation.[104] If a credit institution is classified by the ECB as significant, all banking subsidiaries belonging to the same group will also be considered as being significant.[105] For example, in the Netherlands the ECB supervises the ING Groep N.V. and all of its subsidiaries and branches in other EU Member States.

Notwithstanding the aforementioned division of labor, which may at first sight suggest that the SSM Regulation has established a distribution of competences between the ECB and the NCAs, this is not in fact the case.[106] As confirmed by the CJEU, "the Council conferred on the ECB exclusive competence, the decentralized implementation of which by the national authorities is enabled (…) under the SSM and under the control of the ECB, in relation to less significant credit institutions (…)."[107] In other words, exclusive competence with respect to specific prudential tasks has been transferred to the ECB. In turn, the ECB delegated part of its exclusive tasks to NCAs, which assist the EU authority in the implementation of its exclusive tasks. A closer look at the SSM Regulation and a combined reading of different provisions do in fact back the CJEU's assertion.

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[99] According to the CRD IV, "senior management means those natural persons who exercise executive functions within an institution and who are responsible, and accountable to the management body, for the day-to-day management of the institution."
[100] SSM Regulation, art 18(5)
[101] SSM Framework Regulation, recital 5
[102] SSM Regulation, art 6(4)
[103] SSM Regulation, art 6(4)
[104] SSM Framework Regulation, part IV
[105] SSM Framework Regulation, art 40
[106] See, Argyro Karagianni and Mirosava Scholten, "Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework" (2018) 34 Utrecht Journal of International and European Law 185, 190
[107] Case C-450/17 P, *Landeskreditbank Baden-Württemberg* v *European Central Bank* [2019] ECLI:EU:C:2019:372, para 49

In the first place, Article 6(5)(b) prescribes that the ECB can take over the supervision of an LSI, whenever it deems that to be necessary, which suggests that the EU supervisor is responsible for and controls the entire system. In the second place, pursuant to Article 9(1) para.3 SSMR, the ECB can instruct NCAs to make use of the powers that they have on the basis of their national law. While the content of this power will be explained later, this provision already shows that far-reaching powers vis-à-vis NCAs have been vested in the ECB. Third, NCAs are under a general obligation to report to the ECB on the performance of their tasks vis-à-vis less significant banks.[108] Fourth, the ECB has set up a specialized Directorate General, named DG Micro-Prudential Supervision III, which oversees the supervision of less significant banks,[109] something which shows that NCA work vis-à-vis LSIs is overseen on a day-to-day basis by the ECB. The aforementioned suggests that the ECB is not only *de jure*, but also *de facto* involved in overseeing the supervision of the less significant banks by the respective NCAs. The aforementioned legal provisions do support the Court's postulation, namely that NCAs play an assisting role and that the overall competence and concomitant responsibility lays primarily with the ECB.

5.6 The role of criminal law enforcement

Criminal law enforcement is peripherally related to the ECB's mandate and tasks by virtue of the fact that, in addition to administrative law sanctions, several Member States have opted for using criminal law sanctions to enforce prudential legislation as well.[110] Thus, the potential synergies between different types of authorities and legal domains become, at this juncture, apparent. While national criminal law enforcement authorities are not institutionally related to the ECB, both sides do share a common denominator: in one way or another, both SSM authorities and national criminal law agencies enforcing prudential law are responsible for contributing to the achievement of financial stability in the EU.

Nevertheless, the position of criminal law enforcement authorities in the SSM is not particularly clear. The EU legislature did not originally lay down any modalities to regulate potential interactions between the ECB and national criminal enforcement agencies. The ECB, obviously recognizing this deficit, utilized its limited regulatory powers, and at a later stage touched upon the issue by including a provision in the SSM Framework Regulation[111]and by publishing an ECB decision concerning the disclosure to national criminal enforcement authorities of confidential information obtained for banking supervision purposes.[112] These two *modi* of interaction are scrutinized later in this chapter (Section 7.3), as this section merely seeks to sketch the relevant "players."

Now that the institutional design of the SSM and the position and nexus between the different players have been introduced, in the next section, I delve into the information-gathering structures that are foreseen in the EU legal framework, their powers, and the applicable safeguards and remedies.

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[108] SSM Framework Regulation, art 99

[109] European Central Bank, 'Guide to Banking Supervision' (September 2014) 13, <https://www.europarl.europa.eu/cmsdata/69321/ECB%20Guide%20to%20Banking%20Supervision.pdf> accessed 28 January 2021

[110] CRD IV, art 65(1); see also Silvia Allegrezza (ed), *The enforcement dimension of the Single Supervisory Mechanism* (Wolters Kluwer Italia 2020)

[111] SSM Framework Regulation, art 136

[112] Decision (EU) 2016/1162 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19) [2016] OJ L 192/73 ('Decision 2016/1162')

6 The obtainment of information by the ECB

The ECB's organizational structures that are primarily utilized for the obtainment of information are joint supervisory teams ("JSTs") and on-site inspection teams ("OSITs"). In addition to these two teams, an independent investigating unit ("IIU")[113] "may exercise the powers granted to the ECB under the SSM Regulation."[114] Whenever the ECB gathers information by means of the aforementioned structures, the EU institution acts autonomously, in its own name and on the basis of Union law (SSM Regulation).[115] It should be noted that these structures function independently from the fact that ECB receives information directly from credit institutions, at recurring intervals, as part of the latter's reporting obligations which are laid down in Union law.[116]

In addition to these structures, which can directly use the EU information-gathering powers that shall be discussed in the next sections, indirect mechanisms through which the EU watchdog can obtain operational information are also foreseen in the EU legal framework; from a combined reading of a number of provisions in the SSM Regulation and the SSM Framework Regulation, it transpires that the ECB can obtain operational information also through NCAs. Indeed, the ECB and NCAs are under a duty of cooperation in good faith and an obligation to exchange information.[117] In addition to that postulation that comprises an overarching institutional obligation, several provisions in the EU legal framework specify that duty. These shall be discussed shortly. The distinction between direct and indirect information-gathering channels is of significant importance, as it comes to prove that that SSM has rightly been described as a hub-and-spoke system.[118] In other words, the ECB is the "hub" which overlooks the entire system and comprises a pool of operational information concerning all euro area credit institutions and the NCAs are the geographically dispersed "spokes" which assist and serve the interests of the hub.

6.1 Joint Supervisory Teams (JSTs)

6.1.1 Composition and tasks

JSTs are mixed teams that carry out the day-to-day supervision of significant credit institutions, mostly off-site. Their mandate, composition, and powers are laid down in the SSM Framework Regulation.[119]

For each significant bank or banking group, a JST is established, which is composed of ECB staff members and of staff members employed by NCAs, on whose territory large banking groups have subsidiaries or branches.[120] For example, the JST that oversees a large group that has branches and subsidiaries in Spain, Italy, and Portugal shall be composed of ECB officials and of staff members of the Spanish, Italian, and Portuguese NCAs.

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[113] SSM Framework Regulation, art 123
[114] SSM Framework Regulation, art 125(1)
[115] Michiel Luchtman and John Vervaele, "Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)" (Utrecht University 2017) 249 < http://dspace.library.uu.nl/handle/1874/352061> accessed 13 December 2021
[116] For example, CRR, arts 99, 100 and 101
[117] SSM Regulation, art 6(2)
[118] Christos Gortsos, "Competence Sharing Between the ECB and the National Competent Supervisory Authorities Within the Single Supervisory Mechanism (SSM)" (2015) 16 European Business Organization Law Review 401, 417
[119] SSM Framework Regulation, arts 3-6
[120] SSM Framework Regulation, art 3(1)

For each JST, a JST coordinator – who is an ECB official – is appointed. The coordinator is assisted by NCA sub-coordinators.[121] A JST coordinator is the leader of the team, since all JST members are obliged to follow his or her instructions.[122] NCA sub-coordinators may only instruct the JST members appointed by the same NCA, as long as these instructions do not clash with the instructions given by the JST coordinator.[123] Even though NCA staff members participating in JSTs remain employees of their respective NCA, they functionally become "EU staff," as they act on the ECB's behalf,[124] and therefore the actions of a JST are ultimately imputed to the ECB. It has been rightly argued[125] that the design of JSTs conforms to the so-called "organ theory" (*Organleihe*), in the sense that "the (national) authority also becomes a part of the EU structure in legal terms; participating states lose control over their authorities, which act as the extended arm of the EU authority. They operate within the framework of EU laws."[126]

The most important task carried out by JSTs is the performance of supervisory review and evaluation of significant banks (SREP), in accordance with Article 97 CRD IV. SREP delves into four thematic areas: 1) assessment of the business model of the bank, particularly its viability and sustainability; 2) adequacy of governance structure; 3) assessment of risks to capital; and 4) assessment of risks to liquidity.[127] These assessments are conducted in three phases: [128]

a) Preparation: First, the Methodology & Standards Development division of the ECB, together with JSTs, form a college. Thereafter, they collect quantitative information, such as risk indicators, financial statements, an institution's internal reports, market views, and quantitative information, such as meeting reports, inspection reports, institutions, internal documents, and business and risk management reports.

b) Evaluation: The aforementioned data is assessed and analyzed jointly by JSTs and the relevant business areas of the ECB. As argued by the ECB, before adopting a SREP decision under Article 16 of the SSM Regulation, there is ongoing dialogue and regular meetings between the JSTs and the banks subject to the evaluation. The evaluation phase is concerned with assessing bank risk level, i.e., "the intrinsic riskiness of an institution's portfolios,"[129] and with assessing risk control, such as the adequacy and appropriateness of the bank's internal governance and risk assessment.

c) Decision: At the end of the assessment, an overall SREP score ranging from 1 to 4 is awarded to the credit institution. The outcome of the SREP is specified in an individual SREP decision, taken on the basis of Article 16 SSM Regulation by the supervisory board and adopted by the Governing Council through the non-objection procedure explained earlier in this chapter. The decision may impose additional own fund requirements, institution-specific liquidity requirements or other qualitative supervisory measures, such as the imposition of more frequent

[121] SSM Framework Regulation, art 6(1)
[122] SSM Framework Regulation, art 6(1)
[123] SSM Framework Regulation, art 6(2)
[124] Lackhoff 2017 (n 49), 49; Eddy Wymeersch, "The Single Supervisory Mechanism: Institutional Aspects", in Danny Busch and Guido Ferrarrini (eds), *European Banking Union* (OUP 2015) 107
[125] Luchtman and Vervaele 2017 (n 115) 251
[126] Ibid
[127] European Central Bank, "Supervisory Methodology for 2019" (January 2020) <https://www.bankingsupervision.europa.eu/banking/srep/2019/html/methodology.en.html> accessed 28
[128] Ibid
[129] Ibid

reporting obligations.[130] The ECB recommends that JSTs organize physical meetings or conference calls with the senior management of the relevant credit institution to present the conclusions of the evaluation, the measures potentially included in a SREP decision and to engage in a dialogue and allow the bank the opportunity to ask questions.[131]

In addition to the SREP, which is JSTs' most important task, the teams perform a number of additional tasks: they propose the supervisory examination program, including a plan for on-site inspections, they implement any adopted supervisory decisions, they coordinate with OSITs and are in contact with national supervisors,[132] and they prepare draft supervisory decisions.[133]

Below, I delve into JST enforcement powers and applicable safeguards.

6.1.2 Enforcement powers and applicable legal safeguards

The mixed composition of JSTs and the fact that they are the most active structure in the day-to-day supervision of credit institutions, inevitably begs the question of which enforcement powers are available to JST members. What is the content of EU law powers? Can NCA staff member partaking in JSTs still make use of investigative powers pursuant to their national law? Which safeguards apply to the supervised entities and their employees, in the course of the gathering of information? These questions are scrutinized henceforth.

In performing day-to-day supervision, JSTs make use of formal and informal powers. That is not surprising, seeing that traditionally, banking supervision is to a large extent carried out in an informal manner. In that light, JSTs also often utilize informal tools, termed "operational acts."[134] These include oral exchanges, communication via email, and letters signed by JST coordinators.[135] Operational acts have no binding legal effect and cannot be contested before a court, but as has rightly been noted, the critical question in that respect is if "such acts can be treated as if they are binding legal acts when they are perceived by the addressee as binding."[136] Up until the moment of writing, this issue remains unclear. Still, it appears that supervision by means of informal acts is not a novelty specific to the ECB[137] and it may even be a necessity, particularly in view of the fact that cooperation and trust between supervisor and supervisee is the cornerstone of effective banking supervision.

Formal powers, on the other hand, are those that can be exercised only upon the adoption of an ECB decision. The power to request information[138] and the power to carry out "general investigations"[139] are the two formal powers codified in the SSM Regulation, even though information requests may also be

[130] Ibid
[131] Ibid
[132] ECB, 'Joint Supervisory Teams' https://www.bankingsupervision.europa.eu/banking/approach/jst/html/index.en.html accessed 28 January 2021
[133] European Central Bank, 'SSM Supervisory Manual - European banking supervision: functioning of the SSM and supervisory approach' (March 2018) 18 < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?42da4200dd38971a82c2d15b9ebc0e65> accessed 30 January 2021 ('Supervisory Manual')
[134] Duijkersloot, Karagianni and Kraaijeveld 2017 (n 11)
[135] Lackhoff 2017 (n 49) 51, 106 and 179
[136] Lackhoff 2017 (n 49) 106
[137] This statement is a personal interpretation that stems from the experience I gained as a trainee at the DG Legal Services of the ECB in 2016.
[138] SSM Regulation, art 10
[139] SSM Regulation, art 11

exercised by means of an operational, non-binding act.[140] Against this background, the power to request information and the power to carry out general investigations are discussed below in more detail.

Information requests

Article 10 SSM Regulation constitutes the legal basis for *ad hoc* information requests[141] and for requests concerning credit institutions' reporting obligations at recurring intervals.[142] The ECB (and therefore JSTs) can require credit institutions, persons belonging to them and third parties to whom SIs have outsourced functions or activities, to provide *all* information that is *necessary* for the ECB to fulfill its tasks enshrined in the SSMR.[143] While this provision is quite broad, the term "necessary" implies that ECB requests should be reasonable and proportional and relevant to the ECB's mandate.[144] If information is requested on the basis of an ECB decision, the decision must therefore clearly stipulate which tasks the ECB pursues and why the information it requests is necessary for pursuing its objectives.[145] It is important to note that the aforementioned information providers are not covered by professional secrecy rules, such as national banking secrecy rules.[146] They are thus under an obligation to produce any information requested by means of an ECB decision.

As to the procedure to be followed when requesting information, before issuing such a request, the ECB must first check with the information that is already available to the relevant NCA.[147] If it is not available, it must set a reasonable time limit within which supervised entities must produce the requested information.[148] If the request was made on the basis of a formal decision, failure to provide the ECB with the requested information can trigger a sanctioning procedure.[149] Information providers are therefore under an obligation to cooperate, and the ECB is enabled to exert legal compulsion.

The fact that information requests can be addressed to information providers by means of a formal decision, naturally implies that the addressee(s) of such a decision can appeal the EU Decision before the CJEU. On the other hand, simple information requests, by means of operational acts, are not legally binding and do not establish an obligation on the supervisee's part, neither can the ECB impose a sanction for a breach of its decision.

General investigations

Article 11 SSM Regulation, which is titled "General Investigations," prescribes that the ECB – and as a corollary also its organizational structures – can:

a) require the submission of documents
b) examine books and records of supervised entities
c) obtain written explanation from the aforementioned legal and natural persons, their legal representatives, or staff members

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[140] Lackhoff 2017 (n 49) 179
[141] SSM Framework Regulation, art 139 specifies that information requests can also be issued on an *ad hoc* basis.
[142] Lackhoff 2017 (n 49) 176
[143] SSM Regulation, art 10(1)
[144] Case T- 371/17 *Qualcomm and Qualcomm Europe v Commission* [2019] ECLI:EU:T:2019:232
[145] Lackhoff 2017 (n 49) 179
[146] SSM Regulation, art 10(2)
[147] SSM Regulation, art 10(3)
[148] SSM Framework Regulation, art 139(1)
[149] SSM Regulation, art 18(7)

These powers must be exercised on the basis of an ECB decision, which must state the legal basis for the decision and its purpose, the intention to exercise the aforementioned powers, and the fact that obstruction of the investigation constitutes a breach of an ECB decision.[150] Again, as it becomes evident from this provision too, information providers are under an obligation to cooperate and refusal to cooperate can trigger a sanctioning procedure.[151] Even though the SSM Regulation clearly states that general investigations – in the sense of Article 11 – shall be launched only pursuant to a formal decision,[152] it has been noted that, in practice, "a general investigation request may be made by a JST in form of an operational act."[153]

It is important to note that, according to Article 11(2) SSM Regulation, if a person obstructs the exercise of any of the ECB's general investigatory powers, the ECB can turn to the relevant NCA, which shall afford the necessary assistance in order to facilitate ECB entry to the business premises of supervised entities. This *modus operandi* resembles to a large extent the well-known mechanism of mutual administrative assistance (MAA).[154] In other words, the ECB (or its organizational structures) can request the assistance of an NCA, albeit for the fulfillment of the ECB's mandate. At the same time, when such national assistance is provided, the applicable procedural law (powers, safeguards, remedies) is determined by national law and the decision to gain entry to business premises is in turn attributable to the national authority.

Rights of the defense that are of significant importance in the context of the ECB's power to request information and to carry out general investigations are the legal professional privilege (LPP) and the privilege against self-incrimination (PSI), although the latter becomes important only once a person is involved in punitive proceedings and/or if the public authority is in a position to anticipate a latter punitive proceeding. Since JSTs are active in ongoing supervision, the discussion here will revolve around the LPP. With respect to the LPP, we may only find a general postulation contained in a recital 48 of the SSM Regulation, which states that "legal professional privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisers, in accordance with the conditions laid down in the case law of the Court of Justice of the European Union (CJEU)."[155]

Notwithstanding the fact that LPP is not explicitly regulated in the EU-level SSM legal framework, that does not absolve the ECB and its organizational structures of the obligation to afford them, within the parameters that have been recognized by the CJEU. That is so because both the privilege against self-incrimination and LPP have the status of general principles of EU law. As explained by the CJEU in the *Dow Benelux* case:

> "(…) the rights of the defense must be observed in administrative procedures which may lead to the imposition of penalties. But it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in particular, investigations which may be

[150] SSM Regulation, art 11(2); SSM Framework Regulation, art 142
[151] SSM Regulation, art 18(7)
[152] SSM Regulation, art 11(2)
[153] Lackhoff 2017 (n 49) 181
[154] Luchtman and Vervaele 2017 (n 115) 251
[155] SSM Regulation, recital 48

decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable."[156]

After the introduction of the CFR, the LPP falls under the scope of Article 41 CFR. From recital 48 of the SSM Regulation, it follows that the ECB shall respect LPP within the limits that have been set by the CJEU, in its jurisprudence relating to the enforcement of EU competition law. The first case which dealt with the LPP as a general principle of EU law was the *AM & S Europe* case.[157] Near the end of an on-site inspection at the premises of the applicant, competition inspectors took extracts and copies of certain documents, while also submitting to the undertaking a written request, whereby they requested further documents. The company refused to disclose some of the requested documents on the grounds that they contained communication with their internal lawyers and were thus covered by the LPP.

The CJEU responded that LPP protection extends only to independent external lawyers, thus not to lawyers who "are bound to the client by a relationship of employment."[158] The notion of a "lawyer" is to be understood as a person entitled to practice the legal profession in one of the Member States.[159] Information exchanged between the undertaking and external lawyers will be protected, as long as it was exchanged for the sole purpose of protecting the client's rights of the defense.[160] In that respect, advice falling outside this strict classification, such as general legal advice, will not be protected.[161] Regarding the question of how LLP is to be waived and enforced, in the *AM & S* case, the Court first explained that if an undertaking waives LPP, it is up to them to provide all relevant information which proves that the requested materials meet the criteria of LPP.[162] The procedure for waiving LPP is a distinct issue and will be discussed in more detail in the context of the power to carry out on-site inspections, as it is typically in the context of that power that disputes regarding the waving of LPP generally come to the fore. For now, it is sufficient to state that the LPP is a general principle of EU law, which protects the confidentiality of communications exchanged between a legal person and its external lawyers for the purposes of the former's defense. That in turn means that when requesting information, as well as requiring submission of books, documents and records, the ECB shall not read/collect communication exchanged between a bank/its employees and external lawyers.

Oral explanations and interviews

A distinction between "oral explanations" and "interviews" is evident in the SSM legal framework. Both powers are included in Article 11 SSM Regulation. The former is understood as "oral explanations from any person referred to in Article 10(1) or their representatives or staff."[163] The latter is understood as the interviewing of *any other* person, as long as he or she consents to be interviewed, for the purpose of collecting information that is relevant for the subject matter of the investigation.[164]

As the wording of the SSM Regulation suggests, the two powers differ in their scope. The former power deploys oral explanations as a way of clarifying information found in documents, books and records.

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[156] Case 85/87 *Dow Benelux NV* v *Commission of the European Communities* [1989] ECLI:EU:C:1989:379, para 26
[157] Case C-155/79 - *AM & S* v *Commission* [1982] ECLI:EU:C:1982:157 ("*AM & S* v *Commission*")
[158] ibid paras 21 and 24.
[159] Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2010] ECLI:EU:C:2010:512, para.44 ("Akzo Akcros")
[160] *AM & S* v *Commission* (n 157), para 21
[161] Luis Ortiz Blanco, *EU Competition Procedure* (OUP 2013) 348
[162] *AM & S* v *Commission* (n 157), para 29
[163] SSM Regulation, art 11(1)(c)
[164] SSM Regulation, art 11(1)(d)

As it has rightly been noted, the ECB can oblige legal persons, their representatives or staff members to provide such oral explanations.[165] On the other hand, the power to interview has a broader scope; it empowers the ECB to ask anything related to the investigation at hand (purpose limitation), however the interviewee must give their consent. I do not therefore read Article 11(1)(d) SSM Regulation as obliging these persons to cooperate.

With respect to the legal safeguards that are generally applicable to oral explanations and interviews, a defense right that may come at play, albeit at a later stage is, the privilege against self-incrimination.[166] Again, a distinction should be made between the two different powers: the power to request oral explanations and the power to conduct interviews. As I explained earlier, if oral explanations are requested on the basis of a formal decision, based on Article 11 SSM Regulation, and not by means of an informal, operational act, employees are under an obligation to cooperate. In line with the *Orkem* case,[167] when requiring such explanations, if the ECB's organizational structures anticipate that the procedure may later become criminal in nature, persons shall not be required to make incriminating statements. Alternatively, incriminating statements can still be taken, but once the procedure switches to being punitive, the oral statements must not be used in an incriminating way. I will come back to that issue in more detail below.

The picture is markedly different when it comes to interviews. Interviews are conducted on a voluntary basis and the obligation to cooperate (legal compulsion) is therefore not incumbent upon the interviewees. However, the privilege against self-incrimination may apply only where persons are forced to cooperate[168] and only with respect to will-dependent information.[169] Given that senior management and other employees cannot be forced to partake in interviews, I would argue that the privilege against self-incrimination does not apply in that particular context.

6.1.3 Any room for national powers?

In the preceding sections, JSTs, their tasks, powers, and applicable safeguards were scrutinized. EU law provides for far-reaching monitoring and investigative powers. However, it was shown that JSTs are hybrid teams, in the sense that they composed of EU and national staff member. The latter functionally become part of the EU structure. Such a mixed design brings to the fore the question whether NCA staff participating in JSTs, in addition to powers stemming from EU law (SSM Regulation), which they clearly have at their disposal, can also make use of national investigative powers, in which case they would obviously apply national safeguards. The answer to that question is currently quite unclear. It has been argued that NCA staff members do retain and may exercise the powers they derive from their national law.[170] If this is the case, the next logical question that comes to the surface and is particularly relevant from the perspective of legal certainty and legal protection, is how the decision to make use of potentially more intrusive national investigative powers is made. These issues are currently far from clear.

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[165] Lackhoff 2017 (n 49) 181

[166] Again, it must be stressed that the privilege against self-incrimination has to be afforded only when an ECB organizational structure anticipates that the procedure may switch to a punitive one.

[167] Case 374/87 *Orkem* v *Commission of the European Communities* [1989] ECLI:EU:C:1989:387 ("Orkem")

[168] *Ibrahim and Others* v. *United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR 13 September 2016) para 267

[169] *Saunders* v *United Kingdom* App no 19187/91 (ECtHR 17 December 1996), para 69

[170] Laura Wissink, Ton Duijkersloot and Rob Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection' (2014) 10 Utrecht Law Review 92, 106

One could, of course, go as far as to question whether the question that I have just posed is worth examining. Indeed, seeing that the ECB has far-reaching powers to obtain information in itself, why would a JST member "bother" to make use of national powers? Still, I do find the issue quite significant. For example, as explained earlier, the ECB cannot oblige persons to agree to be interviewed. What if a JST member, who is an employee of the NCA of Member State x can actually "interrogate" bank employees? Would making use of that power not be tempting for JST members who are employed by an NCA? Assuming that that was a possibility, this would likely pose problems in view of legal certainty, as it may not always be clear to supervised entities what the precise scope of SSM enforcement powers are.

6.2 On-site inspection teams (OSITs)

6.2.1 Composition and tasks

On-site inspection teams (OSITs) are established by the SSM Framework Regulation.[171] OSITs are appointed by the ECB and their task is the performance of on-site inspections at the business premises of the legal persons mentioned in Article 10(1) SSMR, as well as at the premises of any undertaking who, according to Article 4(1) point (g), is included in supervision on a consolidated basis.[172] As to the composition of OSITs, similar to JSTs, each team comprises ECB and NCA staff members.[173] The head of the OSIT (head of mission) is appointed by the ECB[174] from among ECB and NCA staff members.[175] The head of mission instructs the rest of team.[176]

OSITs work in close cooperation with JSTs, but they are organizationally independent.[177] Concerning the question of when OSIs are triggered, the ECB, more specifically its Directorate General micro-prudential supervision 4 and the division called "centralized on-site inspections division," carries out a formal planning for on-site inspections at least annually, in liaison with JSTs and NCAs.[178] Thus, inspections are in principle planned, and they are part of the supervisory evaluation program; therefore, supervised entities are generally aware of OSIs in advance.[179] Planned OSIs consist of the following steps: a) planning of the work program,[180] as just explained; b) a preparatory phase, in which the ECB may ask supervised entities to fill in and submit a standardized package of templates, in order to assist the OSIT with its preparation;[181] c) execution of the work program,[182] which is discussed in the next section; d) a reporting phase,[183] also discussed below; and e) a follow – up phase, the responsibility for which lies with the JSTs.[184]

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[171] SSM Framework Regulation, art 143
[172] SSM Regulation, art 12(1)
[173] SSM Framework Regulation, art 144(1)
[174] SSM Framework Regulation, art 144(2)
[175] SSM Framework Regulation, art 144(2)
[176] SSM Framework Regulation, art 146(1)
[177] European Central Bank, "Guide to on-site inspections and internal model investigations" (September 2018) 7, <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.osi_guide201809.en.pdf?49b4c0998c62d4ab6f31a4733c7ea518> accessed 28 January 2021 ('ECB guide to on-site inspections')
[178] Ibid 5
[179] Ibid 3
[180] Ibid 5
[181] Ibid 9
[182] Ibid 12
[183] Ibid 13
[184] Ibid 17

It should be noted that OSIs may also take place on an *ad hoc* basis, especially if there is an incident which requires prompt supervisory action.[185] Typically, such *ad hoc* inspections are unannounced.[186] Below, I delve into the specific powers that are available to OSITs and to the applicable safeguards.

6.2.2 Enforcement powers and applicable legal safeguards

Like JST members, OSIT inspectors have all the powers that JSTs have, namely the power to request information (Article 10 SSM Regulation) and the power to carry out general investigations (Article 11 SSM Regulation). The content of those powers is the same as discussed above; therefore, to avoid repetition, I will move on to discussing the power to carry out on-site inspections, a power vested only in OSITs. Obviously, the powers of Articles 10 (power to request information) and 11 SSM Regulation (general investigations) can be exercised by OSITs *during* an on-site inspection.[187] Similar to national JST members and the question of which monitoring/investigative powers they have at their disposal, it does not follow with certainty whether OSIT members employed by NCAs can – during the course of EU inspections – make use of additional powers they may have in accordance with their national law.

What is, then, an on-site inspection? In essence, it is an enforcement power that enables the ECB and particularly its OSITs to enter supervised entities' land and premises.[188] Once entry has been gained, OSITs can also carry out the powers contained in Article 11 SSM Regulation (request documents, examine them, obtain explanations, interview persons).[189] An on-site inspection must be conducted on the basis of an ECB decision which must specify at least the subject matter of the envisaged OSI and its purpose, as well as the fact that obstruction of the OSI constitutes a breach of an ECB decision.[190] Obstruction may in turn trigger sanctioning proceedings, in accordance with Article 18(7) SSM Regulation and Regulation EC/2532/98.[191] OSIs are therefore obligatory and supervised entities must cooperate.

The fact that OSIs can be exercised only pursuant to a decision implies that the addressee of the decision is enabled to contest it before the CJEU and seek a remedy directly. It should be noted that the fact that an ECB decision must state the reasons for ordering the OSI, as well as specify the subject matter and purpose of the OSI, has been recognized by EU Courts as an essential requirement, which is designed "not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding their rights of defense."[192] Indeed, the fact that the decision shall state precisely the reasons and subject matter of the inspections, can be seen as a safeguard against so-called "fishing expeditions."[193]

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[185] Ibid 6
[186] Ibid 6
[187] SSM Regulation, art 12(2)
[188] SSM Regulation, art 12(2)
[189] Of course, the powers contained in Article 11 SSM Regulation are not "attached" to an on-site inspection, but can exercised by the ECB irrespective of an OSI
[190] SSM Framework Regulation, art 143(2)
[191] SSM Framework Regulation, art 143
[192] Case C-583/13 P *Deutsche Bahn* v *Commission* [2015] ECLI:EU:C:2015:404, para 56
[193] Giacomo Di Federico, "Deutsche Bahn: What the Commission Can and Cannot do in Dawn Raids" (2014) 5 Journal of European Competition Law & Practice 29

In the case of announced OSIs, the ECB must communicate to the credit institution the decision, as well as the identity of the members of the OSIT, at least five days before the commencement of the inspection.[194] In addition, it must notify the relevant NCA at least a week in advance. In the case of *unannounced* inspections, the NCA of the relevant Member State must be notified "as soon as possible before the start of such on-site inspection."[195]

According to Article 12(4) SSM Regulation, staff members appointed by the relevant NCA shall actively assist the ECB officials during OSIs. When they participate in OSITs, NCA employees fall under the supervision and coordination of the ECB.[196] In case a supervised entity opposes the envisaged inspection, NCAs shall afford the ECB the necessary assistance in accordance with national law, such as the sealing of business premises, books, and records.[197] If the NCA is not entrusted (by national law) with such powers, it shall make use of its power to request the necessary assistance from other national authorities,[198] for example the police. It is important to note that when such assistance is requested, national procedural law applies.[199] It is worth mentioning that under certain national laws, obstructing an NCA's powers can constitute a criminal or administrative offense.[200]

Concerning the question of what OSITs can and cannot do, as is further specified in the ECB's "guide to on-site inspections," the head of mission requests from the inspected bank the allocation of a physical space to be made available for the inspection team and all the necessary IT facilities.[201] The execution phase commences with a kick-off meeting between the OSIT and a senior representative of the legal person, during which the OSIT explains the objective, content, and steps of the inspection.[202] After the kick-off meeting, the OSIT begins its activities on the business premises, which mostly include the following techniques:[203]

- observations, information verification, and analysis: The goal here is to check, analyze and observe processes. To that end, OSITs shall be given access "to all requested information and read-only access to all relevant IT systems."[204]
- targeted interviews: The OSIT meets key personnel and cross-checks the documented processes with what happens in practice in the credit institution.
- walk-throughs: Through this technique, OSITs verifies whether the processes that the credit institution claims that it has in place are actually applied in practice.
- sampling/case-by-case examinations: Samples of real transactions are taken to allow the OSITs to assess the quality of the credit institution's risk management approach.
- confirmation of data: Data previously submitted by the supervised entity is recalculated and cross-checked for its accuracy and consistency.

[194] SSM Framework Regulation, art 145(1)
[195] SSM Framework Regulation, art 145(2)
[196] SSM Framework Regulation, art 146(1)
[197] SSM Regulation, art 12(5)
[198] SSM Regulation, art 12(5)
[199] For that reason, Luchtman and Vervaele characterize that particular *modus* of interaction as "Amtshilfe," see Luchtman and Vervaele 2017 (n 115), 252
[200] For an example of the Italian legal system, see: Raffaele D' Ambrosio, "Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings" (2013) 74 Banca d' Italia Quaderni di Ricerca Giuridica della Consulenza Legale 23-24, 71 et seq
[201] ECB guide to on-site inspections (n 177) 11
[202] Ibid
[203] Ibid 11-12
[204] Ibid 12

- model testing: The OSIT poses certain scenarios and the inspected credit institution is asked to test the performance of its models against these hypothetical scenarios.

The outcome of the inspection can be presented in a formal or an informal way. The latter consists of the drafting of a letter (operational act) addressed to the credit institution which formulates certain recommendations and is accompanied by a closing meeting with the legal entity.[205] The former consists of the adoption of an ECB supervisory decision, which is addressed to the credit institution and formulates legally binding supervisory measures.

Even though, by their very nature, OSIs are linked to the investigative phase of law enforcement,[206] since they are typically deployed in response to a suspicion, the SSM legal framework seems to have placed them in the phase of ongoing supervision. That is so, because according to the SSM Regulation, if during an inspection the OSIT suspects a violation, the case shall be referred to the IIU for investigation.[207] It therefore follows that OSITs will transmit any relevant information to the IIU, which will proceed with the "investigation." In my opinion, this is quite a paradox given that in the ECB's guide to on-site inspections, OSIs are clearly called "investigations."[208]

What about legal safeguards in the context of OSIs? As already posited in Chapter II, an OSI can be understood as a two-part process. In the first place, the administrative authority must *enter* premises. Once entry has been obtained, supervisors collect information, *inter alia* by taking oral statements, reading and assessing documents and records, interviewing persons who consent to being interviewed *et cetera*. The right to privacy and particularly its respect for the home dimension plays a significant role at the "entry stage," since it functions as a safeguard against disproportionate interferences in the sphere of private activities. Entry of premises and the procedure thereof is regulated in Articles 12 and 13 of the SSM Regulation. To gain entry to premises, the ECB must request *ex ante* judicial authorization from the competent national authority in the following two situations:

a) if the national law of the relevant Member State requires that for the performance of an on-site inspection authorization by a judicial authority is necessary
b) if the assistance by the NCA, which is contained in Article 12(5) SSM Regulation as discussed above, requires judicial authorization

According to Article 13(2) SSM Regulation, whenever such *ex ante* authorization is sought, the national judicial authority may only examine that the ECB decision "is authentic and the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection."[209] In doing so, the national judicial authority can request from the ECB the provision of explanations, including information concerning the grounds for suspicion, the seriousness of the suspected infringement and the nature of the involvement of the persons subject to the coercive measures.[210] On

[205] Ibid 15
[206] This is also evidenced by the fact that where JSTs enter into business premises, the ECB must not check whether national law permits such an entry. On the other hand, before the performance of on-site inspections, the ECB must check with how national law complies with the inviolability of the home. If national law so requires, the ECB must apply for an *ex ante* judicial warrant. Such types of safeguards are typical to punitive investigations.
[207] Duijkersloot, Karagianni and Kraaijeveld (n 11) 32
[208] ECB guide to on-site inspections (n 177) 11
[209] SSM Regulation, art 13(2)
[210] SSM Regulation, art 13(2)

the other hand, the assessment of the necessity of the inspection and/or the legality of the ECB decision is a competence reserved exclusively for the CJEU.

The aforementioned arrangement in the ECB's legal framework, as a way to respect the inviolability of the home, is on par with EU case law and particularly with the division of labor that was articulated by the CJEU in the famous *Roquette Frères* judgment.[211] In short, the Court there managed to strike a balance between EU and national interests. The ECB does not have at its disposal any coercive powers, i.e., powers to overrule potential opposition by the supervised entity. Coercive powers remain a national competence and as a result, national Courts have the last word as far as the testing of coercive measures is concerned.

On the other hand, the national sphere does not interfere with assessing the need for the inspection, which is tested by the CJEU. I believe that in situations where the ECB acts completely autonomously, in the sense that the procedure commences at the EU level and ends at the EU level, the input for a final decision has been obtained on the basis of EU law powers and safeguards, the aforementioned division of labor, as a way to secure the right to respect for the home, is quite realistic and tenable. Whether it is still tenable in situations where an investigation is commenced by the ECB but ends in a national legal order, after a national investigation, yet the input has been provided by different channels/legal orders, is still an open question with which I shall deal later, after I have discussed the situations in which information obtained by the ECB is transferred to another legal order.

Having entered a credit institution's premises, OSITs enjoy all the powers that were previously discussed, namely the power to request information (Article 10 SSM Regulation) and the powers to require submission of documents, examine books and records, obtain oral or written explanations, carry out interviews with the consent of the persons concerned (Article 11 SSM Regulation). To avoid repetition, I shall not discuss the applicable safeguards, but the reader is reminded that the most significant defense right in this non-punitive phase is the LPP. LPP, as general principle of Union law and as part of the rights of the defense (Article 48(2) CFR) and of the right to good administration (Article 41 CFR), has already been discussed.

Here, I shall go a bit deeper into the procedure for waiving LPP. I have opted to discuss the issue at this point because, in contrast with off-site supervision, which is the rule of thumb in the context of JST activities, OSITs work on-site. Indeed, when JSTs request information, the supervised entity can always carry out its own assessment and thus not submit information covered by LPP. That is markedly different during OSIs. Having entered, ECB inspectors start to look for information. Given that ECB inspectors shall be given access "to all requested information and read-only access to all relevant IT systems,"[212] the question as to how legally privileged and/or private information is to be shielded from collection and potential transfer off-site comes to the fore. It is precisely at this point that the procedure for waiving LPP becomes important.

The issue was discussed in detail by the General Court in the *Akzo Akcros* case,[213] which was later endorsed on appeal. From that case, it follows that if – during an on-site inspection – the investigated party invokes an LPP claim and thus refuses to produce certain documents, a three-step procedure must

[211] Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603, paras 39-40; See also, Case 85/87 *Dow Benelux NV* v *Commission of the European Communities* [1989], ECLI:EU:C:1989:379, para 46
[212] ECB guide to on-site inspections (n 177) 12
[213] *Akzo Akcros* (n 159)

be followed. [214] First, the person claiming a document to be covered by LPP must provide EU officials with materials demonstrating that the documents fulfill the conditions of LPP. Second, if the EU Commission – and in our case the ECB – believes that such evidence has not been successfully provided, it must order the production of the documents at issue (obviously pursuant to Article 10 SSM Regulation) and may even impose a penalty or periodic penalty payment ("PPP") for the bank's refusal to disclose the documents. In addition, the EU authority may place the documents in question in a sealed envelope, thereby removing them from the business, which is to ensure that the documents will not be destroyed or manipulated.[215] The third step consists of giving the person under investigation the opportunity of bringing an action for annulment before the CJEU, which may also be coupled with a request for interim relief.[216] The aforementioned procedure shows that the mere fact that a credit institution invoked LPP is not sufficient in itself, if it is not backed by materials proving that the said information is actually covered by LPP.[217] Additionally, the procedure discussed above ensures that the EU authority does not read the contents of the contested document before a court has definitely decided on the applicability of LPP.

This leads me to my next point, namely that inspectors may very well come across private information in the course of the OSI. Is the protection of correspondence element of Article 7 CFR sufficiently safeguarded in the EU legal framework? The ECB's supervisory manual does not currently make any reference as to how such private information is to be protected exists. Of course, one could argue that EU inspectors are not particularly interested in obtaining private communication. Still, I do not consider it inconceivable that, going through emails of a senior manager, an inspector would – for instance – come across private communication between that manager and their partner where it is discussed that another senior manager is not fit-and-proper and so on.

Having discussed the ECB's organizational structures that are active in the stages preceding the ECB's formal investigations, I now move on to discussing the information-gathering powers of the ECB in the stage of investigation, i.e., after a JST or an OSIT has a suspicion that a violation of the law has occurred.[218]

6.3 Independent investigating unit (IIU)

6.3.1 Composition and tasks

The independent investigating unit (IIU) is part of the Enforcement and Sanctions Division of the ECB's Directorate General Micro-Prudential Supervision 4.[219] It is an internal independent body, which is composed of investigating officers appointed by the ECB.[220] These officers must not be involved or have been involved in any way for the past two years in in the supervision or authorization of the relevant bank.[221] This is in line with the requirement of separation between the investigative and sanctioning (prosecution) phases.[222]

[214] Ibid, para 79
[215] Ibid, para 83
[216] Ibid, para 79; *AM & S* v. *Commission* (n 157) para 32
[217] *Akzo Akcros* (n 159), para 80
[218] SSM Framework Regulation, art 124
[219] Supervisory Manual (n 133) 102
[220] SSM Framework Regulation, art 123(1)
[221] SSM Framework Regulation, art 123(2)
[222] *Dubus* v *France* App no 5242/04 (ECtHR 11 June 2009)

The IIU is competent to act from the moment that either the JSTs or the OSITs *suspects*: a) a breach of directly applicable Union law[223] and/or b) a breach of an ECB regulation or decision.[224] Specifically, when the ECB suspects such a breach, it must refer the matter to the IIU.

6.3.2 Enforcement powers and applicable legal safeguards

For the investigation of suspected infringements, the IIU can exercise all the powers that the ECB has on the basis of the SSM Regulation.[225] For example, it can request documents and statements, hold interviews, carry out OSIs *et cetera*. In addition, the investigating officers can access all the information and documents already obtained by the ECB and the NCAs in the context of ongoing supervision.[226] If the IIU concludes that an administrative penalty must be imposed on a bank, it submits a proposal for a complete draft decision to the supervisory board.[227] Alternatively, if the ECB is not competent to sanction, the IIU can request the NCA of establishment to open sanctioning proceedings.[228] It is interesting to note that according to the ECB's supervisory manual, the IIU "can also(…) require the NCAs, by way of instructions, to make use of their investigatory powers under national law."[229]

Article 126 SSM Framework Regulation lays down the procedural rights that supervised entities have at their disposal in case the IIU – upon completion of the investigation – reaches the conclusion that an administrative penalty should be imposed. In such a case, after the completion of the investigation and before the submission of a proposal for a complete draft decision to the supervisory board, the concerned credit institution must be notified in writing on the findings of the IIU.[230] In addition, the IIU must set a time limit within which the bank concerned can make written submissions on the factual results and the objections raised against it.[231] The credit institution can be invited to an oral hearing, during which it may be represented and/or assisted by a lawyer.[232] Finally, Article 126(4) SSM Framework Regulation foresees the right of access to the file.

It is striking that even though the IIU carries out investigations that could lead to the imposition of a punitive sanction, the privilege against self-incrimination is not foreseen in the legal framework. Notwithstanding that shortfall, the privilege against self-incrimination falls under Articles 47 and 48(2) CFR and comprises a general principle of Union law and – as such – EU authorities and national authorities acting within the scope of Union law must observe it. Before discussing the content and the applicability of the privilege against self-incrimination to the activities of the IIU, first, it is necessary to determine which types of information to which banking supervisors come across fall under the scope of the privilege against self-incrimination and which do not.

As explained in Chapter II (Section 3.3.4.3), the privilege against self-incrimination extends only to so-called will-dependent information. Information that can be acquired through the use of compulsion and which exists independently of the will of the accused, such as existing documents or data obtained pursuant to a formal decision or a judicial warrant, does not therefore fall within the protective scope

[223] SSM Regulation, art 18(1); SSM Framework Regulation, art 124 point (a)
[224] SSM Regulation, art 18(7); SSM Framework Regulation, art 124 point (b)
[225] SSM Framework Regulation, art 125(1)
[226] SSM Framework Regulation, art 125(3)
[227] SSM Framework Regulation, art 127(1)
[228] SSM Regulation, art 18(5); Supervisory Manual (n 133) 103
[229] Supervisory Manual (n 133) 102
[230] SSM Framework Regulation, art 126(1)
[231] SSM Framework Regulation, art 126(2)
[232] SSM Framework Regulation, art 126(3)

of the privilege against self-incrimination.[233] Various applicable laws, including the CRR[234] and the CRD/IV,[235] require supervised entities to report on periodic intervals and/or impose on credit institutions general obligations to collect and keep track of specific information. In that respect, Lasagni[236] rightly notes that (quantitative) information which credit institutions are under a general obligation to keep will in principle not be covered by the privilege against self-incrimination, as it would likely be perceived as will-independent information. On the other hand, "qualitative" prudential requirements,[237] such as for instance legal provisions imposing on credit institutions obligations with respect to internal governance arrangements,[238] would arguably require the provision of oral explanations and/or interviews and the production of documents containing will-dependent, subjective judgments, likely covered by the privilege against self-incrimination.

Moving on to discussing the content and the applicability of the privilege against self-incrimination to the activities of the IIU, a distinction shall be made between, on the one hand, the protection offered to legal persons and, on the other hand, the protection offered to natural persons. I shall discuss both in order.

With respect to legal persons, namely credit institutions, the most significant legal precedent in the EU legal order is the *Orkem* case.[239] In the context of an EU Commission investigation, the question arose as to whether undertakings shall be afforded the right to remain silent. The CJEU noted that Article 6 ECHR may be relied upon by undertakings subject to EU competition law investigations,[240] yet within the following strict limits: the EU Commission may not compel an undertaking to answer questions which involve an admission on the part of the undertaking of the existence of an infringement for which the burden of proof rests with the Commission.[241] In other words, according to the CJEU, a law enforcement authority can (a) ask questions which are intended to secure factual information and (b) ask for the disclosure of documents which are already in the possession of the person in question.[242] What a law enforcement authority must not ask, as that would infringe on the privilege against self-incrimination, are questions concerning the purpose of a certain action taken by the person subject to the investigation and the objective pursued by this action.[243] In other words, types of questions by which a law enforcement authority seeks a direct acknowledgment of a person's participation in a certain action, such as for instance a direct acknowledgment of a bank's infringement of the capital requirements framework, are forbidden. It goes without saying that, practically speaking, a bank's privilege against self-incrimination cannot be exercised by the legal person as such. It will thus be

[233] *Saunders* v *United Kingdom* (n 169) para 69
[234] See for instance Article 99 of the CRR, which imposes on credit institutions obligations to report at least on a semi-annual basis on own funds requirements and financial information
[235] See for instance Article 75(3) of CRD/IV which obliges credit institutions to keep information on the number of natural persons who receive remuneration of EUR 1 million or more per financial year, including their job responsibilities, main elements of the salary, bonus, pension contribution and the business area in which they are involved
[236] Giulia Lasagni, *Banking Supervision and Criminal Investigation Comparing the EU and US Experiences* (Springer 2019) 260- 261
[237] Ibid, 261
[238] See for instance Article 74(1) CRD/IV, which requires credit institutions to have in place robust governance arrangements, including a clear organisational structure, transparent and consistent lines of responsibility and processes to identify, manage and monitor risks
[239] *Orkem* (n 167)
[240] Ibid, para 30
[241] Ibid, para 35
[242] Ibid, para 37
[243] Ibid, para 38

exercised by natural persons acting on behalf of the bank.[244] From a combined reading of Article 11(1)(c) and Article 10(1) SSM Regulation, it follows that the persons who can exercise the privilege on behalf of the legal person are the representatives and the staff members of supervised entities.

A subsequent case in which the CJEU upheld the *Orkem* principle is the *Mannesmannröhren-Werke* case.[245] The EU Commission had sent a request for information to the undertaking, since it had suspicions that Mannesmann was participating in a cartel. The CJEU emphasized that undertakings subject to a preliminary investigation procedure by the EU Commission are "under a duty of active cooperation, which means that it must be prepared to make available to the Commission any information relating to the subject matter of the investigation."[246] The Court furthermore stressed that if it were to recognize the existence of an absolute right to silence, this would constitute a disproportionate interference with the Commission's duty under the Treaty to enforce EU competition law.[247] Effective enforcement therefore seems to be taking precedence over the full protection of the privilege against self-incrimination. Finally, the Court repeated the *Orkem* rule, namely that only directly incriminating questions, that is, questions involving an admission on the part of the undertaking of the existence of an infringement for which the EU Commission bears the burden of proof, are forbidden.

From the foregoing, it follows that the privilege against self-incrimination must be observed in punitive administrative proceedings carried out by the IIU vis-à-vis credit institutions, within the limits set in the *Orkem* case. The applicability of the *Orkem* rule to the ECB's enforcement proceedings is also backed by the fact that the ECB's and DG Competition's powers to request information and to examine books, documents and records and obtain written explanations are identical.[248] Both authorities can exercise these powers pursuant to a formal decision, which suggests that in both enforcement systems, investigated parties are under an obligation to cooperate with the EU authority and if they do not, hefty fines can be imposed.[249] The necessary degree of compulsion, which is a prerequisite for the privilege against self-incrimination to apply, is therefore present in both systems of enforcement.

With respect to the applicability of the privilege against self-incrimination to natural persons subject to IIU investigations,[250] in a relatively recent judgment, the CJEU seems to have extended its scope of application. The *DB Consob* case[251] concerned the indirect enforcement of EU (market abuse) law by the Italian securities and markets regulator (Consob). The main questions that arose was the applicability and the content of the privilege against self-incrimination of natural persons in administrative proceedings that may lead to the imposition of a punitive sanction. Consob had imposed on DB two hefty pecuniary penalties for insider trading and for unlawful disclosure of inside information.[252] In addition, a third fine was imposed, on the grounds that DB had deliberately delayed the hearing and that he declined to answer questions posed on him in the course of the hearing, i.e., after he was charged with the former offenses.[253] DB subsequently complained before Italian Courts

[244] Stijn Lamberigts, "The privilege against self-incrimination – A chameleon of criminal procedure" (2016) 7 New Journal of European Criminal Law 418, 435
[245] Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECLI:EU:T:2001:61
[246] Ibid, para 62
[247] Ibid, para 66
[248] Regulation 1/2003, arts 18(1) and 20
[249] Regulation 1/2003, arts 18(3) and 20(4)
[250] It shall be reminded that according to SSM Framework Regulation, art 134(1)(a)(b) natural persons can also be the addresses of non-pecuniary or pecuniary penalties
[251] Case C-481/19 *Consob* [2021] ECLI:EU:C:2021:84 ("DB v Consob")
[252] *DB* v *Consob*, para 14
[253] *DB* v *Consob*, para 15

that his right to remain silent had been violated. The Italian Constitutional Court decided to stay proceedings and ask the CJEU whether– in light of Articles 47 and 48(2) CFR – (natural) persons who are under a duty to cooperate, but refuse to provide the authority at issue with answers that can establish their liability with respect to an offense, which is punishable by means of punitive sanctions, can be left unpunished.[254] The national court asked, in essence, whether, in the context of a non-punitive procedure, natural persons can refuse to cooperate and to provide incriminating information which could later be used by the requesting authority for the imposition of a punitive sanction.

The CJEU responded that Articles 47 and 48 CFR must be interpreted as allowing Member States not to impose punitive sanctions on natural persons who refuse to provide incriminating answers that could establish their liability for offenses that can be punished by means of punitive administrative or criminal sanctions.[255] In other words, the CJEU recognizes that a person's privilege against self-incrimination must be respected in punitive administrative proceedings. Therefore, administrative authorities shall not impose penalties to those natural persons if the latter refuse to provide the authority with incriminating answers.

Translated to the ECB setting, the aforementioned case law suggests that, with respect to legal persons, the IIU may not pose directly incriminating questions. On the other hand, when the investigated party is a natural person, the privilege against self-incrimination extends to all will-dependent information that can be obtained by the IIU by means of legal coercion.

6.4 NCA assistance in the supervision of significant institutions

In the foregoing sections, I have discussed the ECB's organizational structures. However, these are not the only means through which the ECB may obtain information. Even though the ECB is responsible for the day-to-day supervision of SIs, NCAs assist the ECB in the fulfillment of its day-to-day tasks, through the preparation and implementation of acts related to the ECB's tasks under the SSMR. After having read thoroughly the SSM Regulation and SSM Framework Regulation, I have managed to identify the following legal provisions, which point back to the national level and require, either in a formal, or, in a less formal way, NCAs input for the ECB's supervision of significant banks. These provisions are reviewed in order below.

First of all, NCAs participate in the so-called "common procedures," which consist of granting authorizations,[256] withdrawing authorizations, and assessing the acquisitions of qualifying holdings.[257] In that context, NCAs prepare draft decisions, in accordance with national powers and law. These decisions are thereafter assessed by the ECB and, if endorsed, they constitute an ECB/EU decision. However, seeing as the final decision which are the result of a common procedure is a non-punitive decision, these procedures are not that relevant for the dissertation's topic.

The second *modus operandi* mentioned in the legal framework, concerns situations in which NCAs assist the ECB in the performance of its tasks vis-à-vis SIs.[258] The EU-level legal framework makes reference to the following activities:

[254] *DB* v *Consob*, para 15
[255] *DB* v *Consob*, para 58
[256] SSM Regulation, art 14
[257] SSM Regulation, art 15
[258] SSM Regulation, art 6(3); SSM Framework Regulation, art 90(1)

- NCAs submit draft decisions in relations to SIs, upon the ECB's request[259]
- NCAs assist the ECB "in verification activities and the day-to-day assessment of the situation of a significant supervised entity,"[260] while they are also under an obligation to transmit to the ECB "information stemming from NCA verification and on-site activities"[261]
- NCAs may upon their own initiative, submit a draft decision for the ECB's consideration, through the joint supervisory team[262]

The SSM Regulations do not specify whether the aforementioned bottom-up input can be used for enforcement purposes. In the absence of further specification, it seems logical to consider that such input could potentially be relevant both for supervisory decisions and for sanctioning decisions.

Third, according to Article 9(1) SSM Regulation, for the purposes of carrying out its tasks, the ECB shall have all the powers and obligations that NCAs have under relevant Union law.[263] In addition to that, when powers are not afforded to the ECB by Union law, the ECB can issue instructions to NCAs, asking them to make use of the powers that they enjoy under their national law.[264] If the ECB decides to issue instructions, the NCAs will obviously follow national procedural law, as the procedure will be a national procedure. By the same token, the consequences of that procedure shall be imputed to the NCA and not to the ECB. While it is not specified whether the ECB's power to instruct NCAs also encompasses the power to instruct NCAs to make use of investigative powers, I believe that this provision should be read in that spirit, for two reasons: first, the very title of Article 9 SSM Regulation reads "supervisory and *investigatory* powers." Second, in the ECB's supervisory manual, it is clearly stated that the IIU, *by way of instructions*, can require NCAs to make use of their investigative powers.[265] The precise content of such national investigative powers shall be discussed in the chapters dealing with the Dutch and Greek legal orders. For now, what we can see is that, notwithstanding the fact that the EU-level legal framework prescribes wide-ranging information-gathering powers, which the ECB's organization structures can exercise autonomously, without any reliance on national law, the ECB can often "make use" of NCAs, as the latter are under an obligation to assist the former in the implementation of its exclusive mandate. This is the point where – in the information-gathering stage – national law begins to creep into the EU legal framework.

What about applicable safeguards? Obviously, given that all the aforementioned *modi operandi* have in common the fact that some sort of formalized, or less formalized, input is provided by NCAs to the ECB and in the absence of explicit regulation in the EU legislation, it can reasonably be expected that national procedural law and safeguards apply.[266] However, what is not clear at this point is whether – in the particular domain of banking supervision – Member States are allowed to apply national fundamental rights standards, which are more protective compared to the Union standards.

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[259] SSM Framework Regulation, art 90(1)(a) in combination with art 91(1)
[260] SSM Framework Regulation, art 90(1)(b)
[261] SSM Framework Regulation, art 21(1)
[262] SSM Framework Regulation, art 91(2)
[263] SSM Regulation, art 9(1)
[264] SSM Regulation, art 9(1).
[265] Supervisory Manual (n 133) 102
[266] With respect to common procedures, it is in fact already certain that during the national phase of a given procedure, NCAs apply national law and safeguards. See *inter alia*, Filipe Brito Bastos, "Judicial review of composite administrative procedures in the Single Supervisory Mechanism: *Berlusconi*" (2019) 56 Common Market Law Review 1355 discussing Case C-219/17 *Berlusconi and Fininvest* [2018] ECLI:EU:C:2018:1023ECLI:EU:C:2018:1023

6.5 Judicial control of ECB acts in the obtainment phase

6.5.1 Action for annulment and interim relief

According to Article 263(1) TFEU, the CJEU reviews *inter alia* the legality of legislative acts and of acts of the European Central Bank, which are intended to produce legal effects vis-à-vis third parties. In the *IBM* v *Commission* case,[267] the CJEU clarified that this criterion is satisfied when a contested measure is "capable of affecting the interests of the applicant by bringing about a distinct change in his legal position."[268] In turn, a decision is capable of bringing about a distinct change in the legal position and is thereby reviewable only insofar as it is "definitively laying down the position of the Commission [ECB]."[269]

Assuming that reviewability can be established, access to the CJEU can be sought either by persons who are the addressees of a decision or by those who are directly and individually concerned. The first criterion, namely being the addressee of a decision, is quite straightforward. If the decision contains the name of a credit institution, it is addressed to it, and the credit institution will establish standing. The second criterion, namely that of direct and individual concern, poses a hurdle to individuals wishing to bring an action for annulment, but are not the addressees of the decision.[270] The leading case in this regard is the *Plaumann* case,[271] whereby the CJEU articulated that non-privileged applicants may be able to establish *locus standi* as long as they are directly and individually concerned. In *les Verts*,[272] the CJEU noted that contested measures which do not entail implementing provisions can be of direct concern to a non-privileged applicant. The case law on this issue is enormous and an extensive discussion falls outside the scope of this dissertation, still, it is important to note that Lenaerts et al. have discerned – on the basis of that case law – four criteria which must be met cumulatively in order for a legal or natural person to be able to establish direct and individual concern:

a) the contested measure directly affects the legal position of the applicant[273]
b) the contested measure must leave no discretion to the authority in question for implementing the measure
c) the contested measure, albeit not addressed to a person, affects him to such an extent that in essence it is as if the act was addressed to him
d) if the decision affects a closed class of persons; in other words, it is not of general application

Finally, it shall be noted that, based on the axiom that measures adopted by Union institutions, bodies, or agencies are considered valid as long as they have not been annulled, actions for judicial review brought before the CJEU do not have a suspensory effect.[274] However, if the Court deems necessary, it may suspend the contested act (Article 278 TFEU) and prescribe interim relief measures in exceptional cases.[275] Such exceptional circumstances are said to exist when the main application does not appear to

[267] Case C- 60/81 *IBM* v *Commission* [1981] ECLI:EU:C:1981:264
[268] Ibid, para 9
[269] Ibid, para 10
[270] Alexander Türk, *Judicial Review in EU Law* (Edward Elgar 2009) 9
[271] Case 25/62 *Plaumann* v *Commission* [1963] ECLI:EU:C:1963:17, paras 106-107
[272] Case 294/83 *Les Verts* v *Parliament* [1986] ECLI:EU:C:1986:166, para 31
[273] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law* (OUP 2014) 319-326
[274] Türk 2009 (n 270) 198
[275] Case T- 637/11 R, Order of the President of the General Court of 25 January 2012, *Euris Consult Ltd* v *European Parliament* [2012] ECLI:EU:T:2012:28, para 9

be *prima facie* wholly unjustified[276] and when it is shown that the absence of a judgment in the main proceedings may cause to the applicant serious and irreparable damage.[277] Finally, even though this falls outside the dissertation's remit, reference should be made to the possibility of seeking action for damages against the EU (Article 340(2) TFEU). The requirements to be met cumulatively are a sufficiently serious breach of EU law affording rights to individuals, actual damage and a causal link between breach and damage.[278]

6.5.2 A taxonomy of ECB decisions and acts in the information-gathering stage and possibilities for judicial control

To assess the extent to which supervised entities can seek judicial review of the ECB's acts in the information-gathering stage of banking supervision, first, the different acts and decisions should be recapped. As follows from the preceding analysis, the ECB's acts in the information-gathering phase of an enforcement procedures can generally be distinguished in two broad categories: operational acts and decisions. The former are not binding upon their recipient, since they do not bring about a distinct change in their legal position. On the other hand, ECB decisions certainly meet the reviewability criterion.

It therefore follows that *decisions* adopted by the ECB on the basis of Articles 10, 11 and 12 of the SSM Regulation, can be appealed before the CJEU, by their addressee or someone who succeeds in establishing direct and individual concern. At this point, one should be reminded that OSIs conducted pursuant to Article 12 SSM Regulation, may also be unannounced. In such a case, the credit institution will only become aware of the ECB decision when ECB officials arrive on its premises. The bank will thus be able to seek judicial control of the OSI decision either up until two months after it became aware of the inspection decision,[279] or, if an ECB sanction is imposed, based on evidence found in the course of the OSI, after the imposition of that sanction.[280] The credit institution may also decide to fill a request for interim relief, even though the usefulness of this tool in that particular context has been questioned.[281] In short, EU formal decisions, can – in one way or another – be appealed before the EU Courts.

Less straightforward are the possibilities for judicial review of the operational acts adopted by the ECB's organizational structures and for the situations in which NCAs carry out a enforcement tasks in accordance with their national law, with a view to assisting the ECB with the supervision of SIs. I would argue that at the information-gathering stage, these cannot be judicially reviewed, for instance, it is not

[276] Case C-280/93 R, Order of the Court of 29 June 1993, *Federal Republic of Germany* v *Council of the European Communities* [1993] ECLI:EU:C:1993:270, para 21; Case T-65/98 *Van den Bergh Foods* v *Commission*, [1998] ECLI:EU: T:1998:155, para 61

[277] Case C- 377/98 R, *Netherlands* v *Parliament and Council*, Order of the President of the Court of 25 July 2000, ECLI:EU:C:2000:415, para 41; The CJEU has clarified that financial damage cannot be considered as irreparable (Case T- 52/09 R *Nycomed Danmark ApS v European Medicines Agency* (EMA) [2009] ECLI:EU:T:2009:117, paras 71–73). A judge will need to be convinced that the damage is not just hypothetical but entails a sufficient degree of probability. Furthermore. the applicant must establish a causal link between the contested act and the claimed damage (Case T- 303/04 R *European Dynamics SA* v *Commission of the European Communities* [2004] ECLI:EU: T:2004:332, para 66). As far as private parties are concerned and their claims thereof, they must establish that the damage occurred in relation to their own interest. Arguing that the enforcement measure undermined the interests of third parties will hardly ever succeed.

[278] Kathleen Gutman, 'The evolution of the action for damages against the European union and its place in the system of judicial protection' (2011) 48 Common Market Law Review 695, 710 et seq.

[279] TFEU, art 263(6)

[280] *Deutsche Bahn (n 192)* para 26

[281] Wissink, Duijkersloot and Widdershoven 2015 (n 170) 105

possible for a credit institution to appeal the ECB's choice to instruct an NCA to make use of certain powers or challenge the deployment of national powers within a JST or an OSIT. Such acts can arguably be termed as preparatory acts. In the *Tillack* case,[282] the CJEU explained that preparatory measures are not reviewable.[283] However, as argued by Lenaerts et al.,[284] when a party brings an action for annulment against a measure that finalizes a procedure, then any irregularities that may have occurred in the preparatory acts may be reviewed by the CJEU, too. In that sense, in the section that discusses judicial review of final acts, I shall come back to this issue, and examine the extent to which EU and/or national Courts review such preparatory acts.

6.6 Interim conclusion

The ECB obtains operational information in two ways: a) through its organizational structures, namely JSTs, OSITs, and the IIU, and b) through NCAs.

Important enforcement powers that are available to EU teams are the power to request information, the power to carry out general investigations and the power to perform on-site inspections. All of these shall be executed on the basis of a decision, but the first two may also be executed by means of non-binding, operational acts. Such acts, as well as preparatory acts of NCAs, for the fulfillment of the ECB's tasks vis-à-vis SIs, are not, at this stage, capable of being judicially reviewed.

The EU legal framework is notoriously silent with respect to procedural safeguards, such as the LPP and the privilege against self-incrimination in the context of the activities of the IIU. Notwithstanding this deficiency, EU supervisors still need to observe these rights, in view of the fact that they constitute general principles of EU law and are now also protected by the CFR. Still, the question whether the EU principles of LPP and privilege against self-incrimination can give sufficient answers to composite law enforcement questions. As far as compliance with the inviolability of the home is concerned, the EU-level legal framework is in line with relevant case law of the CJEU. Again, the question remains whether this system is still fit for composite enforcement procedures. To continue examining these questions, I shall therefore move on to discussing the different channels through which operational information is transferred within the ECB's organizational units, "within the SSM," that is, between the ECB and NCAs and "outside the SSM," that is, from the ECB to national criminal law enforcement agencies.

7 The transfer of information by the ECB for enforcement purposes

The topic of exchange of information is particularly complex. Having said that, I do not aim to delve into each and every specificity of that domain, as that would exceed the purpose of my dissertation. The section rather aims at sketching in broad strokes the different mechanisms provided for by the EU legal-level framework, on the basis of which information is circulated a) within the ECB, that is, between its different organizational structures and decision-making bodies; b) between the ECB and NCAs ("inner SSM circle"), and c) between the ECB and national criminal law enforcement authorities ("outer SSM circle"). Understanding how information ends in which forum is thus a *necessary step*, in order to facilitate the discussion in the next section, in which the "use" of that information as evidence for punitive purposes and potential fundamental rights issues will be highlighted.

[282] Case T- 193/04 - *Tillack* v *Commission* [2006] ECLI:EU:T:2006:292
[283] Ibid, paras 63-64
[284] Lenaerts, Maselis and Gutman 2014 (n 273) 274

7.1 The transfer of information within the ECB for enforcement purposes

7.1.1 From joint supervisory teams and on-site inspection teams to the independent investigating unit

If the ECB – and therefore also its organizational structures – have a suspicion that a violation may have been committed, they must refer the matter to the IIU.[285] Interestingly, even though the IIU has all the powers that the ECB has under the SSM Regulation,[286] at the same time, "the investigating unit shall have access to all documents and information gathered by the ECB and, where appropriate, by the relevant NCAs in the course of their supervisory activities."[287] One should be reminded that the ECB can obtain information not only through the use of autonomous powers granted by Union law, but also through its "spokes," namely NCAs, which may also gather information in accordance with their national law, powers, and safeguards, for the purposes of assisting the ECB with the supervision of SIs, and thereafter transmit it to the ECB. In that respect, information indirectly gathered by the ECB, via such channels, can also be transferred to the IIU.

With respect to safeguards at this particular phase, the EU legal framework does not include any. For instance, while in the previous phases of the enforcement process we have already seen supervised entities were under an obligation to cooperate (with the exception of interviews and operational acts), the EU-level legal framework does not forbid the transmission to the IIU of information covered by the privilege against self-incrimination or private information, or information obtained by an NCA on the basis safeguards affording more protection than EU law. Obviously, this internal transmission from one internal unit to another cannot be judicially reviewed, as it comprises a preparatory act.

7.1.2 From the Independent Investigating Unit to the Supervisory Board

If the IIU, after concluding its investigation, is of the opinion that an administrative penalty should be imposed on a supervised entity, it drafts a proposal for a complete draft decision, which is then submitted to the SB. In that draft decision, the IIU must mention which breach the supervised person has committed and specify the penalty to be imposed. The file of the investigation in its entirety is also forwarded to the SB.[288] The proposal should be based only on facts and objections on which the supervised party had had the opportunity to comment.[289] In that respect, the IIU must notify a statement of objections to the supervised entity and set a reasonable time limit for the submission of the supervised entity's view.[290] At this point, the IIU must also grant the right to be heard, the right to have access to the file, while the supervised entity may attend an oral hearing, during which it can be represented or assisted by a lawyer.[291]

After the draft decision has been transmitted to the SB, if the Board is of the opinion that the file submitted by the IIU is complete and agrees with the draft proposal, it adopts the complete draft decision, which is then further transmitted to the Governing Council,[292] seeing that this is the ultimate

[285] SSM Framework Regulation, art 124
[286] SSM Framework Regulation, art 125(1)
[287] SSM Framework Regulation, art 125(3)
[288] SSM Framework Regulation, art 127(1)
[289] SSM Framework Regulation, art 127(2)
[290] SSM Framework Regulation, art 126(1) and (2)
[291] SSM Framework Regulation, art 126(3) and (4)
[292] SSM Framework Regulation, art 127(9)

decision-making body of the ECB.[293] If the SB disagrees and is of the opinion that the file does not reveal sufficient evidence of a breach, it can adopt a draft decision and close the case.[294] If, on the other hand, the SB agrees in that a supervised entity committed a breach, but disagrees with the recommendation for a penalty, it adopts a draft decision which specifies the penalty that the SB considers to be suitable.[295] Once the Governing Council has received a draft decision by the SB, it shall act on the basis of the non-objection procedure.

7.2 The exchange of information between SSM authorities for enforcement purposes

7.2.1 Information transfers from the Independent Investigating Unit to the National Competent Authorities

According to Article 18(1) SSM Regulation, where credit institutions breach directly applicable EU law, like the CRR, the ECB is directly competent to impose sanctions. However, in situations not covered by Article 18(1) SSM Regulation, the ECB can require NCAs to open proceedings with a view to taking action in order to ensure that appropriate national penalties are imposed.[296] It should be noted that the ECB addresses such a request by means of a (formal) supervisory decision[297] and not by means of an operational act. Furthermore, even though it is not expressly mentioned in the SSM Regulations, it is nevertheless quite clear that such requests can only be addressed to the NCA of the country of establishment, in other words, the home State supervisory authority, with which lies the power to impose sanctions on the basis its national law.

Concerning the material scope of Article 18(5) SSM Regulation, the provision covers two situations: a) sanctioning proceedings vis-à-vis natural persons[298] and b) sanctioning proceedings concerning breaches (by legal or natural persons) of national law transposing Union directives.[299] The ECB's organizational unit that typically makes use of the aforementioned power is the IIU.[300] Obviously, whenever the IIU addresses such a request to an NCA, the request will also be accompanied by a transmission of all the relevant evidence on the basis of which the IIU concluded that a violation has likely taken place. A similar architecture that resembles to a certain extent Article 18(5) SSM Regulation is to be found in the context of the European Anti-Fraud Office (OLAF). Upon the completion of an EU investigation, OLAF submits an investigation report to the national competent authorities (AFCOS).[301] In the famous *Tillack* case,[302] the CJEU explained that the OLAF report (and the transfer) cannot as such be appealed before the CJEU given that it does not bring about a distinct change in the applicant's legal position.[303] Applying this case *mutatis mutandis* to the SSM context, we may conclude that the IIU's request on the basis of Article 18(5) SSM Regulation, as well as any

[293] SSM Framework Regulation, art 127(4)
[294] SSM Framework Regulation, art 127(5)
[295] SSM Framework Regulation, art 127(6)
[296] SSM Regulation, art 18(5)
[297] Lackhoff 2017 (n 49) 218
[298] SSM Framework Regulation, art 134(1)(a)
[299] SSM Framework Regulation, art 134(1)(b)
[300] Supervisory Manual (n 133) 102
[301] Art 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 [2013] OJ L 248/1
[302] *Tillack* v *Commission* (n 282)
[303] Ibid, paras 67-68

information transfer in accordance with the same legal basis, cannot be appealed before the CJEU as it would not bring about a distinct change in the applicant's legal position.

Concerning information transfers from the IIU to the NCAs and applicable safeguards, the EU-level legal framework does not make reference to any safeguards at this point, besides an indirect reference to the *ne bis in idem* prohibition: Article 18(5) expressly states "in situations not covered by Article 18(1)" and that can arguably be seen as an important safeguard against *ne bis in idem* violations, at least as far as the sanctions of Article 18(1) are concerned.[304]

In addition to that indirect reference to the *ne bis in idem* principle, the EU legal framework does not forbid the transmission of incriminating or private information from the ECB to the NCAs. This transmission cannot be subject to judicial review as it does not (yet) alter the legal position of supervised entities.

7.2.2 Information transfers from the National Competent Authorities to the ECB

Another point in time in which (bottom-up) transmissions take place, are the situations in which NCAs "do something" for assisting the ECB with the performance of its tasks vis-à-vis SIs. In that regard, I shall distinguish between two types of transmissions, without prejudice of course to the broader (institutional) obligation to exchange information, which is incumbent upon the ECB and NCAs.[305]

a) Common procedures and all NCA draft decisions in relations to SIs, upon the ECB's request:

In the case of common procedures, NCAs prepare a draft decision concerning an authorization or a withdrawal of an authorization or an acquisition of a qualifying holding which they then transmit to the ECB. Obviously, in the context of this *modus operandi* the observance of the privilege against self-incrimination is not necessary, because the final decision will not be of criminal nature. However, questions can be raised with respect to the national part of the procedure, for instance, what shall happen if the national part – which a preparatory measure – is characterized be irregularities, but the ECB adopts the final EU Decision? An answer to that question has been provided by the CJEU in the *Berlusconi* case.[306]

The CJEU noted that in order for decision-making to be effective, the EU Courts must carry out a "single judicial review,"[307] namely they reserve the competence to test also the national part of such a procedure: "the EU Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision (…) is affected by any defects rendering unlawful the acts preparatory to that decision."[308] How this review shall be done, for instance on the basis of which procedural standards, is still an open question.[309]

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[304] Bas van Bockel, "The Single Supervisory Mechanism Regulation: Questions of *ne bis in idem* and implications for the further integration of the system of fundamental rights protection in the EU" (2017) 24 Maastricht Journal of European and International Comparative Law 194
[305] SSM Regulation, art 6(2)
[306] Case C-219/17 *Berlusconi and Fininvest* [2018] ECLI:EU:C:2018:1023 ("Berlusconi and Fininvest")
[307] Ibid, para 49
[308] Ibid, para 57
[309] See in that respect, Enrico Gagliardi and Laura Wissink, 'Ensuring effective judicial protection in case of ECB decisions based on national law' (2020) 13 Review of European Administrative Law 41; Brito Bastos 2019 (n 266)

b) NCAs assistance in the performance of the ECB's tasks vis-à-vis significant credit institutions[310]

As was shown earlier, the EU legal framework allows the ECB to also obtain information indirectly, through the NCAs. Obviously, if the ECB informally requires NCAs to carry out verification activities or to make use of their investigative powers, the next logical step consists of that the information obtained within that context, by NCAs, is then transmitted to the "hub" (ECB). Again, seeing that this is a preparatory act that does not change the legal position of any party, that act cannot be judicially reviewed. Furthermore, the legal framework does not include any safeguards. It appears therefore that – at least as a matter of EU law – private and/or incriminating information can be transferred to the EU level. Of course, it may well be the case that national laws prevent such bottom-up transfers, but that issue shall be examined in the chapters discussing the two national legal orders studied in this dissertation.

7.3 Information transfers outside the SSM

7.3.1 The transfer of information from the ECB to national judicial authorities via the NCAs

As has already been discussed, due to the nature of prudential supervision and its enforcement design in several Member States, which utilize both administrative and criminal law enforcement to punish prudential violations,[311] the ECB may need to interact with national judicial authorities. The tasks are peripherally related to banking supervision, in the sense that they are entrusted – by national legislation – with the task to enforce prudential legislation by means of criminal law. The EU legal framework recognizes these interactions in two instances. I shall discuss them below in order.

The first reference is to be found in an ECB decision,[312] which lays down the modalities applicable to requests, by national criminal investigating authorities, of supervisory information, and the circumstances under which such information can be transmitted to them. First of all, national judicial authorities do not liaise directly with the ECB. Any request by, for instance, a public prosecutor, should first be addressed to the local NCA. In turn, the NCA "commits to acting on behalf of the ECB in responding to such a request."

The transfer of requested information will take place under the following conditions: either a) there is an express obligation to disclose such information to a national criminal investigation authority under Union or national law,[313] or b) the relevant legal framework permits the disclosure of such confidential information. However, in this case, if the ECB considers that transmission may jeopardize the accomplishment of its tasks or its independence or may undermine the public interest, transmission can be refused.[314] In any case, the NCA in question must commit itself to asking the requesting national criminal investigation authority to guarantee that the confidential information provided will be protected from public disclosure.[315] No reference to other procedural guarantees or fundamental rights are mentioned in that ECB Decision.

[310] SSM Regulation, art 6(3); SSM Framework Regulation, art 90(1)
[311] Allegrezza 2020 (n 110)
[312] Decision (EU) 2016/1162 (n 112), arts 2 and 3
[313] Ibid, art 2(1)(b)(i)
[314] Ibid, art 2(1)(b)(ii)
[315] Ibid, article 2(1)(c)

The second reference to potential interactions with national judicial authorities is to be found in the SSM Framework Regulation. Article 136 SSM deals with the question of what the ECB must do if – while carrying out its supervisory powers – it comes across facts that could potentially give rise to a criminal offense. Should that happen, the ECB must request the *relevant* NCA to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law.[316] The EU legal framework does not specify whether that obligation exists only with respect to "prudential offenses" or more generally with respect to any criminal offense.[317] I would argue that, under a broader interpretation, the provision shall be seen as covering suspicions for the commission of *any* criminal offense. It is worth mentioning that in the ECB's annual report of 2017, it was communicated that, in the course of 2017, the ECB submitted five such requests to the relevant NCAs,[318] in 2018 one request,[319] while the annual report of 2019 does not touch upon that issue.

A pertinent question, which – regrettably – is not regulated at the EU level, is the question of which NCA shall be considered as "relevant." Seeing in situations covered by Article 136 SSM Framework Regulation, the ECB is dealing with potentially criminal offenses, the rules on the exercise of jurisdiction in criminal matters are automatically triggered. In fact, in a transnational case, positive conflicts of jurisdiction can often occur. The term refers to situation in which more than one Member States may have an interest in prosecuting and adjudicating the same case. Indeed, according to the well-known rules on international jurisdiction,[320] there are several principles that can determine the best jurisdiction to prosecute and adjudicate. For instance, according to the "territoriality" principle, a crime shall be prosecuted by the jurisdiction on whose territory an offense was committed (*locus delicti*).[321] According to the active personality principle, jurisdiction rests with the State whose national(s) committed an offense.[322] On the other hand, the passive personality principle implies that the country of origin of the victim (for example the country of establishment of a credit institution) might be the best suited to prosecute.[323] However, in a transnational crime, if all Member States which may potentially have an interest in prosecuting and adjudicating would actually do so, that could of course result to *ne bis in idem* violations. This shortcoming has been recognized in the EU,[324] hence, various

[316] SSM Framework Regulation, art 136

[317] See in that respect Allegrezza, who distinguishes between "financial crime," under which it groups market abuse, money laundering, terrorism financing, and insider trading and "crimes that protect fair banking as Rechtsgut," which coincides with what I have termed as "prudential offences," examples of which are false supervisory disclosure, carrying out banking activities without an authorization *et cetera*, Silvia Allegrezza, "Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies" (2020) 4 EUCRIM 302 < https://eucrim.eu/articles/information-exchange-between-administrative-and-criminal-enforcement-case-ecb/> accessed 20 January 2022

[318] European Central Bank, "Annual Report on Supervisory Activities 2017" (26 March 2018) para 4.2 < https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2017.en.html> accessed 20 January 2022

[319] Ibid, para.3.2

[320] *See inter alia*, Arthur Lenhoff, 'International Law and Rules on International Jurisdiction' (1964) 50 Cornell Law Review 5

[321] André Klip, *European Criminal Law – An Integrative Approach* (2nd ed, Intersentia 2012) 191

[322] Ibid, 194

[323] Echle Regula, "The passive personality principle and the general principle of ne bis in idem" (2013) 9 Utrecht Law Review 56

[324] Not only at the policy level, but also by various academics. See *inter alia* Maria Kaiafa- Gbandi, 'Addressing the Problems of Jurisdictional Conflicts in Criminal Matters within the EU' (2020) 03/2020 EUCRIM < https://eucrim.eu/articles/addressing-problems-jurisdictional-conflicts-criminal-matters-within-eu/> accessed 20 January 2022; Frank Zimmermann, "Conflicts of criminal jurisdiction in the European Union" (2015) 3 Bergen Journal of Criminal Law & Criminal Justice 1; Martin Böse, Frank Meyer, and Anne Schneider. *Conflicts of*

attempts to resolve such conflicts of jurisdiction have taken place over the year, with the most notable example being Eurojust's guidelines for deciding "which jurisdiction should prosecute."[325]

After this short, but necessary, digression, the question remains as to how the aforementioned rules on jurisdiction relate to the ECB's tasks and to Article 136 SSM Framework Regulation. I will attempt to explain the relevance, by reference to an imaginary example. Let us assume that OSITs gather information in Germany, which suggests that a senior manager of Greek nationality, working at a branch of a Dutch credit institution in Stuttgart, may have committed criminal offenses, such as false reporting and forgery of documents. According to the territoriality principle, the ECB should transmit the critical information to the German public prosecutor. However, on the basis of the active personality principle, Greek judicial authorities may also have an interest in investigating the same case. Assuming that the manager caused harm to the credit institution, would the authorities of the country of the bank's establishment, i.e., the Netherlands, also not have an interest in prosecuting, according to the passive personality principle? To make the example even more tailored to the COVID-19 era, let us assume that the act was committed through a laptop, when the manager was working from his partner's home in Luxembourg. Could Luxembourg not be considered the *locus delicti*? To where shall the ECB transmit the information? To all NCAs and let them "solve" the issue among them, also risking the opening of parallel proceedings? Or should the ECB choose one forum? And how can it choose a forum? It is not a judicial authority. The answers to such questions are currently not regulated by ECB/EU legal framework.

With respect to applicable safeguards, a number of questions can be raised. To begin with, it shall be emphasized that the ECtHR[326] and more recently also the CJEU[327] have clarified that not only the obtainment of information and the subsequent use can interfere with fundamental rights, like the right to privacy and the privilege against self-incrimination, but also the transfer of data. Indeed, the transmission of such information to other public authorities can constitute a separate interference. That shows that the inclusion of procedural safeguards in the relevant legal framework, regulating also the transmission of information to other public authorities is of significant importance. The EU legal framework does not currently regulate that issue and does not contain any safeguards in that respect. The fate of the transmitted information will then depend solely on national law, which must always have due regard for EU law and the principle of effectiveness. This is yet another way in which EU law, at a certain point in the enforcement process, makes way for national law. It is however quite regrettable that the EU legal framework does not regulate fundamental rights issues, as this immediately triggers the question of how fundamental rights will be protected in the national legal orders. Well, this now depends on national law, within the limits set by the CFR.

Finally, it shall be noted that all of the aforementioned transmissions cannot be judicially reviewed (yet), because they constitute preparatory measures, and they do not change the legal position of the persons potentially affected by such transmissions. If that information is, at a later stage, used for the

jurisdiction in criminal matters in the European Union (Nomos 2014); Michiel Luchtman (ed), *Choice of Forum in Cooperation Against EU Financial Crime* (Eleven International Publishing 2013)

[325] Eurojust, "Guidelines for deciding 'Which jurisdiction should prosecute?" (13 December 2013) < https://www.eurojust.europa.eu/guidelines-deciding-which-jurisdiction-should-prosecute> accessed 31 January 2021

[326] *Fernández Martinez v Spain* App no 56030/07 (ECtHR 12 June 2014) para 117; *Silver and others v United Kingdom* App no 5947/72 (ECtHR 25 March 1983) para 87

[327] Case C- 419/14 *WebMindLicenses* [2015] ECLI:EU:C:2015:832

imposition of a punitive sanction, questions with respect to the transmission can be raised before the reviewing court.

8 The use of information by the ECB, NCAs, and national judicial authorities for punitive purposes

In the preceding section, albeit in broad strokes, I painted the different instances in the enforcement process in which the transmission of information, either within the ECB's units or between the ECB and NCAs or between the SSM and national judicial authorities, occurs. After having taken this necessary step, in this section the attention focuses on the use of information by the receiving EU/ECB organizational unit, or the NCA or the national judicial authority, as evidence in the context of a punitive enforcement procedure. As we already saw, the EU-level legal framework does not contain any significant safeguards with respect to information transfers. The absence of safeguards at the "transmission stage" necessarily begs the question whether the EU legal framework regulates/poses limits at least to the use of private, legally privileged, incriminating, and/or unlawfully gathered information.

To examine that question, for analytical purposes, I have narrowed the possibilities down to three different types of situations, to which I will be continuously referring: a) information lawfully obtained by an EU unit or SSM authority on the basis of x procedural standards and later used as evidence for the imposition of a punitive sanction by another SSM authority, which observes higher (national) standards. How can such divergent standards be accommodated in the "use" phase? Does EU law regulate this issue?; b) information lawfully obtained by the ECB or an NCA but later used as evidence for punitive purposes in a way that undermines fairness.[328] That would be the case where the ECB lawfully obtained information in the course of ongoing supervision, during which supervised entities were under the duty to cooperate, and that information is later used in an incriminating way by an NCA for the imposition of a punitive sanction. How does the SSM EU-level legal framework deal with such situations?; c) information obtained unlawfully in the "gathering" legal order and thereafter transmitted to another legal order, which may use it for punitive sanctioning. An example of information obtained unlawfully is the situation in which an administrative authority obtains information in violation of the LPP. Does the EU-level legal framework impose limits the use as evidence of information obtained unlawfully? These questions are scrutinized below.

8.1 The use of information by the ECB for punitive purposes

A discussion on the use of information, gathered by means of investigations, as evidence for the imposition of punitive sanctions by the ECB, logically implies that the ECB's direct sanctioning powers are first analyzed. As already explained in Chapter I, supervisory measures enshrined in Article 16(1) of the SSM Regulation fall outside the scope of my analysis, since they are preventive in nature and not punitive.[329] This distinction is important, in light of the fact that only a sanction that is both deterrent

[328]See for instance, John Vervaele, "Lawful and fair use of evidence from a European Human Rights Perspective" in Fabio Giuffrida and Katalin Ligeti (eds) *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (ADCRIM Report, University of Luxembourg 2019) 56-94 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021

[329] Silvia Allegrezza and Olivier Voordeckers, "Investigative and Sanctioning Powers of the ECB in the Framework of the Single Supervisory Mechanism – Mapping the Complexity of a New Enforcement Model" (2015) 4 EUCRIM 151, 155 <https://eucrim.eu/articles/investigative-and-sanctioning-powers-ecb-framework-single-supervisory-mechanism/> accessed 20 January 2022

and punitive shall be deemed to be criminal in nature[330] and therefore in need of stricter procedural safeguards. Furthermore, the distinction is relevant from the perspective of the *ne bis in idem* principle, as only combinations of punitive administrative and/or criminal sanctions would trigger the applicability of the principle.

8.1.1 ECB's sanctioning powers

This section deals with the ECB's direct sanctioning powers.[331] Regulation EC/2532/98[332] constitutes a general legal basis that lays down the ECB's power to impose sanctions. Certain provisions of that Regulation were amended in 2015, by Regulation EU/2015/159,[333] which takes into account the new supervisory competences and tasks of the ECB.[334]

Article 2 of Regulation EC/2532/98 prescribes that the ECB can impose fines and periodic penalty payments (PPPs). From the SSM Regulation, it can be deduced that *fines* have a punitive character and they can be imposed for breaches of ECB decisions or regulations.[335] If such a breach is continuing, the ECB can impose periodic penalty payments. PPPs may be imposed for a maximum period of six months following the notification of the undertaking of the decision.[336] According to Article 4a(1) Regulation EU/2015/159 it follows that the ECB can impose a fine of up to twice the amount of the profits gained or losses avoided because of the infringement. Or, if these cannot be determined, 10% of the total annual turnover of the bank. For PPPs, the upper limit is 5% of the average daily turnover per day of infringement. In addition, from Article 2(3) Regulation 2532/98 it follows that for the determination of the amount of a fine, the ECB must take into consideration a number of factors:[337] the good faith, degree of openness, diligence and cooperation shown by the undertakings; how serious the effects of the infringement are; the economic size of the undertaking; prior sanctions imposed by other authorities on the same person on the basis of the same facts. This last requirement obviously points to *ne bis in idem*.

While *fines* are imposed for breaches of ECB decisions and regulations, administrative pecuniary *penalties* are imposed for breaches of directly applicable Union law, for example, the Capital Requirements Regulation. The amount of these penalties can be "of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10% of the total annual turnover."[338]

The relationship between fines and penalties from a *procedura*l point of view (i.e., which procedure applies for fines and which for penalties) is clarified in Article 121 SSM Framework Regulation, which reads as follows:

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[330] See also, Adrienne de Moor van Vugt, "Administrative Sanctions in EU Law" (2012) 5 Review of European Administrative Law 5, 11 et seq
[331] For a discussion on the ECB's sanctioning powers in general, see *inter alia* Konstantinos Magliveras, "The Sanctioning System of the European Central Bank: Origins, Analysis, Comments and some suggestions", (2018) Conference of the Journal of Law, Finance and Accounting <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132940> accessed 20 January 2022
[332] Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions [1998] OJ L 318 ("Regulation 2532/98")
[333] 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 [2015] OJ L 27/1 ("Regulation EU/2015/159")
[334] Ibid, recital 5
[335] SSM Regulation, art 18(7)
[336] Regulation (EC) No 2532/98 (n 332), art 2(1)(b)
[337] Ibid, art 2(3)
[338] SSM Regulation, art 18(1)

"1. For the purposes of the procedures provided for in Article 18(1) of the SSM Regulation, the procedural rules contained in this Regulation [SSM FR] shall apply, in accordance with Article 18(4) of the SSM Regulation.
For the purposes of the procedures provided for in Article 18(7) of the SSM Regulation, the procedural rules contained in this Regulation shall complement those laid down in Regulation (EC) No 2532/98 and shall be applied in accordance with Articles 25 and 26 of the SSM Regulation."[339]

Practically, the above distinction means the following: When the ECB imposes a fine or a PPP for a breach of an ECB regulation or decision, it must follow the procedure contained in Regulation EC/2532/98, as amended by Regulation EU/2015/159. Specifically, the supervised entity must be informed in writing of the findings of the ECB's investigation and of any objections raised thereto.[340] Furthermore, the supervised entity must be afforded the opportunity to submit written submissions on the objections raised within a reasonable time limit,[341] it must be given access to the file[342] and the right to be heard orally and to be represented and/or assisted by lawyers.[343] Finally, the supervised entity should be notified in writing of its right of (internal) judicial review.[344]

On the other hand, when the ECB imposes a pecuniary *penalty*, i.e., for a breach of a directly applicable legal provision, in addition to the procedure described above, Articles 123 to 127 of the SSM Framework Regulation apply, too. Practically speaking, this means the following: on completion of investigation and before a draft decision is prepared and submitted to the supervisory board, the independent investigating unit should send a statement of objections to the supervised entity and set a time limit for receipt of submissions on the part of the credit institution. An oral hearing may also be held, during which the investigated party can be assisted by lawyers.[345]

8.1.2 The imposition of sanctions by the ECB and applicable legal safeguards

After the conclusion of a JST's off-site assessment or after the conclusion of an OSI, evidence establishing breaches of CRR provisions, reaches the desks/computers of ECB officials working for the Enforcement and Sanctions division. In all the previous phases, supervised entities were under an obligation to cooperate. At this point, the investigators shall decide how to proceed. The file, as already discussed, may well contain incriminating information, as the EU legal framework does not impose any such limits, i.e., the non-transmission of, for instance, incriminating information from the JSTs to the IIU. Can the IIU use it for the preparation of a decision, which will then be submitted to the SB? If so, could we speak here of lawful gathering but unfair use?

Unfortunately, the SSM Regulations do not provide any guidance with respect to that matter. Could general principles of EU law and/or relevant EU case law perhaps shed some light? As already explained (Section 6.3.2), the *Orkem* principle has a rather strict content and does not really regulate the relationship between closely interlinked non-punitive and punitive proceedings. As at the "use as evidence" stage, the crux of the matter is the coordination of proceedings that took place in ongoing

[339] SSM Framework Regulation, art 121
[340] Regulation EU/2015/159 (n 333) art 4b(3)
[341] Ibid, art 4b(3)
[342] Ibid, 4b(3)
[343] Ibid, 4b(3)
[344] Ibid, 4b(5)
[345] SSM Framework Regulation, art 126

supervision (non-punitive) and subsequent punitive proceedings, it is important to have a look at the case law of the ECtHR, which has given more clear answers concerning the relationship between the non-punitive and the punitive legs of an enforcement procedure.

In the *Saunders* v *UK* case,[346] transcripts of evidence obtained under compulsion in a non-punitive procedure, were later used in punitive (judicial) proceedings. Prosecution relied heavily on nine interviews, during which Mr. Saunders was under a duty to answer them.[347] Subsequently, he complained to the ECtHR arguing *inter alia* that the *use* of those transcripts in the domestic criminal proceedings infringed his privilege against self-incrimination and as a consequence his right to a fair trial, since the statements had been obtained through the use of compulsion.[348] Saunders's argument was upheld by the ECtHR.[349]

According to the ECtHR, the crux of the matter was that the transcripts of Mr. Saunders's interviews – irrespectively of whether they were directly incriminating or not – were *used* in the course of subsequent punitive proceedings in a manner which sought to incriminate the applicant.[350] The key conclusion that can thus be deduced from the *Saunders* case is the following: whereas a non-punitive procedure– carried out by JSTs or OSITs – should not necessarily be subject to each and every fair trial guarantee, as this would "unduly hamper the effective regulation in the public interest of complex financial and commercial activities,"[351] what may prove to be problematic, is the use of statements against a supervised entity in a subsequent punitive procedure, for instance one carried out by the IIU. That could jeopardize the fairness of the procedure as a whole.

If we are then to apply the *Saunders* case to the particular example of enforcement carried out by the ECB, the main idea would be that whenever the ECB requests information by means of a decision, the requested persons are under an obligation to cooperate, as far as already existing documents are concerned. Nevertheless, will-dependent incriminating information must not be used in subsequent punitive procedure in an incriminating way. For instance, this would be the case if – to establish a breach of law – the IIU is based solely on the will-dependent incriminating information obtained by JSTs and/or OSITs.[352]

In addition to the foregoing, there are indications that the ECtHR is willing to also accept another way of ensuring protection with the privilege against self-incrimination. As we have noted elsewhere,[353] in

[346] *Saunders* v *United Kingdom* (n 169)
[347] Ibid, para 28
[348] Ibid, para 60
[349] It is worth noting that the Court also took the chance to clarify that the privilege "does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect" (para 69), for example documents acquired on the basis of a warrant.
[350] *Saunders* v *United Kingdom* (n 169) para 72
[351] Ibid, para 67
[352] See, Charlotte Leskinen, "An evaluation of the rights of defense during inspections in the light of the case Law of the ECtHR: Would the accession of the European Union to the ECHR bring about a significant change?" (2010) Working Paper IE Law School 10-04, 16 https://cee.ie.edu/sites/default/files/wp%202%20Charlotte.pdf accessed 20 January 2022
[353] Michiel Luchtman, Argyro Karagianni and Koen Bovend' Eerdt, "EU administrative investigations and the use of their results as evidence in national punitive proceedings" in Fabio Giuffrida and Katalin Ligeti (eds) *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (ADCRIM Report, University of Luxembourg 2019) 9 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021

proceedings that are closely interlinked (for reasons relating to the facts of the case), to avoid a violation of the privilege against self-incrimination, the legislator may also choose to take away the element of (significant) compulsion in the non-punitive proceedings.

While, as explained in the previous chapter, the case law of the ECtHR is binding upon EU institutions,[354] the problem remains that there are different ways in which the ECB or the IIU can potentially observe the privilege against self-incrimination in combinations of non-punitive and punitive procedures. In the EU legal order, up until the moment of writing, the CJEU has been called upon to interpret the applicability of the privilege against self-incrimination only in combinations of non-punitive and punitive administrative proceedings vis-à-vis natural persons, hence it is currently unknown how the privilege against self-incrimination should be safeguard in combinations of non-punitive and punitive administrative proceedings vis-à-vis legal person. Of course, one my argue that the *DB Consob* case does in general signal that the CJEU is inclined to follow the ECtHR in respect of the privilege against self-incrimination. New questions concerned with the applicability of the privilege against self-incrimination on legal persons in combinations of non-punitive and punitive administrative proceedings will eventually be posed to the CJEU. For the time being, it appears, however, the IIU is currently bound by the *Orkem* rule and – as regards natural persons – the IIU is bound by the *DB Consob* rule.[355]

If the SB endorses the decision of the IIU, further submits it to the Governing Council and the procedure ultimately ends by means of an ECB decision, that decision can be appealed before the CJEU by the addressee of the decision or by anyone who is directly and individually concerned.[356] Any potential defects that occurred in previous stages, for instance in the phase of the on-site inspection, can now be raised by the applicant before the CJEU, which is competent to carry out a full *ex post* review, that is, not only test the final decision, but also any of the previous actions.[357]

8.2 The use of information by the NCAs for punitive purposes

As follows from the foregoing discussion, sanctions vis-à-vis natural persons and sanctions for breaches of national law implementing EU Directives, fall outside the scope of the ECB's direct sanctioning powers. In the absence of a direct competence to impose a sanction, the ECB may alternatively transmit information to its national counterparts and request the opening of sanctioning proceedings.[358] In this *modus operandi*, information is gathered by the organizational structures of the ECB, to a large extent through the use of information-gathering powers which have their basis in EU law, although the obtainment of information by other NCAs," by means of national law powers is another indirect

[354] CFR, art 52(3)
[355] See in that respect, *DB* v *Consob* (n 251), in which the CJEU applied the Saunders standard, but only in relation to natural persons, while maintaining that the *Orkem* principle is not called into question, as from the previous case law of the CJEU in relation to EU competition rules, *"(…) it is apparent, in essence, that, in proceedings seeking to establish an infringement of those rules, the undertaking concerned may be compelled to provide all necessary information concerning such facts as may be known to it and to disclose, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, inter alia in its regard, the existence of anti-competitive conduct (…) In this context, that undertaking cannot be compelled to provide answers which might involve an admission on its part of the existence of such an infringement*," at para. 46. The ECB does not have the power to impose punitive sanctions on natural persons, thereby that relevance of this case is rather limited for the ECB.
[356] TFEU, art 263
[357] *Deutsche Bahn* v *Commission* (n 192)
[358] SSM Regulation, art 18(5)

possibility. The collected information is subsequently transferred to an NCA and the latter must open a sanctioning proceeding.

A question that comes to the fore is the extent to which NCAs enjoy discretion as to the outcome of the national sanctioning procedure. For instance, can the NCA decide not to impose any penalties? According to the prevailing view[359] and in line with the *Tillack* case, the imposition or the non-imposition of a penalty remains within the discretion of the NCA. Furthermore, in the *Tillack* case, the CJEU has explained that national authorities are under a duty to cooperate in good faith and examine the information transferred to them by the EU authority carefully.[360] In other words even though the procedure under Article 18(5) is conducted under the responsibility of the requested NCA, at the same time, the NCA must also take into account the limits set by general principles of EU law, such as the CFR, the principles of sincere cooperation, effectiveness, and equivalence and the principles of effective, proportionate, and dissuasive sanctions.[361]

Notwithstanding the fact that information which was obtained by the ECB can be used as evidence by an NCA for the imposition of a punitive fine, the ECB legal framework does not provide any guidance as to how that information shall be used. The issue depends on national law, within – of course – the boundaries of the CFR and more specifically the Articles 47 and 48(2) and the general principles of Union law, such as the principle of effectiveness. In addition, it is worth noting that while NCAs are empowered to impose punitive and – depending on the law of the Member State at issue – also criminal sanctions for breaches of prudential legislation,[362] the ECB framework is silent on such issues as the admissibility of ECB collected information as evidence and its use by NCAs for the imposition of punitive or criminal sanctions vis-à-vis both legal and natural persons.[363]

Against the foregoing gap in the EU legal framework, in the context proceedings based on Article 18(5) SSM Regulation, I foresee four types of potential fundamental-rights related problems, which I shall discuss in order below: a) evidence lawfully obtained, but used in another legal order in an unfair way; b) evidence obtained according to the fundamental rights standards of legal order A and used in legal order B, whose national law provides for higher fundamental rights standards; c) evidence obtained in

[359] Wissink 2021 (n 15) 262-264; Allegrezza and Voordeckers 2015 (n 329) 157; Wissink, Duijkersloot, and Widdershoven 2015 (n 170) 103
[360] *Tillack* v *Commission* (n 282) para 72
[361] Chapter II, Section 4.2
[362] CRD IV, art 65(1)
[363] That is in stark contrast with other domains of Union law, notable EU competition law enforcement, which provide for specific guidance concerning the use of information as evidence by NCAs for punitive purposes. See in that respect Article 12, Regulation 1/2003, which reads that "1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.
3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:
-the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,
-the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions."

legal order A unlawfully and used in legal order B for punitive purposes; d) frictions with the *ne bis in idem* principle.

8.2.1 Lawful obtainment, but unfair use: the example of the privilege against self-incrimination

Here, I wish to explore the scenario in which information is gathered by the ECB's organizational structures, in accordance with EU law, but is used in a subsequent punitive procedure in an unfair manner. Let us imagine, for instance, that a JST gathered information which contains incriminating evidence, for example, oral explanations. The gathering, as such, was completely lawful, after all, in the context of ongoing supervision, supervised entities were under an obligation to cooperate. That incriminating information is now in the hands of an NCA, which has been requested by the ECB to open sanctioning proceedings. The gathering was lawful. Could we detect here a potential issue of "unfair use"?

Again, where the sanctioning proceedings concern legal persons, the only guidance that NCAs have as a matter of EU law, is the *Orkem* rule. However, the *Orkem* rule does not offer guidance in cases of composite sanctioning proceedings. In other words, it does not really instruct NCAs as to whether they must or must not use for punitive purposes information lawfully obtained by the ECB in the course of ongoing supervision. Where the sanctioning proceedings concern natural persons, the *DB* v *Consob* judgment could prove to be a turning pointing for national punitive administrative procedures, which are carried out by Member States, for the implementation of EU law. Whereas for legal persons, the *Orkem* rule remains – at least for now – the rule,[364] i.e., they cannot be compelled to provide answers which might involve an admission on their part of the existence of a violation, natural persons can now rely on the broader *Saunders* rule.

What does the foregoing mean for the SSM and Article 18(5) SSM Regulation in particular? In my view, it means that – with respect to natural persons – SSM authorities may be "forced" to observe the *Saunders* rule. However, seeing as *DB* v *Consob* concerns the decentralized implementation of Union law, the question does remain as to how this case can be applied at the intersection of different legal orders. In the SSM, we in fact see that the "gathering" and "using" segments of a banking supervision procedure can be dispersed across different legal orders. Does this case law mean that the ECB should anticipate that the information it obtains can potentially – at the "use" stage – violate natural persons' privilege against self-incrimination and therefore adjust the safeguards it affords accordingly? Or is it up to the NCA in question to decide how to treat incriminating information, in accordance with its national law?

Again, to get the full picture of these interactions, one must also study national law. I will thus return to this issue in the subsequent chapters, but for now, the foregoing analysis warrants the conclusion that the EU legal framework is silent on composite questions pertaining to the use of ECB transmitted information by NCAs and applicable safeguards thereof.

[364] Marc Veenbrink, "The Freedom from Self-Incrimination—A Strasbourg-Proof Approach? Cases C-466/19 P *Qualcomm* and C-481/19 P *DB* v *Consob*" (2021) 12 Journal of European Competition Law & Practice 750

8.2.2 The use for punitive purposes of information obtained on the basis of divergent standards: the example of the legal professional privilege

Here, I will explore how the SSM Regulations deal with the effectuation of defense rights, such as the LPP, at the interface of different legal orders.[365] A good example to illustrate the potential problem is the case of LPP. As we have already seen, under EU law, in-house lawyers are not protected by LPP. In other jurisdictions, including the ones studied here,[366] they are. This misalignment, though not an issue in itself, can create problems where investigations take place at the EU level and end up with a punitive administrative fine by, for instance, the Dutch central bank. As already mentioned, the SSM legal framework does not regulate the admissibility of ECB collected information as evidence in the national proceedings. Let us assume that the IIU transmits *inter alia* internal communications between a bank and an in-house lawyer to DNB, requesting it to open sanctioning proceedings. How is the DNB to assess the critical piece of evidence? It was lawfully gathered on the basis of EU law powers and subsequently introduced in a legal order that provides for higher protection. Currently, as a matter of EU law, the answer to that question is not entirely clear. This already raises questions as to how the effectuation of LPP at the interface of different legal orders can be safeguarded. The issue shall further be explored in the subsequent two chapters, from a bottom-up perspective.

8.2.3 The use as evidence for punitive purposes of unlawfully obtained information: the example of the legal professional privilege

In this section, I discuss the situation in which information was obtained unlawfully by an SSM authority and is subsequently used by another SSM authority for punitive purposes. Does EU law regulate that issue? To begin with, the SSM Regulation do not touch upon such questions. However, guidance may be sought from relevant case law. Before discussing such case law, it is essential to first clarify that one may distinguish between two types of "unlawful obtainment": (a) unlawful obtainment by an EU organ and (b) unlawful obtainment by a national administrative organ.

An example of (a) would be the situation in which a JST member obtains information in violation of the EU LPP principle and that information is used for punitive purposes by an NCA (vertical relationship). An example of (b) would be the situation in which an national supervisor obtained information using national powers, in violation of his or her national LPP standard, and that information is channeled through the ECB to another NCA and is used for punitive purposes by that other NCA (diagonal relationship).

Case law specifically concerned with such composite questions does not exist up to the moment of writing. Once again, some guidance can be sought from CJEU case law developed in the context of the decentralized enforcement of Union law. In the case *Prokuratuur*,[367] the CJEU advocated that in view of the principle of effectiveness of EU law, national Courts have leeway in deciding what do with unlawfully obtained evidence: for instance, they may factor in whether that material is unlawful when determining the sentence or they may disregard information obtained unlawfully, should its use lead to a violation of the right to a fair trial.[368] While this is – undoubtedly – an important judgment, how it could play out in composite procedures, remains unclear. Does the judgment, for instance, impose an

[365] This argument has already been presented in the context of an earlier blogpost, see, Argyro Karagianni, "How to ensure defense rights in the composite SSM setting?" (EU Law Enforcement Blogspot December 2019) < https://eulawenforcement.com/?p=7334#> accessed 3 February 2021
[366] See, Chapter IV, Section 3.2 and Chapter V, Section 3.2
[367] Case C-746/18 *HK Prokuratuur* [2021] ECLI:EU:C:2021:152
[368] Ibid, para 44

obligation on NCAs (and national Courts) to make at least a marginal assessment of the lawfulness of the obtainment? If so, would that be on par with the principles of effectiveness, sincere cooperation and mutual trust? For now, it can be concluded that EU law alone does not give answers to such composite questions.

8.2.4 The use for punitive purposes by NCAs of lawfully obtained information and the *ne bis in idem* principle

In this section, I discuss the extent to which the *ne bis in idem* principle may "block" the use by an NCA for punitive purposes of information obtained lawfully by another SSM authority, such as the ECB. Before delving into the analysis, I should first address the following caveat. I do recognize that the *ne bis in idem* principle may in fact play a role at an earlier stage, i.e., at the stage in which the ECB will need to decide whether it will request from an NCA to open sanctioning proceedings or not, as the *ne bis in idem* principle may "force" authorities with overlapping competences to coordinate their actions in the investigative stage, in order to avoid violation of the principle at the sanctioning phase of law enforcement (see Section 8.3.1 below) However, a strict separation between the three phases that are used here merely for analytical purposes ("obtainment"- "transfer"- "use as evidence for punitive purposes"), does not really work in practice. It may thus be the case that *ne bis in idem* considerations will (or will not) come to the fore only after a second authority has initiated a second "prosecution". After this short, but necessary digression, I will now discuss to what extent *ne bis in idem* violations are likely within the SSM.

If NCAs – pursuant to Article 18(5) SSM Regulation – use as evidence for the imposition of a punitive, the question arises as to how *ne bis in idem* violations will be avoided. An explicit *ne bis in idem* provision has not been included in the SSM Regulations. Nevertheless, in view of Article 50 CFR, SSM authorities are under an obligation to ensure that *ne bis in idem* will not be violated.

In my view, *ne bis in idem* violations between the ECB and the NCAs are highly unlikely. As it follows from the preceding analysis concerning the division of labor between the ECB and NCAs and the allocation of sanctioning competences (Section 8.1.1), there are no instances in which the ECB and NCAs are concurrently competent to sanction the same breach. As shown in the below scheme, the ECB can only sanction breaches of ECB Regulations and Decisions and breaches of EU Regulations and only those committed by legal person. The rest of the sanctioning takes place at the national level.

Sanctioning in the SSM

ECB	**NCAs**
Breach of EU Regulations by SIs (**Article 18(1) SSM Regulation**)	Breach of national legislation by SIs (**Article 18(5) SSM Regulation and Art. 134(1) SSM Framework Regulation**)
Breach of ECB Regulations or ECB decisions by SIs (**Article 18 (7) SSM Regulation**)	Breach of EU Regulations by natural persons in SIs (**Article 134 SSM Framework Regulation**)
-	Breach of EU Regulations by LSIs (**national law**)
-	Breach of national legislation by LSIs (**national law**)
-	Breach of EU Regulations by natural persons in LSIs (**national law**)

-	Breach of national legislation by natural persons in LSIs (**national law**)

It has been argued[369] that a combination of an ECB penalty and a withdrawal of an authorization by the ECB may violate *ne bis in idem*. While this may be true, at the same time there is lack of consensus on whether the withdrawal of a license constitutes a punitive sanction or not.[370] Some authors argue that "the withdrawal of the banking license is a reaction to unlawful behavior too severe to be considered as having only a reparatory aim,"[371] but other comparative studies[372] show that Member States struggle with attributing a punitive or remedial character to the withdrawal of licenses. In any case, assuming that a license withdrawal constitutes a punitive sanction, if such a withdrawal is an "direct and foreseeable consequence" of the decision to impose another sanction, then *ne bis in idem* will likely not be violated.[373]

To conclude, thanks to the clear allocation of competences between the ECB and the NCAs, I do not think that systemic risks for *ne bis in idem* violations are present within the SSM system.

8.3 The use of SSM information by national judicial authorities for punitive purposes

8.3.1 Punitive follow-up by national judicial authorities and applicable legal safeguards

The EU legal framework stipulates that information that may be relevant for national criminal law enforcement shall be transmitted to the "relevant" NCA. In the "use as evidence" phase, which I discuss here, criminally relevant information has already been transferred to the national level and the NCA needs to decide how to proceed, i.e., how to use that information. Does the EU-level legal framework offer guidance in that respect? By guidance, I am of course referring to fundamental rights and particularly to the rights of the defense and to the *ne bis in idem* principle. Unfortunately, the SSM Regulations do not provide such guidance. The SSM Framework Regulation provides that the NCA shall further disclose such information to the appropriate national authorities in accordance with national law. The fate of that information shall then depend on national law provisions. For example, while certain NCAs are under an obligation to report criminal offenses to judicial authorities, others have discretion in doing so.[374] Those that enjoy a margin of discretion may thus decide to close the case, while others will further transfer it to the competent judicial authorities, or impose a (punitive) administrative sanction themselves.

[369] Valentina Felisatti, "Sanctioning Powers of the European Central Bank and the Ne Bis In Idem Principle within the Single Supervisory Mechanism" (2018) 8 European Criminal Law Review 378, 399; Bas van Bockel, *Ne bis in idem in EU law* (Cambridge University Press 2016) 229

[370] Generally, the CJEU will look into the purpose of the administrative sanction. If its purpose is to punish the offender, then the sanction is generally punitive. If it aims at repairing the interest harmed by the offender, then it is non-punitive (administrative measure). See, Case- 489/10 *Bonda* [2012] ECLI:EU:C:2012:319, para 40; see also, de Moor- van Vugt (330) 12

[371] D' Ambrosio 2013 (n 200) 25

[372] Oswald Jansen (ed), *Administrative Sanctions in the European Union* (Intersentia 2013)

[373] *Affair Maszni* v *Romania* App no 59892/00 (ECtHR 21 September 2006)

[374] According to a comparative study, drafted by Lasagni and Rodopoulos, the Austrian, Belgian, German, French, Irish, Luxembourgish, and – to a certain extent – the Italian NCAs are obliged to report criminal offences to competent judicial authorities, while the Greek and Dutch NCAs have discretion in doing so. See, Giulia Lasagni and Ioannis Rodopoulos, 'A comparative study on administrative and criminal enforcement of banking supervision at national level', in Allegrezza 2020 (n 110), section 3.7.1

Assuming that information is further transferred to judicial authorities, what status does the ECB information enjoy? Can it be used as evidence, or does it merely serve as circumstantial evidence, which may justify the initiation of a national procedure?[375] These questions have not been dealt with by the EU legislator, neither the question of the admissibility of ECB transmitted information as evidence in national criminal proceedings.

The absence of provisions in the EU legal framework raises a plethora of questions. The concerned supervised persons are under a duty to cooperate at the EU level but may subsequently (or in parallel) be subject to criminal proceedings at the national level, on the basis of information gathered precisely because they were under a duty to cooperate with the ECB.[376] How can their privilege against self-incrimination be effectuated at the intersection of different legal orders and legal domains (administrative-criminal)? Currently, we do know that the CJEU has embraced the *Saunders* rule, but only with respect to natural persons.[377] What about legal persons and specifically the interactions between non-punitive EU administrative enforcement by the ECB and national criminal law enforcement by national judicial authorities? How can the privilege against self-incrimination be effectuated there? By reading the EU legal framework, one does not currently get answers to these questions.

Another question that comes to the surface is how national judicial authorities shall treat evidence gathered on the basis of lower procedural standards. Again, the example of the LLP that I have previously discussed is quite illustrative in this setting, too. It shall, however, be emphasized that, unlike the previous scenario, in which I raised a potential LPP problem in relation to Article 18(5) SSM Regulation, here, in contrast with NCAs opening sanctioning proceedings upon the ECB's request, national judicial authorities are not institutionally linked to the ECB. That said, even if one were to argue that NCAs can simply apply the principle of effectiveness and the principle of mutual trust and thereby disregard procedural differences, can national judicial authorities do the same, seeing that they are not embedded in a network-type of structure, such as the SSM, in other words, they cannot be seen as being the ECB's "spokes"? To conclusively answer such questions, however, one would also need to examine whether and, if so, how, national legal orders deal with such issues.

A last point that I wish to explore, concerns the *ne bis in idem* prohibition, which – at this phase of the enforcement process – becomes particularly relevant, given that it acts as a safeguard against double prosecution and/or sanctioning. For example, it could be that the ECB runs an investigation which may lead to the imposition of a punitive sanction and the information transmitted to the national level may be used also by judicial authorities, for the imposition of a criminal sanction for the same material facts. Does *ne bis in idem* apply in combinations of punitive administrative and criminal sanctions? If yes, does it also apply if the proceedings take place in different legal orders? And, if so, should the EU legislator coordinate the EU administrative and the national criminal proceedings? Or can the ECB impose a sanction – for instance – for false reporting and thereafter a national judicial authority a criminal sanction for the same act?

[375] Case C- 67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others* [1992] ECLI:EU:C:1992:330*;* Case C- 537/16 *Garlsson Real Estate* [2018] ECLI:EU:C:2018:193; Joined Cases C-596/16 and C-597/16 *Enzo Di Puma* v *Commissione Nazionale per le Società e la Borsa (Consob)* and *Commissione Nazionale per le Società e la Borsa (Consob)* v *Antonio Zecca* [2018] ECLI:EU:C:2018:192

[376] Luchtman, Karagianni and Bovend'Eerdt 2019 (n 353) 39

[377] *DB* v *Consob* (n 251)

Before looking at these questions, it shall first be mentioned that the SSM Regulations do not contain a *ne bis in idem* prohibition. Still, the ECB and national authorities implementing EU law are bound by Article 50 CFR and therefore must observe the principle at any rate, within the parameters recognized by the CJEU.

Currently, the case law of both the CJEU and the ECtHR is clear in that combinations of punitive administrative and *stricto sensu* criminal proceedings will not violate the *ne bis in idem* principle if they pursue an objective of general interest,[378] contain rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings,[379] and third, the severity of all of the penalties imposed must be limited to what is strictly necessary in relation to the seriousness of the offense in question.[380]

While the applicability of the principle in double-track systems is indisputable, the issue that still causes much uncertainty is what is meant by "same facts" or "same offense." At the EU level, while in the AFSJ it is clear that *idem* means a set of concrete circumstances, inextricably linked together, irrespective of the legal classification given to them or the legal interest protected,[381] outside the domain of the AFSJ, the scope is more limited. In EU competition law, the CJEU applies a stricter three-part test in order to establish whether the *idem* element is met: "identity of the facts, unity of offender and *unity of the legal interest* protected."[382]

The CJEU's reasoning in competition law enforcement has not (yet) been applied in the domain of banking supervision. If the Court's postulations in the domain of competition law were to be applied to the domain of banking supervision, the requirement of the unity of legal interest would possibly result in that a sanction by the ECB and a "prudential" criminal sanction by national judicial authorities for the same material facts, do not – according to the Court's logic – violate *ne bis in idem*. The ECB sanction would possibly serve the broader aim of financial stability, while the criminal sanction would probably serve social aims, retribution, deterrence *et cetera*.[383] Furthermore, the same logic would result in that offenses committed by one person and arising out of the same facts, which infringe rules aimed at different regulatory objectives, such as, for example, prudential rules on the one hand and anti-money laundering rules on the other, can be sanctioned twice.[384]

The EU Courts' approach in the domain of competition law enforcement has generally been subjected to criticism[385] and – in my opinion – rightly so. I find the opinion of AG Kokott very well-aimed in that

[378] Case C-524/15 *Menci* [2018] ECLI:EU:C:2018:197, para 44
[379] Ibid, para 63
[380] Ibid
[381] Eg, Case C- 467/04 *Gasparini and Others* [2006] ECLI:EU:C:2006:610; Case C-367/05 *Kraaijenbrink* [2007] ECLI:EU:C:2007:444
[382] Case C- 204/00 P *Aalborg Portland and Others* v *Commission* [2004] ECLI:EU:C:2004:6, para 338
[383]Albert Alschuler, "The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next" (2003) 70 The University of Chicago Law Review 1
[384] On the links between prudential supervision and AML control, see, Yves Mersch, "Anti-money laundering and combating the financing of terrorism – recent initiatives and the role of the ECB", Speech at the Colloque de l'AEDBF-Europe, Paris' (15 November 2019) <https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp191115~4369baad76.en.html> accessed 18 May 2020. See also, Bas van Bockel, 'Ne Bis in Idem Issues Under the Single Supervisory Mechanism', in Bas van Bockel (n 369) 230
[385]See *inter alia*, Marc Veenbrink, *Criminal Law Principles and the Enforcement of EU and National Competition Law- A Silent Takeover?* (Kluwer Law International 2020) 170; Alessandro Rosano, "*Ne Bis Interpretatio In Idem*? The Two Faces of the Ne Bis In Idem Principle in the Case Law of the European Court of

respect. In the first place, to interpret the principle differently depending on the policy domain at issue might disturb the unity of the EU legal order: "the crucial importance of the ne bis in idem principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned."[386] In the second place,[387] the same principle that has been invoked by the CJEU in its *ne bis in idem*/CISA case law as the cornerstone of the AFSJ, namely the right to free movement, is also applicable in the area of EU prudential law, namely the right of establishment and the provision of cross-border services.

Be it as it may, EU law alone does not currently provide answers as to how national judicial authorities should (or should not) use information transmitted to them on the basis of Article 136 SSM Framework Regulation, in order to ensure protection of *ne bis in idem.* Therefore, national law has to be studied as well. In that respect, I shall pause the discussion here and continue examining the same questions, from a bottom-up perspective, in the subsequent chapters, in order to ultimately give some conclusive answers in Chapter VI.

8.3.2 Parallel proceedings by national judicial authorities and applicable legal safeguards

Now, let us imagine that a credit institution operates transnationally, i.e., in various EU Member States. The ECB came across criminal evidence and – in the absence of rules as to where this information shall be transmitted – it decided to transmit it to the *locus delicti*, to the country of active nationality and to the country of passive nationality. Alternatively, judicial authorities of several Member States requested information from the ECB (via NCAs), which was subsequently transmitted.[388] As a result, parallel proceedings have been opened, this time on the horizontal level, i.e., between national legal orders.

As it has probably become evident by now, the EU legal framework does not deal with what the status of such information shall be, evidence or starting information, neither with how it can be used by judicial authorities, whether is shall be admissible as evidence or not, how the privilege against self-incrimination and private information can be safeguarded in that setting and how national judicial authorities should deal with discrepancies in procedural standards between the "obtainment" and "use" phases. In that respect, the points and questions that I raised in the preceding Section (Section 8.3.1) find application *mutatis mutandis* here as well.

The *ne bis in idem* principle at a horizontal level is not dealt with either, however, in contrast with the previous scenario, if the parallel proceedings have been opened among judicial authorities, arguably the transnational AFSJ principle[389] would find application and therefore the occurrence of horizontal *ne bis in idem* violations is less likely.

Justice" (2017) 18 German Law Journal 39; Renato Nazzini, "Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law" (2014) 2 Journal of Antitrust Enforcement 270; Bas van Bockel, "The *ne bis in idem* principle in the European Union legal order: between scope and substance" (2012) 12 *ERA Forum* 325; Case C-17/10 - Toshiba Corporation e.a [2012] ECLI:EU:C:2012:72, Opinion of AG Kokott

[386] Opinion of AG Kokott (n 385) para 117

[387] Ibid, para 118

[388] Decision (EU) 2016/1162 (n 112)

[389] John Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 Utrecht Law Review 211

9. Conclusions and outlook

In this chapter I have "produced" the first building block of the legal-empirical part of this dissertation, by scrutinizing the ECB, its powers and applicable legal safeguards and – more generally – EU legal framework applicable to the SSM.

A number of interim conclusions can already be drawn. The SSM and interactions thereof can be distinguished between an "inner circle," which comprises the ECB and 19 NCAs that are institutionally related to the ECB and whose staff members often functionally become part of the EU organizational structures and an "outer circle" which comprises the SSM and its interactions with national judicial authorities, which often enforce "prudential offenses," by means of criminal law.

In its supervisory capacity, the ECB has a strong information-gathering position with direct and indirect investigative powers. Even though it has been entrusted with exclusive competences, for the implementation of that exclusive mandate, it still relies to a significant extent on the expertise and powers of NCAs. Against this background it was shown that, to ensure effective supervision, the SSM is characterized by a constant flow of information between different EU units, between different legal orders and between different types of authorities (administrative to criminal).

Pinpointing applicable safeguards in the legal framework is a rather daunting task. While the EU Regulations do provide important procedural rights, these are offered only just before the adoption of a supervisory or a sanctioning decision. Important safeguards in that respect are the right to have access to the file, the right to be heard, the right to be assisted by a lawyer and the right to reasoned decisions. However, the rights which are of interest to this dissertation and which shall be afforded already in stages preceding the imposition of sanctions, as they can influence the legal position of persons in future punitive proceedings, as well as the fairness of the proceedings, are often missing. Of course, SSM authorities are bound by the CFR and by general principles of EU law, but often times, the precise scope of these rights in this new setting, whereby an EU authority is in constant interaction with various national authorities is not entirely clear either.

Against this background, on several occasions throughout this chapter, I have raised a number of questions which can be summarized in the following three points and which I shall continue examining in the next two chapters, from a bottom-up perspective: a) how are fundamental rights effectuated at the intersection of different legal orders; b) how are fundamental rights effectuated at the interface of administrative and criminal law enforcement; c) how is the gap between punitive and non-punitive administrative enforcement to be bridged?

The next two chapters, I shall examine how the SSM legal framework and protection of fundamental rights thereof is integrated in two national jurisdictions: the Netherlands and Greece. More specifically, I shall examine if and how these two national legal orders have regulated cooperation with the ECB and with national judicial authorities which have powers to criminally enforce prudential legislation

CHAPTER IV: Enforcement of prudential banking legislation in the Netherlands

1.Introduction

This chapter constitutes the first building block of the bottom-up analysis of this dissertation. In this light, the leading question is how the Netherlands regulates the interactions of DNB with the ECB, under the framework of the SSM. How is the enforcement of EU prudential legislation organized in the Netherlands? What are the tasks and the powers of the relevant authorities and what are the applicable legal safeguards available to supervised entities? How is judicial protection, and particularly the right of access to a court dimension ensured in composite proceedings that end with a punitive sanction imposed by a Dutch authority? What is the role of criminal law in the enforcement of prudential legislation?

To answer these questions, the chapter is structured in the following way: Section 2 discusses institutional aspects of the system of prudential banking law supervision and enforcement. Section 3 analyzes the obtainment of information by the Dutch NCA, *De Nederlandsche Bank* ("DNB"), by looking into the information-gathering powers of DNB as well as the applicable safeguards that supervisory authorities in the Netherlands must observe. Section 4 briefly looks into mechanisms that foresee the transmissions of DNB gathered information to the ECB, as well as transmissions of SSM information by DNB to national judicial authorities. In Section 5, the use of SSM materials in Dutch punitive administrative and criminal proceedings is scrutinized and an analysis of the applicable fundamental rights is provided.

2.Enforcement of prudential legislation in the Netherlands

2.1 Key concepts and legal sources

Before portraying the picture of the enforcement of prudential legislation in the Netherlands, it is important to mention at the outset that the Dutch legal order is monist. According to Articles 93 and 94 of the Constitution of the Netherlands (*Grondwet*), directly applicable international law, which includes the ECHR and the case law of the ECtHR, enjoys supremacy over national law, in the sense that, should a provision of international law be in conflict with national law, the latter shall not be applicable.

Prudential legislation in the Netherlands is primarily enforced by the Dutch Central Bank (DNB) by means of administrative law and to a lesser extent by judicial authorities, through criminal law enforcement.[1] Generally, due to its purely repressive nature, the administrative fine is perceived as being more suitable for the punishment of non-continuous offenses, such as credit institutions' obligation to report certain facts at a legally determined moment.[2]

Dutch administrative law is highly systematized and important provisions of general administrative law are to be found in the General Administrative Law Act (*Algemene wet bestuursrecht*, hereafter

[1] See, Danielle Arnold, Laurens van Kreij, and Michiel Luchtman, "The Netherlands" in Silvia Allegrezza, *The enforcement dimension of the Single Supervisory Mechanism* (Wolters Kluwer 2020)
[2] Kamerstukken II 1997-1998, 25821, no 3, 5

"GALA").[3] The GALA[4] applies always unless sectoral legislation provides for more specific rules. The GALA is divided into 11 chapters; the most relevant section for the purposes of this dissertation is Chapter V, which deals with enforcement. It thus contains general rules that apply to law enforcement organs, it lays down such powers as the power to request information and to carry out on-site inspections, as well as rules and principles that should guide sanctioning proceedings, such as the *ne bis in idem* prohibition,[5] *mens rea*, and more.[6]

A number of important principles, such as the obligation to weigh interests[7] and the proportionality principle, are explicitly laid down in the GALA.[8] On the other hand, the principles of legitimate expectations, legality, legal certainty, equality, and impartiality, are not explicitly laid down in the GALA, however they are considered to be unwritten, general principles of constitutional and administrative law.[9] In addition to the GALA, more specific rules are to be found in sectoral legislation, which often refers back to GALA provisions. For the SSM and the DNB the most important sectoral legislation is the Financial Supervision Act (*Wet of het financieel toezicht*, hereafter "FSA").[10] Finally, it is important to note that DNB's decisions are subject to judicial review by the District Court of Rotterdam at first instance and by the Trade AND Industry Appeals Tribunal at second instance (*College van Beroep voor het bedrijfsleven*).

The concept of punitive administrative proceedings is quite clear and the definition of punitive sanctions and applicable safeguards does not present any notable challenges, as is the case in other Member States.[11] The DNB is empowered to impose a wide range of sanctions, some of which are punitive. These are discussed in more detail below (Section 5.2.1), but it is important to note that according to Articles 5:40(1) and 5:2(1)(c) of the GALA, administrative fines (*bestuurlijke boeten*) are always considered to be of a criminal nature, within the meaning of Article 6 ECHR.[12] In turn, this necessitates the existence of stricter safeguards in the course of administrative proceedings that may lead to the imposition of a punitive sanction, such as the right to remain silent and the privilege against self-incrimination. Those rights must be respected from the moment that proceedings become criminal in

[3] For an overview see Jan Brouwer and Arnold Emanuel Schilder, *A survey of Dutch administrative law* (Ars Aequi Libri 1998)
[4] General Administrative Law Act (*Wet van 4 juni 1992, houdende algemene regels van bestuursrecht*, *Stb.* 1992, 315)
[5] GALA, arts 5:43 and 5:44
[6] GALA, art 5:41.
[7] GALA, art 3:4(1)
[8] GALA, art 3:4(2
[9] See *inter alia* Frank van Ommeren, "Het legaliteitsbeginsel als hoeksteen van het staats- en bestuursrecht'' (2010) 59 Ars Aequi 645; Anoeska Buijze and Rob Widdershoven, "De Awb en EU-recht: het transparantiebeginsel'' in Tom Barkhuysen, Willemien den Ouden en Jaap Polak (ed), *Bestuursrecht harmoniseren: 15 jaar Awb* (Boom Juridische uitgevers 2010) 590; Gio ten Berge and Rob Widdershoven, "The principle of legitimate expectations in Dutch constitutional and administrative law'' in Ewoud Hondius (ed), Netherlands Reports to the fifteenth international congress of comparative law (Conference Report, 1998)< https://dspace.library.uu.nl/handle/1874/43885> accessed 1 April 2019
[10] Financial Supervision Act (*Wet van 28 september 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop*, *Stb.* 2006, 475)
[11] See Chapter V, Section 2.1; see also, Michele Caianiello and Giulia Lasagni, "Italy" in Giuffrida, F and Ligeti, K (eds), "Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings" (ADCRIM Report, University of Luxembourg 2019) 170 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021
[12] Kamerstukken II 1997-1998, 25821 no 3, 9; Michiel Luchtman, *European cooperation between supervisory authorities, tax authorities and judicial authorities* (Intersentia 2008) 93. On the other hand, penalty payments are not punitive, since they do not require the element of *mens rea*, see District Court of Rotterdam 5 January 2016, ECLI: NL:RBROT:2016:117

nature, that is, when it can be reasonably expected that a fine might be imposed on a person. It should be emphasized that *nemo tenetur* sidesteps the general obligation of supervised persons to cooperate when there is no indication of a criminal charge.[13]

Violation of a prudential rule may often constitute a criminal offense too. The Economic Offenses Act (*Wet op de economische delicten*, hereafter "EOA")[14] comprises a special statutory law that deals with economic and environmental criminal offenses. Article 1 of the EOA, lists the provisions to be found in statutory legislation or in EU Regulations that constitute also a criminal offense, within the meaning of the EOA.[15] Examples are, the refusal to cooperate,[16] operating a credit institution without a license,[17] the non-provision of supervisory information to DNB or the provision of false information,[18] the obtainment of a qualifying holding without the approval of DNB or ECB.[19]

In view of the *una via* principle (see *infra*, Section 5.4.4), the fact that certain conduct can trigger both a (punitive) administrative and a criminal response, results in that the authorities concerned should liaise with each other, so as to decide whether a case will take the criminal or the administrative road, as in the Netherlands an accumulation of a criminal and a punitive administrative sanction is not possible. The choice as to whether a certain case will follow the administrative or the criminal path depends primarily on the nature of the offense, the seriousness of the violation, and its relation to other factors, or the need to use more coercive measures to effectively address a certain offense.[20]

It is important to note that as a matter of Dutch criminal law, legal persons can also be subject to criminal liability. If a criminal offense is or has been committed by a legal person, criminal proceedings can be instituted and criminal sanctions can be imposed a) on the legal person, b) to persons who actually directed the unlawful act, b) on both the legal and the natural person(s) who directed the act.[21] In that respect, it is not inconceivable that the same conduct will give rise to a punitive response that targets both a natural and a legal person. Obviously, this would not undermine the *ne bis in idem* principle.[22]

[13] Kamerstukken II 1997-1998, 25821 no 3, 9
[14] Economic Offences Act (*Wet van 22 juni 1950 houdende vaststelling van regelen voor de opsporing de vervolging en de berechting van economische delicten*, *Stb.* 1950, K258)
[15] Economic Offenses Act, art 1(2)
[16] FSA, art 1:74
[17] FSA, art 2:3a para 1
[18] For instance, FSA, art 3:77; FSA art 3:297
[19] FSA, art 3:95(1)
[20] Benny van der Vorm, "De keuze tussen strafrechtelijke en bestuursrechtelijke sanctionering en het criterium van de ernstige gedraging" (2017) 96 PROCES 267, 275
[21] Dutch Criminal Code (*Wetboek van Strafrecht*, *Stb*. 1886, 6), art 51
[22] Case C- 217/15 *Orsi* [2017] ECLI:EU:C:2017:26

Finally, it is worth mentioning that many provisions in the EOA point back to the general penal code (*Wetboek van Strafrecht*), which is thus also of importance when it comes to economic criminal offenses. The most relevant provisions are those on deception[23] and on the forgery of documents.[24]

Now that it has been explained that violations of prudential norms can be enforced both through administrative or criminal law enforcement, the next sections look into the relevant authorities that are responsible for enforcement, as well as their relationship with the ECB.

2.2 The Dutch Central Bank (DNB)

2.2.1 Introduction

Dutch financial supervision underwent significant transformation in the beginning of 2000s. Prior to 2002, DNB was supervising credit institutions, while there also existed two specialized supervisors, one authority responsible for overseeing the insurance and pensions sector and one authority responsible for the securities sector.[25] After the reform of 2002, the insurance and pensions supervisor, as well as the securities supervisor were abolished. Subsequently, DNB became a more powerful supervisor, responsible for micro-prudential and macro-prudential supervisor vis-à-vis all Dutch financial institutions.

According to the FSA, the prudential supervision of credit institutions is entrusted to the Dutch Central Bank (*De Nederlandsche Bank*).[26] Even though Dutch Authority for the Financial Markets (*Authoriteit Financiële Markten*, hereafter "AFM"), plays an important role in the supervision of financial markets, it is less relevant for the purposes of this research, since it is responsible for the supervision of conduct of business. The below sections thus focus on the Dutch Central Bank, which – within the SSM context – is recognized as the Dutch NCA, in accordance with the SSM Regulation.[27]

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[23] The unofficial translation reads, "1. Any person who, with the intention of benefitting himself or another person unlawfully, either by assuming a false name or a false capacity, or by cunning manoeuvres, or by a tissue of lies, induces a person to hand over any property, to render a service, to make available data, to incur a debt or relinquish a claim, shall be guilty of fraud and shall be liable to a term of imprisonment not exceeding four years or a fine of the fifth category. 2. If the offence is committed with the intention of preparing or facilitating a terrorist offence, the term of imprisonment prescribed for the offence shall be increased by one third.
2. If the offence is committed with the intention of preparing or facilitating a terrorist offence, the term of imprisonment prescribed for the offence shall be increased by one third." (Dutch Criminal Code, art 326 [unofficial English translation] < https://www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf> accessed 2 October 2021)

[24] There is in fact a special provision that concerns forgery of documents, which refers particularly to the managing or supervisory directors of a legal person or a company. The unofficial translation reads as follows: "A trader, managing director, managing partner or supervisory director of a legal person or a company, who intentionally publishes a false statement, balance sheet, profit and loss account, statement of income and expenditure or a false explanatory note to such documents, or intentionally allows such publication, shall be liable to a term of imprisonment not exceeding six years or a fine of the fifth category" (Dutch Criminal Code, art 336 [unofficial English translation] < https://www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf> accessed 2 October 2021)

[25] See Jeroen Kremers and Dirk Schoenmaker, "Twin Peaks: Experiences in the Netherlands" (2010) LSE Financial Markets Group Paper Series no 196 < https://www.fmg.ac.uk/sites/default/files/2020-10/SP196.pdf> accessed 21 January 2022

[26] FSA, art 1:24 para 2

[27] European Central Bank, "National Supervisors" <https://www.bankingsupervision.europa.eu/organisation/nationalsupervisors/html/index.en.html> accessed 2 October 2021

DNB was established in 1814 as a commercial bank by King William I. Its primary aim was the restoration of the Dutch economy. In this respect, in the beginning, its activities did not relate to monetary policy, but rather to the issuing of bank notes.[28] It was only after the 1930s that DNB started performing monetary tasks and tasks pertaining to prudential supervision.[29] The Act on the Supervision of the Credit System (*Wet Toezicht Kredietwezen*) of 1952 explicitly distinguished between monetary supervision, business supervision and structural supervision.[30] Concerning the independence of DNB, in the Bank Act of 1948 (*Bankwet 1948*), the authority fell under the responsibility of the Minister of Finance, however, since the introduction of the Bank Act of 1998 (*Bankwet 1998*) whereby the instruction right that the Minister of Finance was revoked, the Dutch Central Bank is legally independent.[31]

Today, DNB is a public limited company (*naamloze vennootschap*) and its sole shareholder is the Dutch State.[32] In the below section, DNB's mandate tasks and governance arrangements are discussed in more detail.

2.2.2 DNB mandate, tasks and governance arrangements

The DNB's mandate and tasks are to a large extent laid down in the FSA. DNB's primary mandate consists of ensuring price stability and financial stability. As DNB itself notes, it strives to maintain price stability, a strong and shock resilient financial system and to ensure that financial institutions are ethical and fulfill their obligations and commitments.[33] DNB is thus is entrusted with a dual mandate, the exercise of monetary policy, aimed at price stability, and the exercise of prudential supervision.[34] The FSA explains that prudential supervision shall aim at the solidity of financial undertakings and at the stability of the financial sector. According to the FSA, DNB grants authorizations to credit institutions, however, after the introduction of the SSM, this is a common procedure and the final decision is an ECB decision.[35] In addition to that, DNB is responsible for assessing business plans, solvability, liquidity, own funds, internal organization and the eligibility and integrity of directors of the less significant credit institutions.

As far as the internal organization of DNB is concerned, the Dutch NCA is run by an executive board,[36] which consists of a president, at least three and at most five executive board members, one of whom

[28] Joke Mooij and Henriette Prast, "A Brief History of the Institutional Design of Banking Supervision in the Netherlands" (November 2002) Research Memorandum Wo no 703/De Nederlandsche Bank NV/Research Series Supervision no 48 < https://www.researchgate.net/publication/4879365_A_Brief_History_of_the_Institutional_Design_of_Banking_Supervision_in_the_Netherlands> accessed 21 January 2022
[29] Ibid
[30] Henriette Prast and I van Lelyveld, "New architectures in the regulation and supervision of financial markets and institutions," (2004) DNB working paper no 21, 3 < https://pure.uvt.nl/ws/portalfiles/portal/1273204/new_architectures.pdf> accessed 28 February 2021; Kees van Dijkhuizen, "A functional approach to fifty years of banking supervision" in Thea Kuppens, Henriëtte Prast, Sandra Wesseling (eds), *Banking Supervision at the Crossroads* (Edward Elgar 2003) 45
[31] Bas Jennen, Niels van de Vijver (eds), *Banking and Securities Regulation in the Netherlands* (Kluwer Law International 2010) 3
[32] De Nederlandsche Bank, "Organisatie" < https://www.dnb.nl/over-ons/organisatie/> accessed 2 October 2021
[33] De Nederlandsche Bank, "Missions and tasks" < https://www.dnb.nl/en/about-us/mission-and-tasks> accessed 7 March 2021
[34] FSA, art 1:24
[35] SSM Regulation, art 14
[36] Statutes of DNB, art 6(1), 16 January 2015

holds the chair for prudential supervision.[37] The Bank Council is a Council that acts as the executive board's sounding board.[38] The president of DNB reports to the Bank Council on the general economic and financial developments and on the policy pursued by DNB.[39] In addition, a supervisory board oversees the overall developments within DNB, while it is also empowered to approve the budget and adopt annual accounts.[40] One of the members of the supervisory board is appointed directly by the Dutch State.[41]

The DNB is further run by a Prudential Supervision Council, which is charged with preparing the deliberations and decision-making of the Executive Board Members of Supervision.[42] It is important to note that after the introduction of the SSM, DNB modified its organizational structure.[43] The NCA used to have one large division, responsible for the supervision of all banks in the Netherlands; however, after 2014 that division was broken down into three divisions so as to accommodate the need for supervision of both SIs and LSIs. In this light, a division named "European Banks Supervision Division" is now responsible for the supervision of the significant credit institutions that fall under the direct supervision of the ECB.[44] A second division, called "On-site supervision and Banking Expertise" is responsible for on-site supervision and the third and last division, responsible for the supervision of LSIs, is called "National Institutions Supervision."[45]

The former two divisions assist the ECB in the following ways. First, DNB employees take part in JSTs. Second, they assist the ECB in on-site inspections. Third, they follow the ECB's instructions by *inter alia* using powers that are not available to the ECB itself.[46] Fourthly, they are empowered to assist the ECB both if a supervised entity opposes an on-site inspection[47]but also, more generally, by preparing draft decisions for the ECB and by carrying out verification tasks.[48] Finally, in accordance with Article 18(5) SSM Regulation, DNB's competent divisions are enabled to open a sanctioning proceeding upon the ECB's request.

Concerning the supervision of LSIs, notwithstanding the fact that they day-to-day supervision is carried out by DNB's "National Institutions Supervision" division, decisions that are of material importance, such the termination from the office of a bank's board member, must be submitted to the ECB by the Dutch NCA and thereafter, the ECB shall formulate its view.[49] Finally, it shall be noted that DNB divisions are generally competent to adopt both supervisory decisions and sanctioning decisions.[50]

[37] Statutes of DNB, art 6(2), 6 January 2015
[38] Statutes of DNB, art 17, 16 January 2015
[39] Statutes of DNB, art 17(5), 16 January 2015
[40] Statutes of DNB, art 17(8), 16 January 2015
[41] Statutes of DNB, art 17(3),16 January 2015
[42] Statutes of DNB, art 17a(1), 16 January 2015
[43] Parlementaire monitor, "Organisatie DNB aangepast aan Europese bankenunie" < https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vjkzj219csyn?ctx=vi4tcbrg67l4> accessed 7 March 2021
[44] De Nederlandsche Bank, "DNB organisation chart as of 1 September 2021"< https://www.dnb.nl/media/ourfggdq/web_133307_organogram_extern_eng_september_2021.pdf > accessed 2 October 2021
[45] Ibid
[46] Kamerstukken II 2014-2015, 34049, no 3, 7
[47] SSM Regulation, art 12(5)
[48] Kamerstukken II 2014-2015, 34049, no 3, 7
[49] Ibid
[50] Arnold, van Kreij and Luchtman 2020 (n 1) 516

2.3 Judicial authorities responsible for the investigation and prosecution of prudential offenses

The authority which is responsible for the criminal investigation of economic crime is the Fiscal Intelligence and Economic Investigation Service (*Fiscale Inlichtingen en Opsporingsdienst*, hereafter "FIOD-ECD"), which falls under the responsibility of the Ministry of Finance.[51] As far as prosecution is concerned, the national public prosecutor's office (*openbaare ministerie*, hereafter "OM") and its specialized unit *Functioneel Parket* are responsible for the prosecution of complex fraud and environmental crime.[52]

According to the FIOD's website,[53] FIOD-ECD receives, on a daily basis, reports from supervisory and tax authorities, like DNB, the police, but also by ordinary citizens. If the report falls within the material scope of FIOD's competences, the service collects as much information as possible about the suspects and the suspected crime and drafts a "pre-weighing document" *(pre-weegdocument*). When this document is ready, FIOD-ECD discusses that information with the Public Prosecution Service and a representative of DNB.[54] The tripartite team then liaises as to whether prosecution is justified, while a relevant criterion that determines such a decision is the financial and social impact of the prosecution.[55] In any case, the Public Prosecution Service is the party that ultimately determines whether the suspect will be prosecuted or whether the case will be handled by DNB, by means of a punitive administrative procedure. If, however, the Public Prosecution Service decides to prosecute the suspect, FIOD-ECD has to write an investigation proposal, wherein it states which coercive measures and investigative techniques it wishes to deploy. These can only be deployed upon permission of the public prosecutor, who assesses the proposal and checks whether the is enough evidence for the initiation of a criminal prosecution. Once the FIOD-ECD's investigation is completed, an official report is drafter which is then transferred to the public prosecutor, who further decides whether the case must be taken to the criminal court, in light of the fact that prosecution has to be in the general interest (*algemeen belang*).[56]

3. The obtainment of information by DNB

3.1 Introduction

DNB obtains information in its capacity as the prudential supervisor over LSIs, but also in its capacity as the ECB's assistant.[57] It is important to note in this connection that, after the entry into force of the SSM Regulation, to facilitate the effective performance of the ECB's duties, the Dutch legislator amended the FSA and placed the ECB on an equal footing with DNB, by conferring direct information-gathering powers on the ECB, such as the power to request information and the power to carry out on-site inspections.[58] Where the SSM Regulation does not confer powers on the ECB, but this is necessary

[51] Economic Offenses Act, art 2(a)
[52] Openbaare Ministerie, "Functioneel Parket" < https://www.om.nl/organisatie/functioneel-parket> accessed 7 March 2021
[53] FIOD Belastingdienst, "Hoe werkt de FIOD?" < https://www.fiod.nl/hoe-werkt-de-fiod/> accessed 7 March 2021
[54] *Convenant ter voorkoming van ongeoorloofde samenloop van bestuurlijke en strafrechtelijke sancties*, *Staatscourant* 665, 2009 ("Convenant 2009")
[55] See also van der Vorm 2017 (n 20) 275
[56] Dutch Code of Criminal Procedure (*Wetboek van Strafvordering van 15 januari 1921*, *Stb*. 1921, 14), arts 167 and 242
[57] Case T- 122/15 *Landeskreditbank Baden-Württemberg — Förderbank* v *ECB* [2017] ECLI:EU:T:2017:337, para 72
[58] Kamerstukken II 2014-2015, 34049 no 3, 6

for the exercise of its mandate, the ECB may request DNB to exercise its national powers.[59] It goes without saying that DNB can make use of its information-gathering powers for tasks conferred on it under national law, which fall outside the scope of the ECB's direct supervision under the SSM system.

The FSA is the most significant legal source when it comes to financial supervision in the Dutch legal order. In addition to the FSA, important provisions in relation to the information-gathering powers of the DNB are to be found in a number of ministerial regulations (*ministeriële regeling*), as well as in Section 5 of the GALA, which lays down rules on administrative enforcement. It should be mentioned at the outset that the GALA does not make an explicit distinction between ongoing supervision and investigation. In that respect, the information-gathering powers discussed below are relevant for both phases. Supervision (*handhavingtoezicht*) has been defined in literature as administrative action aimed at assessment of whether the citizen complies with an obligation imposed by an administrative body. It is not only intended to prepare sanctioning decisions, but can have an independent function.[60]

According to the GALA, a supervisor (*toezichthouder*) is a person who by or pursuant to statutory regulation has been charged with supervising the observance of the provisions made by or pursuant to any statutory legislation.[61] Within the meaning of the FSA, an inspector is understood as either DNB in itself or persons authorized by DNB to supervise compliance with the rules laid down in the FSA.[62] Dutch administrative law does not require the existence of a certain threshold for the initiation of an investigation.[63] The DNB is entrusted with all the powers which are vested in the ECB, namely the power to carry out on-site inspections (5:15), the power to require the provision of information (5:16) and the power to request business information and documents (5:17). In addition, the GALA empowers administrative authorities to inspect good and take samples therefrom (5:18). All supervised persons are obliged to cooperate fully with the administrative organs that carry out supervision.[64] It is important to note that aforementioned powers to obtain information which are vested in Dutch administrative organs, such as DNB, are perceived as being *de facto* measures (*feitelijke handelingen*). They are not considered to be appealable decisions, because the obligation to cooperate with these powers results directly from the law (the GALA)[65] and not from the decision.[66]

After these necessary introductory remarks, the next section explores DNB's information-gathering powers, as well as the applicable legal safeguards.

[59] Kamerstukken II 2014-2015, 34049 no 3, 6
[60] Oswald Jansen, *Het handhavingsonderzoek. Behoren het handhavingstoezicht, het boeteonderzoek en de opsporing verschillend te worden genormeerd? Een interne rechtsvergelijking* (Ars Aequi Libri 1999) 43
[61] GALA, art 5:11
[62] FSA, art 1:72 and 1:73
[63] Joske Graat, "The Netherlands," in Michiel Luchtman and John Vervaele (eds), "*Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)"* (Utrecht University 2017) 95 < http://dspace.library.uu.nl/handle/1874/352061> accessed 13 December 2021
[64] GALA, art 5:20
[65] GALA, art 5:20(1)
[66] Peter de Jonge and Judith Kruijsbergen, *Toezicht op de naleving* (Lineke Eerdmans 2014) 16; see also Trade and Industry Appeals Tribunal 2 March 1999, ECLI:NL:CBB:1999:AA3409

3.2 Requests for information and applicable defense rights

DNB is empowered to request written and oral information from supervised entities,[67] while it may also require the provision of business information and documents.[68]

DNB makes use of the aforementioned powers for the execution of its tasks pertaining to the supervision of LSIs. DNB may, of course, also request information and business documents from significant credit institutions, in its capacity as the ECB's assistant. For example, whenever the ECB requests from DNB to carry out verification tasks,[69] DNB will exercise the information-gathering powers vested in it by the GALA and/or by the FSA.

While the GALA contains the general rule that a supervisor is empowered to request information,[70] the power is further specified in the FSA, which prescribes that DNB can request information from any person, as long as the request concerns the performance of a task under the FSA.[71] The power to request information covers both written and oral information.[72] Information can be requested as long as this is reasonably necessary for the performance of the DNB's duties.[73] From parliamentary history it follows that "reasonably necessary" (*voor zover dit redelijkerwijs*) means that the enforcement power may only be exercised in respect of persons who are involved in the activities that fall under the DNB's supervision.[74] Therefore, in the context of prudential supervision, information can be requested from supervised entities, their representatives, and possibly from other key staff, as well.[75] The requested persons are under a duty to cooperate in good faith.[76] In requesting information, DNB needs to inform the persons from whom information is sought the reason as to why a power is exercised; this functions as a safeguard against fishing expeditions.[77]

Given that, in obtaining information from credit institutions, DNB may also request and obtain digital data, in June 2020, DNB published a public document, in which it explains its working method (*werkwijze*) with respect to the viewing and copying of digital data.[78] Article 2(1) of that document states that, in light of the purpose of the investigation (*onderzoek*), DNB supervisors (*onderzoekers*) determine which digital data is required from the person subject to the investigation (*onderzoekssubject*).[79]

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[67] FSA, art 1:74(1); GALA, art 5:16
[68] GALA, art 5:17
[69] Kamerstukken II 2014-2015, 34049, no 3, 7
[70] GALA, art 5:16
[71] FSA, art 1:74(1)
[72] Graat 2017 (n 63) 97
[73] GALA, art 5:13 GALA
[74] Kamerstukken II 1993/94, 23700 no 3, 141
[75] According to Graat, the persons who are under an obligation to cooperate are not only the legal person itself and its representatives; the "involvement" criterion may extend beyond the representatives of the undertaking. Graat, 2017 (n 63) 100
[76] FSA, art 1:74(2); GALA, art 5:20 (1)
[77] Graat 2017 (n 63) 100
[78] De Nederlandsche Bank, "DNB Werkwijze inzien en kopiëren van digitale gegevens" (June 2020) < https://www.dnb.nl/media/3lka5zee/dnb_publiceert_-werkwijze_inzien_en_kopi%C3%ABren_van_digitale_gegevens-_ten_bate_van_ediscovery_onderzoek.pdf> accessed 4 October 2021 ("DNB working method for viewing and copying digital data")
[79] Ibid, art 2(1)

The requested digital data is thereafter copied, encrypted, and transported by an IT specialist and stored in an IT environment, which is independent from supervision and to which DNB supervisors have no access.[80] In requesting (written and/or oral) information on the basis of Article 5:16 GALA and/or 5:17 GALA, the observance of the lawyer-client privilege is of significant importance. Requested documents may be covered by LPP[81] and thereby be termed as "privileged data" (*geprivilegieerde gegevens)*.[82] For that reason, following the copying, encryption, transportation and storage of the requested data, the IT specialist provides an overview of the copied digital data to the investigated person and informs them of the possibility to have the copied digital data cleaned, especially if the copied digital data contains legally privileged and/or private data.[83] As this procedure essentially concerns the so-called waiving of the LPP, I will return to the issue for how legally privileged information is cleaned from the DNB's IT environment.

Legal professional privilege

The GALA prescribes that persons who, by virtue of their profession or by statutory legislation are bound by a duty of secrecy, may refuse to cooperate if their duty of secrecy renders such a refusal necessary.[84] The duty of confidentiality of lawyers (*verschoningsrecht van de advocaat*) is rooted in the idea that the interest that the truth must be revealed must give way to the interest that everyone should be enabled to freely communicate with their legal counsel and receive legal advice, without fear of disclosure.[85] The principle is laid down in the "Lawyer's Act" (*Advocatenwet*),[86] which reads that in the interest of the proper administration of justice, the lawyer ensures the legal protection of his client and in that respect he or she is a trustworthy counsel and observes confidentiality within the limits set by the law.[87] In addition, a lawyer is obliged to maintain secret everything that he or she acquires in the exercising their profession. The obligation of confidentiality continues to exist after the termination of the professional practice.[88]

Additional rules are to be found in the Rule of Professional Conduct for Lawyers of 2018 (*Gedragsregels*). Rule 3 stipulates that a lawyer is required to maintain confidentiality; he or she must remain silent concerning details of the cases he is handling, the client and the nature and extent of the client's interests.[89] In the Netherlands, in-house legal counsels are also covered by LPP protection, provided they are member of the bar association.[90] From the law or from any soft law instruments, it does not follow whether, in assisting the ECB for the supervision of significant institutions, DNB applies the broader national LPP standard.

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[80] Ibid, art 2(2)
[81] See J Kalisvaart, "Erosie van het verschoningsrecht van de advocaat in het effectenrecht" (2011) 10 Vennootschap & Onderneming
[82] DNB working method for viewing and copying digital data (n 78) art 1
[83] Ibid, art 2(3) in tandem with arts 2(4) and 2(6)
[84] GALA, art 5:20
[85] Kalisvaart 2011 (n 81)
[86] Lawyer's act (*Wet van 23 juni 1952, houdende instelling van de Nederlandse orde van advocaten alsmede regelen betreffende orde en discipline voor de advocaten en procureurs*, *Stb*. 1952, 365)
[87] Ibid, art 10a (1)(e)
[88] Ibid, art 11a (1)
[89] Nederlandse Orde van Advocaten, "Rules on Professional Conduct" (*Gedragsregels*), Rule 3 <https://regelgeving.advocatenorde.nl/content/gedragsregels-advocatuur> accessed 7 March 2021
[90] Supreme Court 15 March 2013, ECLI:NL:HR:2013:BY6101

The Dutch Courts have recognized that experts hired by lawyers are entitled to a derivative legal privilege. More specifically, in a case decided in 2002,[91] the Supreme Court expressed the view that the nature and complexity of a matter entrusted to a lawyer can mean that he must also be able to engage an expert, if he considers that to be necessary for the proper fulfillment of his duties as a lawyer,. With regard to documents in the hands of an expert, that expert is entitled to a right of non-disclosure, derived from the lawyer. That derived right of non-disclosure would be illusory if it did not extend to the advice that the expert issued to the lawyer, on the basis of the confidential information provided by the lawyer. Moreover, the Supreme Court has taken the position that, under certain circumstances, legal persons can have a derivative legal privilege, but not an independent right of non-disclosure.[92] Lawyer may refuse to cooperate with a supervisor, if the supervisor requests from them information covered by LPP.[93]

As far as waiving LPP is concerned, as stated previously, once digital data has been stored by the information technology ("IT") specialist in DNB's IT environment, which is separate from supervision, the IT specialist must point out to the person subjected to the investigation the possibility of having legally privileged and/or private data cleaned. If the person subject to the investigation considers that the digital data contains legally privileged and/or private data, they may request DNB – in writing – to have the data cleaned.[94] The request must be addressed to the IT specialist, within 10 days after the IT specialist provided an overview of the copied digital data to the investigated person and informed them of the possibility to have the copied digital data cleaned.[95] Furthermore, the request must contain information about the author and the subject matter and – in case the LPP claim concerns correspondence – information about the sender, the addressee, date, and time in which correspondence was exchanged and arguments to substantiate that the claim concerns privileged or private data.[96] If such a request is not addressed to the IT specialist on the part of the investigated person, the IT specialist gives DNB supervisors access to the digital data.

Investigated persons may also choose to have the privileged nature of their claim assessed by DNB's so-called "non-disclosure officer" (*functionaris verschoningsrecht*).[97] They may also refer to the non-disclosure officer, after an IT specialist has considered their claim to be unjustified.[98] If the non-disclosure officer is of the opinion that the investigated person's claim is justified, they must inform them in writing and also request from the IT specialist to have the relevant digital data cleaned.[99] If, on the other hand, the non-disclosure officer finds the claim to be unjustified, they must inform the investigated persons in writing, stating reasons and informing them that the digital data will be available to DNB supervisors within 10 working days.[100] The 10-day waiting period aims at offering to the investigated party the possibility of bringing proceedings before a civil court.[101]

[91] Supreme Court 12 February 2002, ECLI:NL:HR:2002:AD4402, paras 3.2.3 and 3.4
[92] Supreme Court 26 June 2004, ECLI:NL:HR:2004:AO5070
[93] GALA, art 5:20(2)
[94] DNB working method for viewing and copying digital data (n 78), art 2(4)
[95] Ibid
[96] Ibid, arts 2(5), 2(6) and 2(7)
[97] Ibid, art 4(1)
[98] Ibid, art 4(1)
[99] Ibid, art 4(3)
[100] Ibid, art 4(4)
[101] Ibid, art 4(4); see also Dutch Civil Code (*Burgerlijk Wetboek boek 6, verbintenissenrecht, Stb*. 1991, 600), art 6:162

Privilege against self-incrimination

Information requests based on Article 5:16 GALA – to the extent that they concern the provision of oral information – may interfere with the privilege against self-incrimination, particularly if the provision of oral information is requested in the course of a proceeding that may lead to the imposition of a punitive sanction. Against the foregoing, the scope of the privilege against self-incrimination in relation to the DNB's information-gathering powers are discussed below.

The Dutch legislator has included provisions regulating privilege against self-incrimination in the GALA, which entails that a person has the right to remain silent when interrogated with a view to a punitive sanction being imposed on him or her.[102] Inversely, in proceedings that may lead to sanctions of a non-criminal nature, the privilege against self-incrimination is not afforded.[103] With respect to legal persons, Dutch law applies the ECHR standards and not the narrower EU *Orkem* standard; under Dutch law, the privilege against self-incrimination generally precludes will-dependent information obtained under compulsion from being used in parallel or consecutive punitive proceedings.[104] Therefore, compelling a supervised entity or person to disclose information for the purpose of a *non-punitive* sanction is not unlawful.[105] It is important to note that the privilege against self-incrimination covers both oral and written statements.[106] For that reason, the below considerations concern the power to request information (Article 5:16 GALA), which covers both requests for written and for oral information, and thus may also include statements which are privileged under the privilege against self-incrimination.

In punitive proceedings, before the hearing starts, the person concerned must be informed by the law enforcement organs that he is not obliged to answer incriminating questions.[107] The FSA explicitly mentions that the GALA provision on the privilege against self-incrimination shall apply *mutatis mutandis*.[108] In the case of legal persons, the privilege against self-incrimination is afforded to the director of the undertaking, while the rest of the employees are obliged to cooperate.[109] In the explanatory memorandum of the GALA, it is pointed out that administrative law often imposes obligations on citizens to provide information to administrative bodies. This raises the question of where the obligation to provide information ends and where the right to remain silent begins. Article 6 ECHR only guarantees the right to remain silent in the strict sense: the right not to be forced to make a confession or a statement against oneself. There is no unconditional principle in Dutch law that a person can in no way be obliged to cooperate by disclosing potentially incriminating evidence.[110] It therefore follows that in punitive administrative proceedings, the legislator interprets the principle more narrowly and the privilege against self-incrimination is afforded at a later stage, i.e., from the moment that a person is being interrogated with a view to a punitive sanction being imposed on him,[111] in contrast

[102] GALA, art 5:10a(1)
[103] Lonneke Stevens, *Het nemo-teneturbeginsel in strafzaken: van zwijgrecht tot containerbegrip* (Wolf Legal Publishers 2005) 126
[104] Supreme Court 24 April 2015, ECLI:NL:HR:2015:1129, para 3.8.2; see also Michiel Luchtman, *European cooperation between supervisory authorities, tax authorities and judicial authorities* (Intersentia 2008) 108-109; Stevens 2005 (n 103) 123 et seq; Jansen 1999 (n 60) 104-105
[105] See *van Weerelt* v *The Netherlands* App no 784/14 (ECtHR 16 June 2015) para 61
[106] Michiel Luchtman, *Grensoverschrijdende sfeercumulatie* (Wolf Legal Publishers 2007) 157; Stevens 2005 (n 103) 130
[107] GALA, art 5:10a(2); see also Jansen 2009 (n 60) 104
[108] FSA, art 1:71(3)
[109] Graat 2017 (n 63) 103-104
[110] Kamerstukken II 2003/04, 29702, no 3, 95
[111] GALA, art 5:10a,

with Dutch criminal law, where the privilege against self-incrimination is afforded from the moment that there is a reasonable suspicion.[112]

Turning to the issue of how the privilege against self-incrimination is protected in parallel or consecutive punitive proceedings, the existence of the privilege against self-incrimination in punitive proceedings does not relieve the person concerned of his duty to cooperate in the non-punitive proceedings. A person is still under a duty to cooperate in the non-punitive proceedings, however, will-dependent information may not be used as evidence in a punitive proceeding running in parallel or consecutively.[113]

3.3 On-site inspections and the right to privacy

Another information-gathering power that DNB has at its disposal is the power to carry out on-site inspections. There are two possibilities in that respect. First, DNB carries out an on-site inspection in itself, on the basis of national law.[114] Second, DNB staff members participate in ECB on-site inspection teams.[115] As also discussed in Chapter III (Section 6.2.1), the on-site inspections carried out by the ECB are based on an annual formal planning and they generally aim at complementing ongoing off-site supervision.[116] For significant credit institutions, on-site inspection teams are composed of ECB staff members (inspections), supervisors employed by DNB, supervisors from other NCAs, as well as JST members and other persons authorized by the ECB.[117] As stated earlier,[118] the precise status of NCA staff participating in an on-site inspection team is not entirely clear and, as a result, to what extent national law powers are of relevance is a blurred issue.

With respect to significant credit institutions, the SSM Framework Regulation informs us that NCAs, like DNB, assist the ECB in verification activities and the day-to-day assessment of the situation of a significant supervised entity.[119] That wording can be read as meaning that verification activities may also include on-site verifications by the Dutch NCA, for the fulfillment of the ECB's tasks. For less significant credit institutions, DNB is responsible and thus all actions are carried out in accordance with national law. Finally, where a (significant) supervised entity opposes an envisaged inspection, DNB shall afford the necessary assistance to the ECB, in accordance with Dutch law.[120]

The right to privacy and particularly its "inviolability of the home" element, must be respected in the context of on-site inspections. For a long time, it was assumed that the right to privacy only covered natural persons; following the *Colas Est* line of case law, debates emerged concerning the extent to which Article 8 ECHR applies to legal persons in the context of law enforcement.[121] Nowadays, it is generally well-established that legal persons too, and particularly banks, fall under the protective scope

[112] Dutch Code of Criminal Procedure, art 27; see also Luchtman 2008 (n 104)110; Luchtman 2007 (n 106) 157; Stevens 2005 (n 103) 127
[113] Supreme Court 12 July 2013, ECLI:NL:HR:2013:BZ3640; see also Jansen 1999 (n 60) 143; Luchtman 2008 (n 104) 111
[114] GALA, art 5:15
[115] SSM Framework Regulation, art 144
[116] European Central Bank, "Guide to on-site inspections and internal model investigations" (September 2018) 5 <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.osi_guide201809.en.pdf> accessed 7 March 2021
[117] Ibid
[118] Chapter III, Section 6.1.3
[119] SSM Framework Regulation, art 90(1)(b)
[120] SSM Regulation, art 12(5)
[121] Luchtman 2007 (n 106) 155

of the fundamental right to privacy.[122] However, the right to privacy can be limited for the benefit of other overriding interests[123] and under the conditions laid down in Articles 7 CFR/8 ECHR and Articles.

According to the SSM Regulation, if an ECB on-site inspection or the assistance to be offered by DNB require authorization by a national judicial authority according to the national rules, such authorization shall be applied for.[124] At the same time, from the case law of the ECtHR that was discussed in the previous chapter, it follows that national legislators are given a margin of appreciation in deciding which safeguards to put in place in order to observe the inviolability of the home dimension of the right to privacy, such as *ex ante* judicial review, full *ex post* judicial review, thresholds for opening an investigation, *et cetera*.

In the Dutch legal system, the right to privacy in relation to administrative on-site inspections is understood in the following way: from Article 5:15 of the GALA, it follows that DNB's supervisors are empowered to enter premises, except for private dwellings, unless the occupant consents to such an entry.[125] Such on-site inspections are not based on a formal decision; they constitute a *de facto* measure, in light of the fact that the power of administrative authorities to enter business premises stems directly from the GALA.[126] The possibility of carrying out an on-site inspection of a private dwelling without permission of the occupant was not included for in the GALA, as the interference is so severe that it should only be allowed in exceptional circumstances, in accordance with the general law on entry (*algemene wet op binnentreden*).[127] If, for gaining entry, assistance by the police is necessary, the administrative organ is empowered to seek such an assistance.[128] For the performance of on-site inspections, no *ex ante* judicial authorization is necessary. It has been argued that the rationale underpinning the lack of *ex ante* authorization in the domain of Dutch administrative law enforcement is that Dutch administrative organs must adhere to the principle of proportionality and, as a result, their powers are not as far reaching as in other Member States.[129] Furthermore, according to the GALA, in exercising its powers, an administrative organ must ensure that these powers are exercised only insofar as this can reasonably be assumed to be necessary for the execution of the supervisor's duties.[130]

A *de facto* measure cannot be appealed before the administrative authority or the administrative Courts; a bank may however bring a claim before civil Courts, on the basis of general tort law, by asserting that the act of the supervisor was wrongful.[131] In addition to that possibility, the rule of thumb is that any irregularities that may have occurred on the supervisor's part in the course of the on-site inspection, can be raised by the bank in the court proceedings that follow the imposition of a sanction, if the sanction

[122] Ton Duijkersloot, "Bankentoezicht en constitutioneel recht: where two oceans meet but do not mix?" (2016) 4 Tijdschrift voor Constitutioneel Recht; Mark Bovens, "Hebben rechtpersonen morele plichten en fundamentele rechten?" (1998) Utrecht University Repository< https://dspace.library.uu.nl/handle/1874/12216> accessed 2 October 2021
[123] Luchtman refers to those overriding interests as "the interests of tax, financial and criminal law enforcement," Luchtman 2007 (n 106) 155
[124] SSM Regulation, art 13(1)
[125] GALA, art 5:15 (1)
[126] Council of the State 10 July 2013 ECLI:NL:RVS:2013:199, para 5
[127] Kamerstukken II 1993/94, 23700 no 3, 143
[128] GALA, art 5:15(2)
[129] Laura Wissink, Ton Duijkersloot and Rob Widdershoven, "Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection" (2014) 10 Utrecht Law Review 92, 110
[130] GALA, art 5:13
[131] Dutch Civil Code, art 6:162

was based on information that was seized in the course of the on-site inspection.[132] The Dutch legal system follows in essence the *Deutsche Bahn* line of case law,[133] which entails that full *ex post facto* control is capable of offsetting the lack of *ex ante* authorization.

In the course of an on-site inspection, DNB supervisors are empowered to inspect business information and documents, make copies of such information and – in case the copies cannot be made on the spot – take them away for a short time, for the purpose of copying them, while giving a written receipt to the bank.[134] In other words, the power laid down in Article 5:17 GALA does not include the possibility to seize documents and records,[135] but does include the collection of documents and digital data. If the credit institution can unambiguously and precisely indicate that digital data copied during an on-site inspection contain legally privileged and/or private data, the removal of such date can take place at the bank's business premise, unless – in the opinion of the IT specialist – this entails technical or other serious difficulties,[136] in which case, the collection and clearance occurs off-site, in line with the procedure previously discussed (Section 3.2).

From parliamentary history,[137] it follows that during an on-site inspection DNB staff members are only allowed to have a look around and cannot randomly open drawers and other storage places; should this power be necessary, it must be explicitly provided for in sector specific legislation (*bijzondere wetgever*). In addition, DNB is empowered to seal business premises, books, or documents.[138] It is worth noting that the relevant provision in the FSA explicitly refers to Articles 11 and 12 of the SSM Regulation: DNB is empowered to offer the necessary assistance to the ECB, in accordance with national law, should a credit institution oppose an EU on-site inspection, by sealing premises, books or documents.[139]

3.4 Interim remarks

On the basis of the foregoing analysis, a series of observations can already be made. The same investigative powers that the ECB has at its disposal are vested in DNB, namely the power to request (written and oral) information, the power to request business information and the power to carry out on-site inspections. In exercising those powers, DNB acts in two capacities, first as assistant to the ECB for the successful fulfillment of the ECB's tasks under the SSM Regulation and second, in its own motion as the supervisor of less significant banks, a task that been given by the ECB to the NCAs for the decentralized implementation of the ECB's exclusive tasks.[140]

Where national law is applied, that is, when DNB supervises LSIs or when it offers assistance to the ECB or when the ECB instructs DNB to – for instance – carry out verification tasks or when a (significant) bank opposes an inspection, DNB is enabled to enter banks' business premises. No *ex ante* judicial authorization is necessary. The Dutch NCA does not have the power to enter a private residence.

[132] Wissink, Duijkersloot and Widdershoven 2014 (n 129) 110
[133] Chapter IV, Section 3.3
[134] GALA, art 5:17
[135] Arnold, van Kreij and Luchtman 2020 (n 1) 543
[136] DNB working method for viewing and copying digital data (n 78), art 3(2)
[137] Kamerstukken II 1993/94, 23700, no 3, 143
[138] FSA, art 1:71(2)
[139] FSA, art 1:71(1)
[140] Case C- 450/17 P *Landeskreditbank Baden-Württemberg – Förderbank* v *ECB* [2019] ECLI:EU:C:2019:372, para 41

LPP protection under Dutch law is broader than under EU law. In-house legal counsels who are members of the bar association are covered by the LPP. In essence, this means that where the ECB instructs DNB to take a certain action under national law or where a supervised entity opposes an inspection and DNB has the right to afford to the ECB the necessary assistance by sealing books or documents,[141] the broader Dutch protection applies. As regards the implications of this for the interaction between EU and national law, the question remains as to how should DNB (or a national court) deal with information gathered at the EU level – or in another Member State – on the basis of a more limited LPP, transmitted to the Dutch NCA. How is the DNB to assess the critical piece of evidence? It was gathered on the basis of EU law powers and subsequently introduced in a legal order that provides for higher protection. Currently, the answer to that question is not clear.[142]

As far as the privilege against self-incrimination is concerned, it is unambiguous that the privilege must be afforded in punitive proceedings. We have noted elsewhere that national legislators are in essence free to choose between two ways of ensuring the protection of the privilege against self-incrimination in parallel or follow-up punitive proceedings.[143] In the Dutch legal order, the legislator has elected to keep the element of compulsion in the non-punitive case, by having in place the threat of a punitive sanction, in case a supervised person refuses to cooperate. This is, however, offset through a prohibition of using as evidence in punitive proceedings will-dependent information obtained under compulsion in the course of the non-punitive procedure. It goes without saying that – as explained in the analysis above – the production of digital data often requires complex digital editing. That said, even though, within the Dutch legal order, the protection of the privilege against self-incrimination in principle functions, what is less clear is how the privilege is protected in a composite setting. Can will-dependent information obtained by the ECB for non-punitive purposes be used by DNB to impose an administrative fine?

Now that DNB's information-gathering powers have been discussed, in the next section, the analysis focuses on information transfers by DNB to the ECB and to national judicial authorities.

4. The transfer of information by DNB to the ECB and to national judicial authorities

4.1 Introduction

Seeing that – in a composite setting – the use of SSM information either by the ECB or by Dutch authorities, for the imposition of punitive sanctions, presupposes information transfers from one authority to another, this section looks into the different instances in which DNB transfers information to the ECB (vertical transmissions) and to national judicial authorities (internal transmissions).

4.2 The transfer of information by DNB to the ECB: possibilities and limits

Vertical transfers are regulated in Section 1.3.4 of the FSA, whose title reads "cooperation and exchange of data and intelligence with European authorities." Article 1:69 FSA states that the DNB, in its capacity

[141] FSA, art 1:71(2)
[142] Argyro Karagianni, "How to ensure defence rights in the composite SSM setting?" (December 2019, EU law enforcement blogspot) < https://eulawenforcement.com/?author=5> accessed 1 March 2021
[143] Michiel Luchtman, Argyro Karagianni and Koen Bovend'Eerdt, "EU administrative investigations and the use of their results as evidence in national punitive proceedings" in Fabio Giuffrida and Katalin Ligeti (eds) *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (ADCRIM Report, University of Luxembourg 2019) < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021

as the Dutch NCA, within the meaning of the SSM Regulation, cooperates *inter alia* with the ECB, when such a cooperation is required for the performance of DNB's tasks under the FSA or for the performance of the ECB's tasks.[144] In addition to that, the DNB can request information from *anyone,* if this is necessary for the performance of the tasks with which the ECB – in its capacity as prudential supervisor – is entrusted.[145] Therefore, the scope of this provision is delimited by a necessity criterion, in other words, if information is necessary for the performance of the ECB's tasks,[146] the DNB can ask for it. The persons from whom such information is requested are under a duty to cooperate,[147] unless they are bound by a duty of professional secrecy, by virtue of their office or profession and only to the extent that their duty of secrecy necessitates their refusal to cooperate.[148]

From the foregoing, it follows that, on the one hand, DNB is empowered to gather information in order to transmit it to the ECB, for the execution of the ECB's day-to-day supervision of significant banks. On the other hand, DNB is also under a more general duty to cooperate with ECB and in that respect, it can transmit any information related to the ECB's supervisory mandate.[149]

The transfers of information to the ECB (and to other NCAs) is not without any limits. The FSA imposes on the DNB a duty of confidentiality.[150] This obligation entails that persons who perform or have performed[151]duties or have taken decisions pursuant to the FSA, are prohibited from using that information for purposes other than for the performance of tasks required by the FSA.[152] Despite this general confidentiality obligation, the FSA allows for the transmission of confidential information if the following conditions are met:[153]

a) the purpose for which the confidential data or information will be used is sufficiently determined[154]
b) the intended use of the confidential data or information fits with the scope of the supervision of financial markets or of persons working in those markets[155]
c) providing the confidential data or information is not incompatible with Dutch law or public order[156]
d) the non-disclosure of the information is adequately guaranteed[157]
e) the provision of confidential data or information is not in conflict with interests that the FSA seeks to protect[158]
f) namely it is sufficiently guaranteed that the confidential data or information will not be used for purposes other than those for which the information was provided ("specialty rule")[159]

With respect to the meaning of "confidential information," according to the CJEU, this is to be understood as information that "(i) that it is known only to a limited number of persons, (ii) that its

[144] FSA, art 1:69(2)
[145] FSA, art 1:70(1)
[146] FSA, art 1:70 (2) with reference to GALA, art 5:13
[147] FSA, art 1:70 (2) with reference to GALA, art 5:20
[148] GALA, art 5:20(2)
[149] SSM Regulation, art 6(2)
[150] FSA, Section 1.5.1
[151] FSA, art 1:89(3)
[152] FSA, art 1:89(1)
[153] FSA, art 1:90(1)
[154] FSA, art 1:90(1)(a)
[155] FSA, art 1:90(1)(b)
[156] FSA, art 1:90(1)(c)
[157] FSA, art 1:90(1)(d)
[158] FSA, art 1:90(1)(e).
[159] FSA, art 1:90(1)(f)

disclosure is liable to cause serious harm to the person who has provided it or to third parties and (iii) that the interests liable to be harmed by disclosure are, objectively, worthy of protection."[160]

In case DNB obtained confidential information from an NCA of another Member State, the Dutch supervisor shall not transmit it to the ECB or to another NCA unless the transmitting NCA expressly consented to the provision of this information for a purpose other than that for which the information was provided.[161]

As can be seen, Dutch law does not foresee unconditional transfers to the ECB; on the contrary, we see that even though the SSM Regulation implies an unconditional obligation on the part of NCAs to transmit information to the ECB information which is relevant for the performance of the latter's supervisory tasks,[162] Dutch law does not embrace such unconditional transfers and DNB is even enabled to refuse transmissions if that interferes with Dutch public order. The compatibility of Dutch law with EU law in that respect is therefore highly questionable.

4.3 The transfer of information by DNB to national judicial authorities

Concerning transmissions to national judicial authorities, which is of relevance in the cases covered by Article 136 of the SSM Framework Regulation and in cases where DNB is required by the law to transmit information to national judicial authorities, the modalities are laid down in specific laws that govern such transmissions. These are discussed below.

Notwithstanding the confidentiality obligations that are incumbent upon DNB,[163] there are certain instances in which the supervisor does share information with the public prosecution services (*openbaar ministerie*). The sharing of information between the DNB and public prosecution services is governed both by general and by more specific legal rules. As a first remark, the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) lays down the general rule that any person who has knowledge of a criminal offense committed may file a report or complaint.[164] The provision does not therefore establish an obligation, but rather introduces a possibility to report offenses.[165]

A *lex specialis* is to be found in the FSA,[166] which reads that notwithstanding the duty of secrecy of the financial supervisors, the DNB may provide confidential data or information obtained in the performance of the duties assigned to it under the FSA to *inter alia* the General Intelligence and Security Service (*Algemene Inlichtingen en Veiligheidsdienst*), to the Public Prosecution Service, to tax authorities (*Belastingdienst*), to the fiscal intelligence and investigation service (*Fiscale Inlichtingen en Opsporingsdienst*), to the police, to the financial supervision office (*Bureau Financieel Toezicht*) and to the financial intelligence unit (*Financiële Inlichtingen Eenheid*).

In addition, according to Article 1:92 FSA, DNB may – notwithstanding the obligation of secrecy – provide confidential information obtained in the performance of duties under FSA to an authority charged with the exercise of criminal powers or to an expert who has been entrusted with an assignment

[160] Case T- 345/12 *Akzo Nobel and Others* v *Commission* [2015] ECLI:EU:T:2015:50, para 65
[161] FSA, art 1:90(2)
[162] SSM Regulation, art 6(2)
[163] FSA, Section 1.5.1
[164] Dutch Code of Criminal Procedure, art160
[165] Luchtman 2008 (n 104) 99
[166] FSA, art 1:93(1)(f) FSA.

by such a body, insofar as the requested data or information is necessary for the execution of that assignment.[167] The fact that the same offenses, or different offenses based on the same facts,[168] can be dealt with both by administrative authorities empowered to impose punitive sanctions and by the Public Prosecution Service, has increased the cooperation between the two sides.

The aforementioned cooperation begs the question of the extent to which information obtained through powers of administrative law can be used by criminal justice authorities in the course of a criminal investigation.[169] In this respect, it has been argued that while the FSA provides for information sharing possibilities, in any case, criminal investigating authorities must not "abuse" the supervisor to obtain information in an easier way for the purposes of their investigation.[170] In that connection, the Dutch legislator has recognized a limited right of non-disclosure (*beperkt verschoningsrecht*), imposing on DNB the obligation to balance the importance of confidentiality against the importance of finding the truth.[171] In criminal cases, the weighing up of the importance of confidentiality against the importance of truth-finding are ultimately done by a court.[172] If there is not (yet) a criminal case, then the supervisor itself will have to make that assessment in each individual case. Such an assessment can, incidentally, always be reviewed by a court in the end. Parliamentary history sheds some light with respect to which precise criteria a supervisor should balance, in deciding whether they will disclose confidential information to judicial authorities.[173]

First, if maintaining the confidentiality of the date that persons under supervision have provided to DNB is indispensable for the proper functioning of financial supervision, DNB could invoke a right of non-disclosure.[174] Second,[175] data obtained by financial supervisors who have far-reaching powers should not, in principle, be used for investigative purposes, especially if the person who provided the data in question was not aware that a suspicion had arisen against him.[176] Last,[177] it should not be the case that financial supervisors are "used" by criminal justice authorities, because the former have broader investigative powers.

The issue of circumvention of powers/safeguards,[178] i.e., the fact that a judicial authority may deliberately "use" the supervisor for obtaining information that the former authority may not have been able to gather in its own motion, manifests itself also in the inverse way; the Judicial Data and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens*, hereafter *Wjsg*),[179] which is further specified

[167] FSA, art 1:92
[168] For example, it has occurred that the Public Prosecutor Service was investigating a case concerning the bribery of Dutch civil servants and fraud tenders in Limburg. The same tapped telecommunications would also show breaches of the cartel prohibition. See: Wessel Geursen, "Fruits of the poisonous tree in het kartelrecht: onrechtmatig verkregen bewijs hoeft niet per se te worden uitgesloten" (2009) 6 Actualiteiten Mededingingsrecht 115
[169] See Michiel van Eersel, *Handhaving in de financiële sector* (Kluwer 2013) 57-58
[170] Ibid, 58
[171] Kamerstukken II 2001/2002 no 3 28373, 14
[172] Ibid
[173] Ibid
[174] Ibid
[175] Ibid
[176] Ibid
[177] Ibid
[178] Sabine Gless, *Beweisrechtsgrundsätze einer Grenzüberschreitenden Strafverfolgung* (Nomos 2006), 168-171; Luchtman 2008 (n 104) 150-151
[179] Judicial Data and Criminal Records Act (*Wet van 7 november 2002 tot wijziging van de regels betreffende de verwerking van justitiële gegevens en het stellen van regels met betrekking tot de verwerking van persoonsgegevens in persoonsdossiers, Stb.* 2002, 552)

by the implementing Decree (*Besluit justitiële en strafvorderlijke gegevens*, hereafter *Bjsg*),[180] governs the transmission of data from criminal justice authorities to *inter alia* DNB.[181] Judicial data is defined as personal data or data concerning a legal person, particularly that person's previous conviction and involvement with criminal law or procedure.[182] Criminal records data[183] refers to information concerning natural or legal persons that has been obtained in the course of a criminal investigation and to information which is processed by the Public Prosecution Service in a criminal file or automatically in a database.

According to the Bjsg,[184] judicial data may be transferred to the president of DNB upon his or her request, for the purpose of investigating the reliability and suitability of persons ("fit and proper"), who are going to work for the supervised legal entities or for the ECB. Again, this entails the danger that because DNB does not have the power to – for instance – intercept telecommunications, it may be tempted to ask such information from authorities that are competent to do so; information can be transferred back to administrative authorities through the BJSG.[185] On the other hand, the fact that there exists a clear legal basis for the transmission of judicial and criminal information, certainly mitigates such risks. In other Member States for instance, the transmission of information does not take place in accordance with a legal basis, but informally.[186]

Now that information transfer by DNB to the ECB and to Dutch judicial authorities has been scrutinized, in the next section the analysis focuses on how Dutch law regulates the use of SSM information.

5. The use of SSM materials in Dutch punitive proceedings

5.1 Introduction

Information gathered by DNB or by other SSM authorities and thereafter transmitted to DNB through the ECB,[187] can *inter alia* be used by DNB for the imposition of punitive sanctions. As we have already seen,[188] if a significant credit institution violates a norm laid down in an EU Directive, which is implemented in Dutch law, or if a natural person is suspected of having violated national law implementing an EU Directive, the ECB has only indirect sanctioning powers;[189] in that case, it shall request DNB to open sanctioning proceedings.[190] The Dutch NCA enjoys discretion as to the outcome and the final decision is appealable before Dutch Courts.[191]

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[180] Implementing Decree (*Besluit van 25 maart 2004 tot vaststelling van de justitiële gegevens en tot regeling van de verstrekking van deze gegevens alsmede tot uitvoering van enkele bepalingen van de Wet justitiële gegevens*, *Stb.* 2004, 130)
[181] See for instance, Wjsg, art 39f
[182] Wjsg, art 1a
[183] Wjsg, art 1b
[184] Bjsg, art 26(1)(b)
[185] Trade and Industry Appeals Tribunal 9 July 2015, ECLI:NL:CBB:2015:193
[186] See *inter alia* Silvia Allegrezza, "Italy" in Michele Simonato, Michiel Luchtman and John Vervaele (eds), "Exchange of information with EU and national enforcement authorities Improving OLAF legislative framework through a comparison with other EU authorities (ECN/ESMA/ECB)" (2018) Utrecht University Repository, 97 https://dspace.library.uu.nl/handle/1874/364049 accessed 21 January 2022
[187] For instance, pursuant to SSM Regulation, art 18(5); See also Chapter III, 7.2.3
[188] Chapter III, Section 8.2
[189] Chapter III, Section 8.2
[190] Kamerstukken II 2014-2015, 340409, no 3, 6
[191] SSM Regulation, art 18(5)

In addition to SSM information being used for punitive sanctioning by DNB, as we have seen in Chapter III,[192] it is possible that SSM-generated information can also end up in the hands of Dutch judicial authorities, through DNB.[193] This triggers the question of the use to which such information can be put by criminal justice authorities in the Netherlands.

Against this background, in this section the use of SSM information by DNB and by Dutch judicial authorities are scrutinized, as well as the applicable legal safeguards. Conversely, also examined is the extent to which Dutch law contains limitations on the use of information transferred by DNB to the ECB. In the sanctioning stage of (punitive) law enforcement, the legal safeguards that inherently come into play are the privilege against self-incrimination, the *ne bis in idem* principle and the right of access to a court. However, rights that must be afforded in preceding stages, as they influence the legal position of investigated persons in subsequent punitive proceedings, are the privilege against self-incrimination, the right to privacy and LPP.

This section is structured as follows: first, I look into how DNB uses SSM information, by analyzing its sanctioning powers and the applicable safeguards. Second, I look into which limits Dutch law imposes on the use by the ECB of DNB transmitted information. Third, I discuss the use to which SSM information can be put by Dutch judicial authorities, as well as the applicable safeguards. Finally, given that the composite design of the SSM results in that information used for punitive purposes both by DNB and by national judicial authorities may have been gathered in another legal order, I inquire into how judicial review of DNB decisions is organized within the Netherlands and how Dutch administrative and criminal Courts answer questions with regards to unlawfully obtained foreign evidence and/or evidence obtained abroad on the basis of divergent procedural standards. In other words, it is assessed the extent to which legal protection for violations of rights that took place in another legal order is sufficiently provided in such a composite enforcement design.

5.2 The use of SSM materials by DNB and applicable legal safeguards

5.2.1 DNB sanctioning powers

DNB is empowered to impose fines for breaches of the provisions laid down in the FSA, for breaches of the Capital Requirements Regulation (CRR) and for violations of Article 5:20 of the GALA (obligation to cooperate).[194] In addition to administrative fines, DNB is empowered to take a plethora of enforcement actions. Generally, DNB classifies its enforcement instruments as "formal" (*formele handhavingsmaatregelen*) and "informal" (*informele handhavingsmaatregelen*).

The specific sanctions and informal enforcement measures that can be imposed by DNB are the following:

[192] Chapter III, Section 7.3.1
[193] SSM Framework Regulation, art 136; Decision (EU) 2016/1162 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19) OJ L 192/ 73
[194] FSA, art 1:80

I. An administrative fine which can be up to EUR 20 million for an individual violation.[195] Depending on their severity, violations are arranged in categories which comprise of basic amounts, minimum amounts and maximum amounts. The criteria for determining in which category an administrative fine should fall, are to be found in a Decree on administrative fines in the financial sector (*Besluit bestuurlijke boetes financiële sector*, hereafter "Bbbfs").[196] Generally, before deciding the supervisor must take into account the severity and duration of the violation, the benefit acquired as a result of the violation, losses suffered by third parties as a result of the infringement and the damage caused to the functioning of the market or to the wider economy, the degree of culpability, previous offenses, the extent to which the offender cooperates in determining the violation, and measures taken by the offender after the violation to prevent a repeat of the violation.[197]

II. Periodic penalty payment: DNB may impose on supervised persons a periodic penalty payment ("PPP"). DNB's competence to impose PPPs is based on Article 1:79 of the FSA. More detailed rules concerning the imposition of periodic penalty payments by administrative authorities, are to be found in Section 5.3.2 of the GALA. According to paragraph 1 of Article 5:32 of the GALA, an administrative authority which is entitled to take enforcement action may instead impose on the offender a periodic penalty payment. Concerning the question of how the amount of a PPP is determined, according to the GALA, the amount should be proportionate to the gravity of the interest violated and to the effect at which the penalty payment is aimed.[198]

III. In the event of a violation, DNB is empowered to issue a public statement, in which it publicizes the name of the offender ("naming and shaming").[199] The legal bases for which the DNB is enabled to exercise its naming and shaming powers are listed in Section 1:94 FSA. This is a discretionary power and it must be distinguished from other provisions which oblige DNB to publish its decisions to impose fines and penalty payments.[200]

IV. DNB is additionally empowered to issue an instruction vis-à-vis a supervised entity, in case it discovers that a certain development could jeopardize the equity, solvency or liquidity of the credit institution.[201]

V. If an instruction has not been fully complied with by the supervised entity within the stipulated period or a violation seriously jeopardizes the proper functioning of the supervised entity or the interests of the consumers, DNB may decide to appoint a trustee (*curator*) in respect of all or certain bodies or representatives of the credit institution.[202]

VI. DNB is empowered[203] to suspend the exercise of the voting rights of shareholders responsible for violations of supervisory law.[204]

VII. To prohibit natural persons from performing certain functions.[205]

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[195] See *inter alia* R Lamp, "De Wet of het financieel toezicht" in F Kristen, R Lamp, J Lindeman, M Luchtman, W de Zanger (eds), *Bijzonder strafrecht: Strafrechtelijke handhaving van sociaal-economisch en fiscaal recht in Nederland* (2nd ed, Boom Lemma uitgevers 2019) 328 et seq

[196] Decree on administrative fines in the financial sector (*Besluit van 11 juni 2009, houdende regels voor het vaststellen van de op grond van de Wet op het financieel toezicht en enige andere wetten op te leggen bestuurlijke boetes*, *Stb.* 2009, 329)

[197] Bbbfs, art 1(b)

[198] GALA, art 5:32b, para 3

[199] FSA, art 1 :94

[200] FSA, arts 1:97, 1:98 and 1:99

[201] FSA, art 1:75(2)

[202] Article 1:76 FSA

[203] In cases of violations of articles 2:11 first paragraph, 3:5 first paragraph, 3:95 first paragraph and 3:103 first paragraph of the FSA

[204] FSA, art 1 :86

[205] FSA, art 1 :87

Where DNB adopts a sanctioning decision, this is done in accordance with national law. In this respect, the FSA, the GALA and the general principles of good administration are of relevance.[206] It shall also be noted that whenever the ECB instructs DNB, the final legal act and decision of the NCA is subject to national legal protection and in that connection an instruction must be followed up within the possibilities available to DNB by national legislation and in accordance with the general principles of good administration, which a decision must be sufficiently justified, with a reference to the motivation used by the ECB in its instruction.[207] Within the DNB there exists a separation between the investigation and the sanctioning stages. In this respect, supervisors who were involved in establishing a violation in the course of an investigation shall not be involved in proceedings related to the imposition of administrative fines.[208]

5.2.2 The use of SSM materials by DNB and applicable defense rights

Even though, as we have seen (Section 3.2), in the information-gathering phase of prudential supervision, credit institutions are under a duty to cooperate, will-dependent information obtained under legal compulsion, may not be used as evidence in parallel or consecutive punitive DNB proceedings. [209] By the same token, information existing independently of the investigated person's will can be used as evidence by DNB for punitive sanctioning.

The foregoing suggests that, under Dutch law, DNB must refrain from using for punitive purposes information gathered under compulsion in a preceding non-punitive stage and which depends on the will of the suspect.[210] However, it shall be stressed that, while these rules clearly apply to internal situations, i.e., situations in which DNB gathers information in itself and thereafter uses it for punitive purposes, neither national law nor case law deals with composite situations. Therefore, at the moment it is not clear whether DNB can or cannot use for the imposition of sanctions incriminating information transmitted to it by the ECB.[211]

The same considerations apply also with respect to the LPP. While, in internal situations, the (Dutch) LPP has already been taken into account during the information-gathering stage (Section 3.2), if the punitive procedure is a composite one, as a matter of Dutch administrative law, it is not clear whether information obtained in another legal order, on the basis of a lower LPP standard, should or should not constitute admissible evidence in DNB national proceedings.

5.2.3 Judicial review of DNB punitive decisions and preceding investigative acts

Now that the applicable defense rights have been discussed, the next logical step is to inquire into how persons whose rights may have been violated – particularly in a different legal order – can be granted the right of access to a court. In that light, I first discuss internal situations, i.e., judicial review of DNB

[206] Kamerstukken II 2014-2015, 34049, no 3, 7
[207] Kamerstukken II 2014-2015, 34049, no 3, 8
[208] Section 1:88 FSA; see also Jansen 2009 (n 60) 105; John Vervaele and Rob Widdershoven, *Bestuurlijke handhaving van visserij-regelgeving* (1991) Utrecht University Repository 67-68 < http://dspace.library.uu.nl/handle/1874/4891> accessed 7 March 2020
[209] Supreme Court 12 July 2013, ECLI:NL:HR:2013:BZ3640, para 3.9
[210] Council of the State 27 June 2018, ECLI:NL:RVS:2018:2115, paras 7.2 and 7.3
[211] See also, Argyro Karagianni, "How to ensure defense rights in the composite SSM setting?" (December 2019, EU law enforcement blogspot) < https://eulawenforcement.com/?p=7334> accessed 14 March 2021

decisions that are not the end result of a composite procedure. Thereafter, I discuss the judicial review by Dutch Courts of DNB final decisions that have been adopted pursuant to a composite procedure.

5.2.3.1 DNB sanctioning decisions and the right of access to a court

As noted in Section 3.1, the information-gathering powers exercised by DNB constitute *de facto* measures and as such they are not decisions within the meaning of Article 1:3 of the GALA, since they do not alter the rights and duties of supervised persons.[212] A *de facto* measure may only be challenged before civil Courts, on the basis of tort law. In other words, *ex ante* judicial review on the lawfulness and proportionality of enforcement powers carried out by DNB is not foreseen. Complaints for violations of procedural requirements may only be raised after the adoption of a supervisory or sanctioning decision, in which case, the reviewing court will review the enforcement powers that preceded the adoption of the final decision, to the extent that irregularities thereto influenced the decision to impose a supervisory or sanctioning decision.[213] A decision, as defined in the GALA, is a written decision adopted by an administrative authority, which constitutes an act under public law.[214]

Decisions can be appealed before the administrative Courts by an interested party (*belanghebbende*).[215] However, before appealing a DNB decision before the District Court of Rotterdam, internal review mechanisms must have been exhausted, by submitting a notice of objection to the DNB.[216] The deadline for submitting an objection is six weeks,[217] starting on the day following that on which the decision was communicated to the interested persons.[218] An objection before DNB or an appeal before the administrative Courts do not generally bring about a suspending effect.[219] However, when it comes to a decision to impose an administrative fine, the FSA contains a *lex specialis*, which prescribes that if an objection or appeal has been lodged against a decision to impose an administrative fine, the obligation to pay the fine is suspended until the appeal period has expired or, if an appeal has been lodged, until the appeal has been decided.[220] From parliamentary history it follows that the suspensory effect was included in the FSA because not including it could induce financial supervisors to impose heavier fines.[221]

5.2.3.2 DNB sanctioning decisions adopted pursuant to composite procedures and the right of access to a court

As explained in Chapter III,[222] the ECB may request DNB to open sanctioning proceedings.[223] In addition to such a request, relevant evidence is logically also transferred to the national level. Such (digital) transfers of evidence may at a certain point result in that information obtained outside the contours of the Dutch State, either at the EU level (vertical transfers) or by national law powers in another legal order and thereafter channeled to the Netherlands through the ECB (diagonal transfers), are used as evidence in Dutch punitive proceedings.

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[212] De Jonge and Kruijsbergen 2014 (n 66) 42
[213] Ibid, 44
[214] GALA, art 1 :3
[215] GALA, art 8 :1
[216] GALA, arts 6 :4(1) and 7 :1
[217] GALA, art 6 :7
[218] GALA, art 6 :8(1)
[219] GALA, art 6 :16
[220] FSA, art 1:85(1)
[221] Kamerstukken II 2005/2006, 29708, no 34, 26
[222] Chapter III, Section 8.2
[223] SSM Regulation, art 18(5)

Composite enforcement procedures, give rise to a series of questions. Assuming that DNB used the aforementioned information as evidence for the imposition of a punitive sanction: is the right of access to a court of the addressees of DNB decisions sufficiently ensured? How does the reviewing court deal with unlawfully obtained foreign evidence? Even if the obtainment was perfectly lawful, can DNB use as evidence materials lawfully obtained in another jurisdiction, on the basis of lower procedural safeguards, where at the same time Dutch law accords higher protection? A typical example of such a discrepancy would be the higher level of protection afforded to in-house legal counsels under Dutch law when compared to the EU law standard, but the same considerations apply *mutatis mutandis* to all defense rights. In order to answer these questions, it is essential to first inquire into how such questions they play out in internal situations, i.e., what are the consequences for the Dutch law of evidence if information has been obtained in violation of the right to privacy or of defense rights or if the privilege against self-incrimination was not afforded from the moment that the case became criminal in nature. Arguably, the principle of equivalence[224] suggests that the same considerations should apply also to situations governed by Union law.

As a general remark, case law dealing with the aforementioned questions specifically in relation to DNB and prudential supervision, does not exist so far. Neither is there experience with respect to the lawfulness and fairness of evidence gathered by an ELEA or by another NCA, which ended up for punitive sanctioning in the Netherlands, through that ELEA. The discussion therefore revolves around case law where comparable types of questions have emerged.

In Dutch administrative law, the theory of free evidence applies (*vrij-bewijsleer*),[225] meaning that there is no *numerous clausus* of the means of proof that are admissible before administrative Courts. The GALA does not contain many provisions on evidence. The few provisions concern the participation of witnesses and experts.[226] It was not deemed necessary to include codification of rules of evidence for administrative fines, partly owing to the fact that an administrative decision must be based on a sound statement of reasons, which in turn implies that the administrative authority should make sure that sufficient evidence exists.[227]

Given the absence of a general provision dealing with unlawful obtainment and/or unfair use of evidence, in order to answer the question of to what extent foreign materials can be used as evidence in Dutch administrative proceedings, the terms “unlawful” and “unfair” should be explained. In the first place, the unfairness could lay in that will-dependent incriminating evidence that was lawfully obtained when an obligation to cooperate was incumbent upon a bank and/or a natural person, was later used in punitive proceedings unfairly, i.e., counter to the postulations developed by the ECtHR in the *Saunders* judgment. In the second place, the unlawfulness could lay in that the administrative organ acted in a certain unlawful way in the information-gathering phase by, for instance, violating essential procedural requirements, such as the LPP or by violating the right to privacy. The unlawfully obtained information was used for punitive purposes at a later stage.

[224] Chapter II, Section 4.2
[225] See Y Schuurmans, “De behoefte aan bewijsregels in het bestuursrecht” (Kluwer 2006); F Michiels and R Widdershoven, “Handhaving en recthsbescherming” in F Michiels and E Muller (eds), *Handaving-Bestuurlijk handhaven in Nederland* (Kluwer 2013) 114
[226] GALA, Section 8.1.6
[227] Kamerstukken II 2003/2004, 29702 no 3, 131

As regards the first distinction, i.e., evidence lawfully obtained, but later used by administrative authorities in an unfair way, there are no general exclusionary rules to be found in Dutch law. The primary role of the Dutch administrative judge is to find the substantive truth (*materiële waarheid*).[228] Dutch Courts have embraced the "fairness of the proceedings as a whole" yardstick. In that respect, in literature and in jurisprudence there exists the so-called "manifestly improper" criterion (*zozeer indruist* criterion), which essentially means that exclusion of lawfully obtained but unfairly used evidence should take place only if such a use would run so much counter to what can be expected from a properly acting administrative authority, that every use of it should be excluded.[229]

As regards the second distinction, i.e., evidence obtained unlawfully, for example in violation of the privilege against self-incrimination /legal professional privilege or in violation of the right to privacy, and later used for the imposition of a punitive administrative sanction, the stance of Dutch Courts is as follows. There is no general legal provision forbidding every use of unlawfully obtained evidence in administrative proceedings.[230] The use of unlawfully obtained evidence in administrative proceedings is forbidden only if the evidence was collected in way that runs counter to what can be expected from a properly acting administrative authority (*zozeer indruist* criterion).[231] However, it has been noted that the manifestly improper criterion is a rather highly threshold to meet;[232] it is mostly violations of defense rights that tend to meet the threshold. Examples of situations in which the threshold was met are the following: not warning a person who is under an administrative interrogation that they have the right to remain silent, meets the manifestly improper threshold. Therefore, statements obtained in such a way cannot, as a rule, be used as evidence for the facts on which the sanction is based.[233] The same also applies in case the administrative authority exerted compulsion in punitive proceedings and obtained will-dependent information;[234] such information cannot be used for punitive sanctioning. With respect to violations of Article 8 ECHR/7 CFR in the obtainment phase, the Supreme Court of the Netherlands holds that Dutch (criminal) Courts are in principle not required to test the way in which evidence is obtained in the context of investigations conducted under the responsibility of foreign authority, neither are they obliged to investigate complaints in relation to Article 8 ECHR. Information obtained by foreign authorities in breach of Article 8 ECHR, can be used as evidence in Dutch proceedings, however, Dutch Courts may then investigate whether the use of the results of that foreign investigation is in accordance with Article 6 ECHR, i.e., the use does not undermine the fairness of the proceedings as a whole.[235] It is questionable whether this "find a remedy in the legal order that obtained the information" approach can work in the case of composite enforcement procedures. In composite enforcement procedures, it is unlikely that an affected person will successfully seek a remedy in the gathering legal order because it may not always be clear which legal order gathered the information. Furthermore, it may be the case that – in line with the *Berlusconi* case law (Chapter III, Section 7.2.3) – the legal order which gathered the information is not even competent to review the national part of the composite procedure anymore. A reconceptualization of the notion of composite legal protection may thus be necessary.

[228] Kamerstukken II 2003/2004, 29702 no 3, 131
[229] Y Schuurmans, "Onrechtmatig verkregen bewijsmateriaal in het bestuursrecht" (2017) 5 Ars Aequi 388
[230] Supreme Court 1 July 1992, ECLI:NL:HR:1992:ZC5028, at 3.2.2
[231] Trade and Industry Appeals Tribunal 22 February 2017, ECLI:NL:CBB:2017:47. See also, Ton Duijkersloot, Aart de Vries and Rob Widdershoven, "The Netherlands" in Giuffrida and Ligeti 2019 (n 143) 203
[232] Duijkersloot, de Vries and Widdershoven 2019 (n 231) 203
[233] Council of the State 27 June of 2018, ECLI:NL:RVS:2018:2115, para. 7.2
[234] Council of the State 27 June of 2018, ECLI:NL:RVS:2018:2115, para. 7.3; Council of the State 12 July 2013, ECLI:NL:HR:2013:BZ3640, paras 3.7 and 3.8.
[235] Supreme Court 1 December 2020, ECLI:NL:HR:2020:1889, para 2.2.2; see also the Supreme Court 5 October 2010, ECLI:NL:HR:2010:BL5629

A last distinction concerns which is relevant from the perspective of composite enforcement procedures, concerns evidence obtained lawfully by the ECB or another NCA, but on basis of divergent procedural standards, i.e., procedural standards that are CFR and ECHR compliant, yet offer lower protection than the one offered under Dutch law. A typical example of that is the LPP which – according to EU law (and presumably other national laws not studied here) – is only afforded to external lawyers, whereas under Dutch law it is afforded to all lawyers who are members of the Dutch Bar Association, be they internal or external. At the moment, it is not clear how Dutch administrative Courts would assess evidence obtained by the ECB or by another NCA on the basis of a more limited LPP. It has been submitted that, in view of the fact that the relevant threshold in internal situations is the "manifestly improper" criterion, it is highly unlikely that evidence obtained by a foreign authority in a way which complies with Article 47 CFR/6 ECHR, would be deemed as inadmissible by the Dutch Courts.[236]

5.2.4 The use by DNB of ECB materials and the *ne bis in idem* principle

Even though the *ne bis in idem* principle comprises a criminal law safeguard, it also of significant importance in combinations of punitive administrative and criminal sanctions, [237] but also – as is the case here – in combinations of punitive administrative sanctions. With respect to the nexus between DNB and the ECB, from a bottom-up perspective, the critical question is whether Dutch law contains sufficient safeguards to ensure that DNB and the ECB are precluded from simultaneously imposing on a credit institution punitive sanctions for the same act, facts, or offense.

The GALA contains a *ne bis in idem* clause, which deals with the concurrent imposition of two punitive administrative sanctions. More specifically, it is foreseen that a second administrative fine cannot be imposed if the offender has previously been subject to an administrative fine for the same violation or the administrative authority decides, after hearing the suspect, that no administrative fine must be imposed.[238] While the GALA regulates internal situations, the *ne bis in idem* provision contained in the CFR (Article 50) promises to offer transnational protection. In practice, as it has rightly been noted,[239] owing to the division of sanctioning powers between the ECB and DNB vis-à-vis significant banks, which is foreseen in Articles 18(1) and 18(5) SSM Regulation,[240] *de facto*, there exists a rather limited risk of overlapping sanctioning competences between the ECB and DNB and therefore *ne bis in idem* violations.

5.3 The use of DNB-gathered materials by the ECB and/or other NCAs and applicable legal safeguards

As we saw in Section 4.3 above, Dutch law allows transmissions of confidential information by DNB to the ECB or other NCAs. However, if certain aspects,[241] such as the intended use, are not guaranteed, DNB may refuse to transmit such information. Now, what if information has been already transferred

[236] Duijkersloot, de Vries and Widdershoven 2019 (n 231) 207
[237] Michiel Luchtman, "The ECJ's Recent Case Law on ne bis in idem: Implications for Law Enforcement in a Shared Legal Order" (2018) 55 Common Market Law Review 1717
[238] GALA, art 5:43
[239] Valentina Felisatti, "Sanctioning Powers of the European Central Bank and the Ne Bis In Idem Principle within the Single Supervisory Mechanism" (2018) 8 European Criminal Law Review 378, 398; Bas van Bockel, "The Single Supervisory Mechanism Regulation: Questions of Ne Bis in Idem and Implications for the Further Integration of the System of Fundamental Rights Protection in the EU" (2017) 24 Maastricht Journal of European and Comparative Law 194, 213
[240] Chapter III, Sections 8.1.1 and 8.2
[241] FSA, art 1:90(1)(a)(b)(c)(d)€(f)

by DNB and the receiving authority, like ECB, asks DNB if it is allowed to use the confidential information for a purpose other than that for which DNB provided that information, for instance, for a new investigation? This question is regulated by Dutch law. DNB can grant such a request only if:

a) the intended use is not contrary to Dutch public order, is in line with financial supervision, is not in conflict with the interests that the FSA aims to protect and the purpose for which information will be used is sufficiently specified[242]
b) the ECB or the NCA could obtain access to the information at issue from the Netherlands in another way, with due observance of the applicable legal procedures[243]
c) the request relates to an investigation into criminal offenses, after consultation with the Dutch Minister of Justice[244]

It is worth noting that, even though the ECB is exclusively competent for the supervision of credit institutions in the euro area, DNB can refuse to grant a request for a different use, if that would be contrary to the interests protected by the FSA and/or Dutch public order. No additional legal safeguards are foreseen in Dutch law.

5.4 The use of SSM materials by Dutch judicial authorities and applicable legal safeguards

In this section, I turn to the issue of how Dutch judicial authorities could potentially[245] use information that has been transferred to them by DNB, either on the basis of Article 136 SSM Framework Regulation or Decision 2016/1162, and in accordance with national law. Furthermore, the applicable legal safeguards will also be discussed.

5.4.1 Criminal sanctions for violations of prudential norms

Dutch criminal Courts may use SSM information to impose criminal sanctions for the commission of prudential offenses. As already indicated (Section 2.1), prudential norms in the Netherlands can also be enforced by means of criminal law. Particularly relevant in that respect is the EOA. The crimes that are laid down in the EOA are felonies (*misdrijven*),[246] if committed intentionally, or, in all other cases (*overtredingen*).[247] Certain legal provisions of the CRD IV, as implemented in the Netherlands by the FSA, are mentioned in Article 1(2) of the EOA. One such example is operating a credit institution (in the Netherlands) without holding a license, which – if committed intentionally – can lead to deprivation of liberty of maximum two years or a fine of the fourth category of the Dutch code criminal procedure,[248] or, if the offense was committed by a legal person, a fine of the sixth category[249] of the Dutch Code of Criminal Procedure.[250] The provisions of the ordinary penal code, particularly the ones

[242] FSA, art 1 :90(3)(a)
[243] FSA, art 1 :90(3)(b)
[244] FSA, art 1 :90(3)€

[245] I use the term "could" here, because there has not been a known case yet in which Dutch judicial authorities actually used information transmitted to them by DNB, on the basis of Article 136 SSM Framework Regulation or on the basis of Decision 2016/1162. In that respect, this section discusses how such information could potentially be used by Dutch judicial authorities.
[246] EOA, art 1
[247] EOA, art 2
[248] That can lead to a fine of € 21.750.
[249] Which, as of January 1st 2020, can lead to a fine of € 870.000; see Article 23(4) of the Dutch Code of Criminal Procedure.
[250] EOA, art 6(1)(2)

of forgery of documents and deception, which can lead to a custodial sanction of maximum six years and maximum three years respectively, are also of relevance.[251]

In addition to the aforementioned criminal penalties, the commission of prudential offenses can also lead to the imposition of additional penalties. Examples are the deprivation or revocation of the exercise of certain rights, such as the right to hold offices and exercise certain professions,[252] the closing down of the credit institution for a maximum of one year,[253] the confiscation of certain objects,[254] total or partial denial of certain rights or benefits, which could be granted by the government to the convicted persons, for a period not exceeding two years[255] and the publication of the court's decision.[256]

Finally, it shall be noted that Article 136 SSM Framework Regulation and ECB Decision 2016/1162 have not been introduced in some way into the Dutch legal order. The EU legal texts thus remain the guiding texts. It remains unknown how the FIOD-ECD, the public prosecution services (*Functioneel Parket*) and domestic Courts treat evidence that they received by the ECB through DNB, but it can be argued that, in accordance with the EU principle of equivalence, they would have to treat them in the same way as they would treat evidence gathered by DNB in internal situations.

5.4.2 The use of SSM materials by judicial authorities in the Netherlands and applicable defense rights

Let us assume that information obtained by an SSM authority, be it the ECB or another NCA, reaches Dutch judicial authorities via DNB, either on the basis of Article 136 SSM Framework Regulation or on the basis of Decision 2016/1162.[257] Does national law impose any limits on how information obtained by administrative authorities can be used by Dutch judicial authorities? And what are the applicable legal safeguards in that respect?

First of all, in internal situations, the LPP must already be observed by administrative authorities in the obtainment phase, within the parameters previously discussed (Section 3.2). The observance in the obtainment phase ensures – *inter alia* – that privileged information will not be used for the imposition of a future sanction. However, in composite SSM enforcement procedures, it may well be the case that information was obtained by the ECB on the basis of the more restricted EU-LPP and that information may now be used for the imposition of sanctions by Dutch judicial authorities. National law does not deal with those questions, it thus appears to me that information lawfully obtained in another legal order may be used in Dutch criminal proceedings.

As regards the privilege against self-incrimination, in internal situations, Dutch judicial authorities must observe the privilege against self-incrimination from the moment that a reasonable suspicion arose.[258] If (incriminating) information was obtained by administrative authorities in the phase of ongoing supervision, during which supervised persons were under an obligation to cooperate, to ensure compliance with privilege against self-incrimination, Dutch judicial authorities must exclude such will-

[251] Arnold, van Kreij and Luchtman 2020 (n 1) 549
[252] EOA, art (a)
[253] EOA, art 7 €
[254] EOA, art 7 (d)€
[255] EOA, art 7 (f)
[256] EOA, art 7 (g)
[257] Chapter III, Section 7.3
[258] Luchtman 2008 (n 104) 110; Luchtman 2007 (n 106) 157; Stevens 2005 (n 103) 127

dependent incriminating evidence.[259] Whereas, in internal situations the mechanics of the privilege against self-incrimination are in principle clear, in composite situations, it is currently not clear whether the same rules would be applicable.

5.4.3 The use of SSM materials by judicial authorities in the Netherlands and the right of access to a Court

We have already seen that information initially obtained by an SSM authority for supervisory purposes, could end up in national criminal proceedings and be used as evidence for the imposition of criminal sanctions.[260] To ensure effective fundamental rights protection, complaints raised by defendants before a criminal court concerning the lawfulness and/or the fairness of the used evidence, must logically be capable of being heard and remedied. To what extent, then, do criminal Courts in the Netherlands hear and remedy violations of rights that took place abroad, by EU or foreign administrative organs?

From the analysis in Chapter III, it follows that SSM information can end up in Dutch criminal proceedings in the following ways: a) Dutch criminal investigative authorities, like the FIOD, may utilize ECB Decision EU/2016/1162 and request from the ECB the disclosure of confidential information, for the purposes of national criminal investigations; b) the Dutch NCA may transfer criminally relevant supervisory information to national criminal investigative authorities, in accordance with the provisions stemming from national law; c) the ECB, on the basis of Article 136 SSM Framework Regulation, may transfer criminally relevant information to DNB. DNB may further transmit that information to the FIOD. Against this background, it is important to look into how the Dutch legal order deals with the admissibility of information obtained by national administrative authorities as evidence in criminal proceedings and how administrative evidence, obtained abroad, by foreign authorities, is treated by Dutch criminal Courts.

The Dutch law of evidence in the sphere of criminal law contains a *numerus clausus* of means of evidence: observations of a judge, statements by a suspect, witness statements, expert statements, and written materials.[261] As far as written materials are concerned, it is important to note that these include decisions drawn up by law by tribunals, Courts, or persons charged with the administration of justice,[262] official reports drawn up in the form prescribed by law by persons authorized to do so, including communication of facts and circumstances observed or experienced by them,[263] documents drafted by public bodies or civil servants concerning issues relating to their competence as well as documents drafted by persons in the public service of a foreign State or organization under international law.[264] This points to the fact that reports or documents drafted by EU officials or institutions, are treated in the same way as domestic documents or reports drafted by administrative authorities. Finally, written materials also include reports of expert witnesses[265] and all other written materials, but these can only be used in tandem with the content of other means of evidence.[266] Facts or circumstances that constitute common knowledge (*algemeene bekendheid*) do not need to be proven.[267]

[259] *Saunders* v *UK* App no 19187/91 (ECtHR, 17 December 1996); see also Duijkersloot, de Vries and Widdershoven 2019 (n 231) 209
[260] Chapter III, Section 8.3
[261] Dutch Code of Criminal Procedure, art 339(1)
[262] Dutch Code of Criminal Procedure, art 344(1)
[263] Dutch Code of Criminal Procedure, art 344(2)
[264] Dutch Code of Criminal Procedure, art 344(3)
[265] Dutch Code of Criminal Procedure, art 344(4)
[266] Dutch Code of Criminal Procedure, art 344(5)
[267] Dutch Code of Criminal Procedure, art 339(2)

For the purposes of the present analysis, three distinctions shall be made. In the first place, information obtained by administrative authorities, like SSM authorities, before a case became criminal in nature. For example, in the phase of ongoing supervision, the privilege against self-incrimination was not afforded, since the obligation to cooperate prevailed over the privilege against self-incrimination, and the lawfully obtained information is now used – in an unfair way – as evidence in Dutch criminal proceedings. Second, evidence unlawfully collected by the ECB or by another NCA, i.e., in violation of the right to privacy and/or the rights of the defense, and later used as evidence in Dutch criminal proceedings. Third, information obtained by the ECB or by another NCA on the basis of divergent procedural standards and later used as evidence by Dutch criminal law enforcement agencies. These three situations shall now be further discussed.

As far as the first situation is concerned, (will-dependent) incriminating statements obtained during the non-punitive leg of a national procedure, shall – according to Dutch law, be excluded from criminal proceedings and may only serve as starting information.[268] The extent to which this rule would also be applicable to composite enforcement procedure is still not clear. In other words, in situations in which the ECB or another NCA obtained incriminating information lawfully before the genesis of a reasonable suspicion, and that information was later used by Dutch judicial authorities for the imposition of a criminal sanction, in the absence of relevant case law, it is currently not clear whether Dutch Courts would exclude the unfairly used evidence.

Concerning the use in criminal proceedings of evidence obtained by an administrative authority unlawfully, in internal situations, the following is applicable: evidence obtained illegally by administrative organs is in principle admissible in criminal proceedings,[269] unless it has been obtained in a way that is extremely contrary to what can be expected from a properly acting governmental authority (*zozeer indruist* criterion). That threshold will be met if fair trial is no longer ensured, for instance due to a violation of the right of defense, or if far-reaching infringements of fundamental rights have occurred.[270]

No case law precedence exists[271] regarding the admissibility in national punitive proceedings of evidence obtained by an EU law enforcement authority unlawfully. The existent case law is concerned with the admissibility in Dutch criminal proceedings of evidence obtained unlawfully by foreign (thus not EU) administrative authorities. However, the line of reasoning of the Dutch Supreme Court in such transnational case can arguably provide guidance as to what the approach of the court would likely be in cases with an EU dimension. Against this background, the Supreme Court[272] expressed the view that concerning investigative acts conducted under the responsibility of another State's (which has acceded to the ECHR), the task of the Dutch criminal court is limited to guaranteeing that the way in which the results of this investigation in the criminal case against the suspect are used, does not infringe Article 6 ECHR.[273] The Supreme Court furthermore added that the task of the Dutch criminal court does not consist of checking whether the way in which an investigation was conducted abroad was in accordance with the relevant legal rules applicable in that foreign country.[274]

[268] Duijkersloot, de Vries and Widdershoven 2019 (n 231) 209
[269] Ibid, 210-211
[270] Opinion of Advocate General Wattel of 25 May 2014, ECLI:NL:PHR:2014:521, para. 7.18 and literature cited in paras 7.14-7.17
[271] Duijkersloot, de Vries and Widdershoven 2019 (n 231) 211
[272] Supreme Court 5 October 2010, ECLI:NL:HR:2010:BL5629
[273] Ibid, para. 4.4.1.
[274] Ibid

Translated to the SSM setting, in my view, the foregoing can be interpreted in the following way: if evidence was obtained unlawfully by an NCA and thereafter used in the Netherlands for the imposition of a criminal sanction, the review of the Dutch court will be limited to ensuring compliance with Articles 47/48(2) CFR, i.e., that the fairness of the proceedings as a whole threshold has not been jeopardized. In a similar vein, if evidence was obtained by the ECB unlawfully, Dutch criminal Courts may exclude that evidence if it is found that admission would amount to violation of the right to a fair trial.[275]

A last issue that remains to be discussed is that of the admissibility of evidence lawfully collected either by the ECB, on the basis of EU law, or by other NCAs on the basis of their national law, but such evidence has been obtained on the basis of lower standards, when compared to the Dutch (criminal) standards. A recurring example is that of LPP;[276] the Dutch LPP applies to all member of a bar association, whereas EU law and certain national laws exclude from LPP protection correspondence of a legal person with its in-house legal counsels. Dutch law and case law do not deal with the question of using evidence that was obtained abroad lawfully, yet on the basis of lower procedural standards. It has been submitted in that respect that it is highly unlikely that evidence gathered by an ELEA, on the basis of lower procedural standards, would meet the "manifestly improper" threshold.[277]

5.4.4 The SSM, Dutch judicial authorities and the *una via/ne bis in idem* principle

If Dutch judicial authorities use SSM materials as evidence for the imposition of criminal sanctions, the *ne bis in idem* prohibition may come into play. The critical questions in that respect, which are explored below, are the following: Does Dutch law regulate the *ne bis in idem* principle at the intersection between punitive administrative and criminal law enforcement? If so, besides the rules that are applicable to internal situations, are there rules in place to regulate composite interactions? How are Dutch criminal proceedings and ECB punitive administrative proceedings coordinated, so as to ensure that violations of the fundamental right will not occur?

As we have seen in Chapter III, national legislators tend to regulate the *ne bis in idem* prohibition in two ways. In single track systems, the imposition of a punitive administrative sanction bars the imposition of a criminal sanction or, inversely, the imposition of a criminal sanction blocks a subsequent punitive administrative sanction. In double-track enforcement systems, an accumulation of two responses, i.e., criminal and punitive administrative, is possible, however, the duplication of proceedings must be justified, rules ensuring coordination of the two proceedings must be in place and the severity of all of the penalties imposed is limited to what is strictly necessary.[278] The Netherlands follow the first approach.[279] Both double prosecution and double punishment are forbidden.[280]

According to the GALA, an administrative body shall not impose an administrative fine if, for the same conduct, criminal prosecution has been instituted against the offender.[281] If the conduct at issue

[275] Case C-746/18-*Prokuratuur* [2021] ECLI:EU:C:2021:152, para 44
[276] But the same considerations apply *mutatis mutandis* to all defense rights, as well as to the right to privacy.
[277] Duijkersloot, de Vries and Widdershoven 2019 (n 231)
[278] Case C-524/15 *Menci* [2018] ECLI:EU:C:2018:197, para 63
[279] See *inter alia* Benny van der Vorm, "Enkele opmerkingen over het una via-beginsel in het nieuwe Wetboek van Strafvordering" (2018) 4 Tijdschrift voor Bijzonder Strafrecht & Handhaving 218; Ton Duijkersloot, "Recente ontwikkelingen met betrekking tot het una-via beginsel" (2018) 67 Ars aequi 805
[280] Lodewijk Rogier, *Strafsancties, administratieve sancties en het una via-beginsel* (Gouda Quint 1992) 152 et seq
[281] GALA, art 5:44(1)

constitutes also a criminal offense, it has to be presented to the public prosecutor.[282] If a certain conduct has to be presented to public prosecution, the administrative authority is only enabled to impose an administrative fine if a) the public prosecutor has informed the administrative body that they will refrain from prosecuting the offender or b) the administrative authority has not received a response from the public prosecution services within a period of thirteen weeks.[283] From the foregoing, it follows that the *ne bis in idem* principle bars two prosecutions on the basis of the same facts. In assessing *idem factum,* the Courts look into the legal nature of the facts and the conduct of the suspect.[284] Finally, it is important to note that under Dutch law, the imposition of an administrative fine on a legal person and on a natural person who is the director and sole shareholder does not violate *ne bis in idem*.[285]

Furthermore, according to Article 243(2) of the Dutch Code of Criminal Procedure, if an administrative fine has been imposed on a person who is a suspect within the meaning of criminal law in respect of the same facts, or a notification within the meaning of 5:50(2) GALA has been sent to the suspect,[286] this shall have the same legal effect as a notification of non-further prosecution. Essentially, a notice of non-further prosecution means that a suspect cannot be prosecuted again in respect of the same offense, unless new objections have come to the surface.[287] Therefore, a punitive administrative fine immediately blocks further criminal prosecution for the same facts.

As it follows from the aforementioned provisions, the Netherlands follow a single-track enforcement system; a combination of a criminal sanction and of an administrative sanction for the same act is not possible. In other words, if an administrative inquiry and a criminal investigation run in parallel in relation to the same act or facts, it has to be decided whether the case will be sent to the criminal or the administrative path. This is known as the *una via* rule. The idea underpinning the *una via* rules is that to avoid that persons are unnecessarily involved twice, for the same violation, in a punitive administrative procedure and in a criminal procedure.[288] Furthermore, the *una via* principle promotes effective law enforcement, by stimulating coordination between administrative and judicial authorities.

In a number of sector specific regulations, provisions have been laid down with a view to facilitate the choice between administrative and criminal law enforcement; typically, the decisive legal criterion is the seriousness of the behavior; thus, the more serious the behavior the more likely public prosecution services will take care of the case,[289] but this is not a straightforward exercise.[290]

In the area of financial supervision, the choice between administrative or criminal enforcement is regulated by means of a covenant, which aims at preventing unauthorized overlapping of administrative and criminal sanctions in the event of certain violations of the financial supervision legislation.[291] The mechanics of the covenant are as follows. As soon as the Public Prosecution Service becomes aware – for instance by the FIOD-ECD – of facts or behavior indicating a violation of the financial supervision

[282] GALA, art 5:44(2)
[283] GALA, art 5:44(3)
[284] Supreme Court 1 February 2011, ECLI:NL:HR:2011:BM9102
[285] Trade and Industry Appeals Tribunal 7 August 2018, ECLI:NL:CBB:2018:413
[286] According to that provision, if the administrative authority, after the offender has expressed his opinion, decides that no administrative fine will be imposed for the violation, this shall be communicated to the offender in writing.
[287] Dutch Code of Criminal Procedure, art 255(1)
[288] Kamerstukken II 2003/04, 29702, no 3, 138
[289] See van der Vorm 2018 (n 279) at 2.4.1 and legislation discussed therein.
[290] *E.g.* Trade and Industry Appeals Tribunal 26 October 2017, ECLI:NL:CBB:2017:343
[291] Convenant 2009 (n 54) art 2

legislation, it shall inform the relevant supervisory authority, like DNB, with a view to coordinate the manner in which the case will be settled, unless serious criminal or privacy interests preclude such a consultation.[292] On the other hand, if DNB intends to impose an administrative sanction on the basis of the FSA, it shall inform the Public Prosecution Service.[293] Coordination between the different authorities should place as soon as possible, but in no more than six weeks, following the provision of the aforesaid information. The party that will ultimately continue the investigation and prosecution shall inform the other party about the progress of the investigation and prosecution or the imposition of an administrative sanction.[294] It is important to note that on a periodic basis, i.e., every quarter, DNB must inform the Public Prosecution Service on the administrative sanctions that it imposed.[295] The Public Prosecution Service has similar obligations vis-à-vis DNB.[296]

Generally, the Dutch *ne bis in idem* principle has been characterized as liberal.[297] Indeed, the *una via* principle is quite innovative, since it in essence imposes an obligation on the involved authorities to coordinate their actions prior to the prosecution stage, in order to ensure that *ne bis in idem* violations will be avoided. The *ne bis idem* principle offers broad protection, since it entails that the same person cannot be subject to both a criminal and punitive administrative sanction for the same facts. This is in sharp contrasts with other Member States that have opted for a system where accumulation of a punitive administrative and a criminal sanction is possible. It seems to me that the primary purpose of the *una via* rule is the timely coordination of parallel proceedings and, as a corollary, avoidance of *ne bis in idem* violations. The arrangements found in the GALA demonstrate that criminal law enforcement generally has priority over administrative law. If a certain conduct constitutes also a criminal offense, it must be presented to the public prosecution services and DNB must wait for their assessment.

What about the applicability of the aforementioned provisions to composite enforcement proceedings? The GALA only regulates internal situations. On the other hand, the Dutch penal code recognizes the force of the *res judicata* of foreign decisions. More specifically, according to Article 68(2) of the penal code, a person may not be prosecuted for an offense that has been finally settled in his case in a foreign country.[298] However, that legal provision only concerns previous criminal sanctions in the strict sense. The question therefore remains as to how DNB or Dutch judicial authorities enforcing prudential legislation should act in case a punitive administrative fine has been imposed by the ECB or by another NCA on a Dutch credit institution, given that under Dutch law a bank, as a legal person, can be subjected to criminal liability. In other words, what are the consequences of EU law enforcement for parallel or consecutive Dutch criminal proceedings? As it has been noted, in the Netherlands "these questions are not asked, let alone answered."[299]

[292] Ibid, art 2
[293] Ibid, art 3
[294] Ibid, art 5(2)
[295] Ibid, art 6(1)
[296] Ibid, art 6(3)
[297] John Vervaele, "*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU" (2013) 9 Utrecht Law Review 211, 212
[298] Dutch Criminal Code, art 68(3)
[299] John Vervaele and Michiel Luchtman, "Criminal Law Enforcement of EU Harmonised Financial Policies: The Need for a shared criminal policy" in Ferry de Jong (ed), *Overarching views of Crime and Deviancy—Rethinking the Legacy of the Utrecht School* (Eleven International Publishers 2015) 362

6. Conclusions and outlook

This chapter constitutes the first building block of the bottom-up analysis of this dissertation. I have looked into how the Netherlands regulates the interactions of DNB with the ECB, under the framework of the SSM, the tasks and the powers of the relevant authorities in which tasks with respect to the enforcement of prudential law have been vested, and the applicable legal safeguards available to supervised entities. Attention was also paid to the role of criminal law in the enforcement of prudential legislation.

Even though I will return to discussing elements of this chapter which, from a comparative perspective, deserve more attention, it is essential to pinpoint a number of overarching conclusions already. The Dutch NCA enjoys very similar information-gathering powers to the ECB. This can arguably be attributed to the fact that information-gathering, as well as sanctioning powers, have been minimally harmonized by means of the Directive CRD IV. With respect to the applicable safeguards, we have seen that the Dutch legal order provides for higher LPP and privilege against self-incrimination protection compared to the EU standards. When it comes to judicial review of final DNB decisions and the potential indirect review of preceding investigative acts that took place in a different legal order, by other authorities, the main conclusion that follows from the preceding analysis is that – as regards EU acts – Dutch Courts do not have the competence to invalidate acts of EU organs, while – as regards foreign acts – the threshold for excluding information from being used as evidence is quite high. It is therefore not really possible for an addressee of a punitive DNB decision which is the result of a composite procedure to have their right of access to a court fully guaranteed.

With respect to criminal enforcement of prudential offenses, we have seen that there is a clear link between the SSM and the Dutch system of criminal justice, as a number of substantive provisions that are laid down in the CRR and the CRD IV can be punished also through criminal law. However, the Dutch legal order can be characterized as being quite advanced when it comes to the coordination of punitive administrative and criminal proceedings, even though in internal situations coordination seems to be working optimally, it is far from clear how fundamental rights such as the privilege against self-incrimination and the *ne bis in idem* principle at the interface between EU punitive administrative and Dutch criminal proceedings can be safeguarded.

The next chapter comprises the second building block of the second part of this dissertation. In that respect, it repeats the same exercise, by studying a second legal order, namely Greece, in order to ultimately look at the EU, Dutch, and Greek legal orders, through a comparative lens, in Chapter VI

CHAPTER V: Enforcement of prudential banking legislation in Greece

1. Introduction

This chapter constitutes the second building block of the bottom-up analysis of this dissertation. The overarching question to be explored is how Greece regulates the protection of fundamental rights in the interactions of its NCA, the Bank of Greece (BoG), with the ECB, under the framework of the SSM. How is the enforcement of EU prudential legislation organized in Greece? What are the tasks and the powers of the relevant authorities and what are the applicable legal safeguards that supervised entities have at their disposal? How is judicial protection and particularly the right of access to a court dimension ensured in composite proceedings that end with a punitive sanction imposed by a Greek authority? What is the role of criminal law in the enforcement of prudential legislation?

To answer these questions, the chapter is structured in the following way: Section 2 discusses institutional aspects of the system of prudential banking law supervision and enforcement. Section 3 analyzes the obtainment of information by the Greek NCA, the Bank of Greece ("BoG"), by looking into the information-gathering powers of BoG as well as the applicable safeguards that supervisors must observe. Section 4 briefly looks into the existing mechanisms that foresee the transmissions of BoG gathered information to the ECB, as well as transmissions of SSM information by BoG to national judicial authorities. In Section 5, the use of SSM materials in Greek (punitive) administrative and criminal proceedings is scrutinized and an analysis of the applicable fundamental rights is provided.

2. Institutional design of banking supervision in Greece

2.1 Enforcement of prudential legislation: concepts, legal sources, and ongoing challenges

2.1.1 Enforcement of prudential legislation through administrative law

Before portraying the picture of the enforcement of prudential legislation in Greece, it is important to mention at the outset that the Greek legal order is – in principle – monist. According to Article 28(1) of the Constitution (*Σύνταγμα*), international conventions and rules of international law are an integral part of domestic law and shall prevail over any contrary domestic legal provision. As it can be seen, while the Constitution clearly stipulates that international law has precedence over national statutory law, at the same time, it is does not undeniably state that international law has precedence also over Constitutional provisions.

Prudential legislation in Greece is enforced by the BoG by means of administrative law. Greek administrative law is not as systematized[1] as Dutch administrative law is, in the sense that there is no General Administrative Law Act in force, to provide for general rules that are applicable to all administrative procedures and administrative organs. It has been argued that the lack of codification can be attributed, on the one hand, to the need to constantly adapt administrative rules, which regulate very often changing issues and relationships and, on the other hand, to the wide variety of themes that

[1] Christina Akrivopoulou and Charalambos Anthopoulos, *Eisagogi sto Dioikitiko Dikaio* (Seav 2015) 21

administrative law governs.[2] Nevertheless, important elements of administrative law have been codified over the last few years, such as the code of administrative procedure (*kodikas dioikitikis diadikasias*).[3]

The most significant legal source for the purposes of this chapter is the legal act that transposes the CRD IV (hereafter referred to as the "Prudential Supervision Act" or "Act").[4] In addition to the Prudential Supervision Act, important sources[5] of Greek administrative law are the Constitution, legislative acts, regulatory acts which are issued by administrative authorities, in the case law of the Council of the State, in general principles, in administrative custom, in EU law and international law. The principles of supremacy and of the effectiveness of EU law play a pivotal role, too.[6]As a general remark, the implementation of the CRD IV into Greek law does not deviate to a significant extent from the wording of the EU text, but in certain instances it goes beyond the Directive's minimum standards. For instance, the Act contains some additional provisions concerning the criminalization of the obstruction of supervision.

While it is well established that the imposition of sanctions by administrative authorities should respect the procedural guarantees afforded by Article 20 of the Constitution, i.e., the right to a prior hearing and the right to legal protection, as well as substantive guarantees, the most important being the principle of proportionality,[7] in the Greek legal order, the concept of a punitive administrative sanctions is a rather problematic one. According to administrative law theorists,[8] fines, and pecuniary penalties adopted by the administration constitute a specific category of punitive administrative acts. The question as to the legal nature of such acts, namely whether they are criminal in nature or not, and – as a consequence – whether criminal law safeguards should be afforded in such proceedings or not, has arisen in academia and in case law as early as in 1951. A group of academics argues that administrative offenses lack the basic legal features of a criminal offense and subsequently of the concept of the crime. Therefore, according to one view, the imposition of pecuniary sanctions for the repression of such offenses falls within the sphere of administrative action and justice.[9] In short, the main argument underpinning this idea is that in the case of a criminal offense, the forbidden act is perceived as a disturbance of the conditions for maintaining and promoting an orderly society, while in the case of an administrative offense, the unfair nature of the act lays in that it disrupts the proper functioning of public administration and administrative justice.

In addition to the foregoing, it has been noted that while administrative offenses very often contain important legal features of a criminal offense, namely a wrongful act and imputation of the wrongful act to a person, an administrative offense oftentimes lacks a specific provision for punishment, which constitutes the third legal feature of a criminal offense. A specific provision for punishment is a manifestation of the constitutional principle of *nullum crimen nulla poene sine lege* (Article 7 of the Greek Constitution), which was adopted to protect individuals from arbitrary interferences in the enforcement of criminal law by law enforcement authorities.[10] In the sphere of administrative law and

[2] Evgenia Prevedourou, "I archi tis nomimotitas" in Theodora Antoniou (ed*), Genikes arches dimosiou dikaiou* (Nomiki Vivliothiki 2014) 146
[3] Law 2690/1999 (Government Gazette 45/A/9-3-1999)
[4] Law 4261/2014 (Government Gazette 107/A/5-5-2014)
[5] Spyridon Flogaitis, "Eisagogi sto dioikitiko dikaio" in Apostolos Gerontas, Sotiris Lytras, Prokopis Pavlopoulos, Spyridon Flogaitis, (eds), *Dioikitiko Dikaio* (Sakkoulas 2018) 46 et seq
[6] See *inter alia* Supreme Court 803/2020 Nomos 789435
[7] Ioannis Dimitrakopoulos, *Dioikitikes Kyroseis kai Themeliodi Dikaiomata* (Nomiki Bibliothiki 2014)
[8] See eg, Prodromos Dagtoglou, *Geniko Dioikitiko Dikaio* (Sakkoulas 2015)
[9] See *inter alia* Michael Stasinopoulos, "O alithis charactir ton dioikitikon poinwn" (1950) Arxeio Nomogolias I, 89-91; Georgios Magakis, "To provlima toy oikonomikou poinikou dikaiou" (1958) Poinika Xronika 465
[10] D Papanikolaides, *Ennoia kai nomikos charactiras ton dioikitikon poinwn* (Sakkoulas 1975)

action, it is often the case that legal provisions do not foresee a specific punishment and the administration enjoys wide discretion in setting a penalty. That is precisely why – according to that view – punitive administrative sanctions cannot be equated with criminal sanctions. This view, namely that punitive administrative sanctions are not criminal in nature was for a long time followed also by the Council of the State.

The Greek Council of the State has persistently and for many decades avoided applying the *Engel/Bonda* criteria to administrative fines.[11] However, over the past five years, the Council of the State is gradually aligning itself to the jurisprudence of the ECtHR. Lately, in a number of tax and customs related cases, the Council of the State – citing the reasoning of the ECtHR – classifies "serious administrative penalties, such as very high fines as criminal in nature, if the *Engel* criteria for classifying a case as an offense of a criminal nature are met."[12] In the area of national competition law enforcement, the Council of the State has also recognized that competition proceedings constitute proceedings that may lead to the imposition of fines that are criminal nature, in light of the *Engel* criteria.[13]

From the foregoing discussion it becomes evident that the application of the *Engel* criteria in the Greek legal order and, as a corollary, the interpretation of the notion of punitive administrative proceedings is not as clear cut, as is the case in the Netherlands.[14] There exists a strict separation between administrative and criminal procedure and the classification of an offense as administrative or criminal adheres to the letter of the law. This is not problematic *per se*, but it can become problematic insofar as the guarantees afforded in the determination of criminal offenses *stricto sensu* are not afforded in administrative proceedings that can lead to the imposition of punitive sanctions. In addition, assessing on a case-by-case basis whether a particular sanction is criminal in nature is problematic for the viewpoint of legal certainty.

Up until the moment of writing, the Greek Courts have not had the chance to rule on whether banking supervision proceedings leading to an imposition of a punitive sanction are to be considered as criminal in nature. Nevertheless, it can be presumed that the BoG and the Council of the State will not qualify all fines as punitive given that – so far – the Council of the State has qualified as punitive only very high administrative fines. This, of course, seems somewhat problematic, because one of the relevant issues in deciding whether the *Engel* criteria are applicable or not, is the maximum amount that an authority can potentially impose on the economic undertaking, as laid down in the law, and not the

[11] In a decision published in 2011, the Council of the State even questions the applicability of the *Engel* criteria in administrative sanctions: "it is obvious [*emphasis added*] that for the ECtHR, the system that the constitutional and statutory Greek lawmaker had in mind cannot work. There should be a new system in which all penalties, both administrative and criminal, are imposed by one court. But this is not permissible under the Greek Constitution, given that according to the Constitution, administrative courts have sole jurisdiction to resolve administrative disputes and criminal courts criminal disputes, however not in the meaning given by the ECtHR, but in fact in the meaning given by the Greek legal order. (…) Furthermore, since the express wording of Article 4 (1) of the 7th Protocol to the ECHR refers to "criminal" conviction and prosecution and to "criminal proceedings" of the States, by adhering to it and aiming at the letter of the law, Greece could not have imagined that through a constantly evolving ECtHR case law, it assumed international commitments contrary to its well-established legal traditions and to the Constitution itself (...)." The Court concluded by stating that the evolving jurisprudence of the ECtHR in essence deprives Greek administrative and criminal courts from their obligation to adjudicate on the administrative or criminal disputes that the Constitution has entrusted them with, which does not perceive the relevant terms in the way the ECtHR perceives them. Although the ECHR and its protocols have in Greek law, like any international convention, precedence over statutory law (*ypernomothetiki ischi*), the Constitution does not state nor does it imply that international conventions have precedence over the Constitution, Council of the State 2067/2011, Nomos 553760, paras 10 and 11

[12] See *inter alia* Council of the State 39/2018, Nomos 718605; Council of the State 3473/2017, Nomos 719555

[13] Council of the State 2007/2013, Nomos 604581, para 4

[14] Chapter IV, Section 2.1

amount that is actually imposed. By way of example, the Bank of Greece has the power to impose pecuniary administrative penalties of up to 10% of the bank's total annual net turnover;[15] for natural persons, it is empowered to impose administrative pecuniary penalties of up to EUR 5 million.[16] The fact that the supervisor decides to impose a penalty of – for instance – EUR 5000 on a natural person instead of the maximum, does not take away the punitive character of the proceedings.

2.1.2 Enforcement of prudential legislation through criminal law

To date, in contrast with what we saw in the Netherlands,[17] there is no specialized regime dealing with the enforcement of prudential legislation through criminal law. That is not to say that criminal law plays no role at all, but rather that if a natural person breaches prudential legislation, provisions of the general penal code (*poinikos kodikas*),[18] such as disloyalty of bank executives (*apistia trapezikon steleghon*),[19] forgery of documents (*plastografia*)[20] and fraud (*apati*),[21] in case – for instance – a natural person has intentionally provided false statements for the purposes of obtaining a bank authorization,[22] could be triggered. The fact that criminal law does play a role, is also evidenced by the fact that the legal provision in the Prudential Supervision Act, which lays down the BoG's powers to impose administrative sanctions, mentions that these powers are "without prejudice to criminal law."[23] However, special laws specifically dealing with the criminal enforcement of prudential offenses, like the Economic Offenses Act in the Netherlands, do not exist.

It is worth noting that under Greek law only natural persons can be subject to criminal liability. There are currently no rules in place that coordinate criminal and administrative prosecution of natural persons for the same offense or facts, even though it has been argued that an administrative authority may, but not must, "postpone the sanctioning procedure, by a specifically justified decision in order to wait of the results of a pending criminal trial,"[24] but that seems to be the exception rather than the rule.

Now that it has been explained that violations of prudential norms are mostly enforced through administrative and to a much lesser extent through criminal law, the next sections look into the relevant authorities that are responsible for enforcement of prudential legislation, as well as their relationship with the ECB.

2.2 The Bank of Greece

2.2.1 Introduction

The Greek national competent authority within the framework of the SSM is the Bank of Greece ("BoG"). The BoG was established in 1927 and commenced its operations in 1928. Concerning its legal status, the Greek NCA was incorporated as a société anonyme ("SA"). However, the Council of the

[15] Prudential Supervision Act, art 58(2)(c)
[16] Prudential Supervision Act, art 58(2)(d)
[17] Chapter IV, Section 2.1
[18] Law 4619/2019 (Government Gazette 95/A/11-6-2019)
[19] Greek Penal Code, art 405
[20] Greek Penal Code, art 215
[21] Greek Penal Code, art 386
[22] Prudential Supervision Act, art 59(a)
[23] Prudential Supervision Act, art 57(1)
[24] Anna Damaskou and Ioannis Rodopoulos, "Greece", in Silvia Allegrezza (ed), *The enforcement dimension of the Single Supervisory Mechanism* (Wolters Kluwer 2020) 336

State (StE) has developed a consistent line of case law[25] whereby it has classified the BoG as a legal person of "a dual nature" (*nomiko prosopon difyous charactira*). That means that, in terms of its banking activities and its relations with its employees and customers, the NCA is considered to be a legal person governed by *private* law and therefore all relevant disputes are brought before the civil Courts.[26] On the other hand, as regards the management of the foreign exchange, prudential supervision over banks, its mandate of ensuring financial stability and of enhancing public confidence in the financial system, the BoG is considered to be a legal person governed by public law. Therefore, disputes pertaining to such issues are governed by administrative law and are dealt with by administrative justice. According to the Council of the State, in the latter case, the BoG exercises public policy and public tasks.[27] As a consequence, the (executive) acts adopted by the Governor of the BoG or the bodies which the Governor has authorized for purposes of prudential supervision are enforceable administrative acts and can be challenged only by means of a so-called "cancellation request" (*aitisi akiroseos*), namely a specific type remedy by means of which persons can contest an administrative act directly before the Council of the State.[28]

As an SA, the BoG issues shares, which are registered.[29] The Greek State as well as public enterprises, cannot, directly or indirectly, hold shares of the BoG amounting to more than 35% of the nominal value of the issued share capital. In addition, supervised entities, members of the Board of Directors or companies affiliated to these persons cannot hold any shares.[30]

2.2.2 BoG mandate, tasks and governance arrangements

The mandate and the powers of the BoG are laid down in the Statute of the BoG.[31] The statute was ratified by law in 1927 and since then, it has undergone several amendments. The most noteworthy amendment is that of 2000, which was aimed at harmonizing the statute with the Member State's participation in the monetary Union and with the adoption of the euro as its new currency. In that respect, a pivotal amendment was a clause which stipulates that after the adoption of the euro, the BoG shall be an integral part of the ESCB and shall therefore act in accordance with the guidelines and instructions given to it by the ECB.[32]

The primary objective of the BoG is to ensure price stability,[33] an objective of monetary policy.[34] In addition to that, the BoG is responsible for exercising prudential supervision over credit institutions, insurance companies and other types of institutions, such as bureaux de change and financial leasing companies.[35] The scope and content of prudential supervision for each category of institutions or organizations is further specified by means of statutory law.

As far as the prudential supervision over credit institutions is concerned, the more specific legal instrument is the Prudential Supervision Act.[36] That piece of legislation stipulates that prudential supervision carried out by the BoG aims at ensuring credit institutions' solvency, adequate liquidity,

[25] Eg, Council of the State 2080/1987, Nomos 44370
[26] Supreme Court 19/2013, Nomos, 605898
[27] Ibid, para 9
[28] See Prokopis Pavlopoulos, *I syntagmatiki katochirosi tis aitiseos akiroseos* (Sakkoulas 1982)
[29] Article 8, BoG Statute
[30] Ibid
[31] Law 3424/1927 (Government Gazette A/298/7-12-1927)
[32] BoG Statute, art 2, para 2
[33] BoG Statute, art 2(a) and 4(1)
[34] Milton Friedman, "The Role of Monetary Policy" (1968) 58 The American Economic Review 1
[35] BoG Statute, art 2(d) and 55A
[36] Law 4261/2014 (n 4) accessible in English < https://www.bankofgreece.gr/BogDocumentEn/LAW_4261_OF_2014.pdf> accessed 9 April 2021

compliance with the EU capital requirements framework, and smooth and transparent operation of credit institutions.[37] It is worth mentioning that, as far as credit institutions are concerned, the BoG is also the competent authority for ensuring compliance with the national legislation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.[38]

In the context of the SSM, BoG staff members partake in joint supervisory teams[39] and in on-site inspection teams.[40] Furthermore, the BoG prepares draft decision for the ECB in respect of significant credit institutions,[41] assists in verification activities and the day-to-day assessment of the situation of a significant bank[42] and assists the ECB in enforcing its decisions.[43] The BoG may also open sanctioning proceeds, in accordance with national law, upon the ECB's request.[44]

When performing their tasks, the BoG and members of its decision-making bodies should be independent, in the sense that they should not seek or take instructions for the government or the industry.[45] The Statute of the BoG establishes numerous decision-making bodies with various responsibilities, namely the General Meeting of its shareholders,[46] the General Council,[47] the Executive Committee,[48] the Monetary Policy Council,[49] the Governor and Deputy Governors,[50] the Credit and Insurance Committee,[51] and the Resolution Measures Committee.[52] In this section, I only focus on those bodies whose tasks relate to prudential supervision.

The ultimate decision-making body of the BoG is the General Meetings of the Shareholders.[53] It holds an annual General Meeting,[54] but it may also hold extraordinary meetings if the circumstances so require.[55]

The second decision-making body, which is responsible for running the day-to-day matters of the BoG is the General Council.[56] It is composed of the Governor of the BoG, two Deputy Governors, the members of the Monetary Policy Council, and six Councillors.[57] Members of the Parliament and the government, civil servants and employees of public institutions, and employees of other banks cannot

[37] Prudential Supervision Act, art 4(2)
[38] Law 4557/2018 (Government Gazzette A/139/30-7-2018), art 6(1)(a)(aa); the BoG's mandate as regards money laundering is to ascertain that the supervised banks have in place mechanisms to prevent money laundering. Having said that, the BoG does not have any powers of judicial nature-it may only impose administrative measures and sanctions for failures to put in place the organizational framework for detecting suspicious transactions. Criminal investigations and potential prosecution for money laundering offences belongs to the sphere of the activities of public prosecution services, in accordance with the code of criminal procedure.
[39] SSM Framework Regulation, art 4
[40] SSM Framework Regulation, art 144
[41] SSM Framework Regulation, art 90(1)(a) and 91
[42] SSM Framework Regulation, art 90(1)(b)
[43] SSM Framework Regulation, art 90(1)(c); SSM Regulation, art 12(5)
[44] SSM Regulation, art 18(5)
[45] BoG Statute, art 5A
[46] BoG Statute, arts 11-19
[47] BoG Statute, arts 20-27
[48] BoG Statute, arts 28 and 55A
[49] BoG Statute, art 35A
[50] BoG Statue, arts 29-35
[51] BoG Statute, art 55A; PEE 4/08-01-2013; Act of the Executive Committee of the BoG 1/20-12-2012
[52] Bank of Greece, "Resolution Measures Committee" < https://www.bankofgreece.gr/en/the-bank/organisation/resolution-measures-committee> accessed 23 January 2022
[53] BoG Statute, art 11
[54] BoG Statute, art 12(a)
[55] BoG Statute, art 12(b)
[56] BoG Statute, art 20
[57] BoG Statute, art 21

be elected as Councillors.[58] The General Council is empowered to take all decisions and exercise the powers that are not specifically granted by the Statute to the General Meeting of Shareholders or to the Monetary Policy Council.[59]

The third decision-making organ is the Executive Committee, which is composed of the Governor and by the Deputy Governors. Every year, the General Council appoints three persons who should not be members of the Executive Committee. Their task consists of monitoring how the Executive Committee performs its tasks.[60] The Executive Committee of the BoG is the decision-making body as regards the imposition of sanctions for violation of the prudential supervisory legal framework. Such sanctioning decisions are imposed by acts (final decisions) of the Executive Committee or organs empowered by it to that effect.[61]

The Credit and Insurance Committee ("EPATH") is not mentioned in the statute. It was re-established by means of an act of the Executive Committee. The main tasks of the Credit and Insurance Committee of the BoG revolve around issuing regulatory acts and individual decisions of the BoG, in particular those relating to the establishment and conditions for the operation of credit and financial institutions, payment institutions, and private insurance companies, as well as the adoption of measures and the imposition of sanctions and pecuniary fines vis-à-vis the supervised legal persons, but also vis-à-vis natural persons.[62]

2.3 Judicial authorities responsible for the investigation and prosecution of economic crime

While national law foresees the operation of an economic prosecutor specifically committed to the prosecution of economic crime (*eisaggeleas oikonomikoy eglimatos*), no specialized judicial authorities exist which are specifically responsible for the criminal investigation or prosecution of *prudential* offenses. The economic prosecutor is responsible for the prosecution of customs, tax, or financial offenses committed against the financial interests of the EU, the Greek State, the local administration, and legal entities of public law.[63] That said, the economic prosecutor would only be competent for crimes that are peripherally related to banking supervision, such as tax offenses. One must be reminded that, unlike the Netherlands, under Greek law there is no specialized criminal law regime for the prudential offenses, on which this dissertation focuses. If deemed necessary, these prudential offenses can be investigated and prosecuted by the non-specialized bodies that are foreseen in the code of criminal procedure, such as the investigative magistrate (*anakritis*) on the investigation side[64] and the public prosecutor on the prosecution side.[65]

As the (non-specialized) public prosecutor is the body that generally receives intelligence and/or reports and thereafter – if he or she deems necessary – can request an investigating magistrate to initiate preliminary investigations,[66] it is presumed that, for the purposes of Article 136 SSM Framework Regulation, the "competent" authority according to Greek law would be the (general) public prosecutor. The same goes for ECB Decision (EU) 2016/1162 on the disclosure of confidential information in the context of criminal investigations. However, neither Article 136 SSM Framework Regulation nor ECB

[58] BoG Statute, art 22
[59] BoG Statute art 20
[60] BoG Statute, art 28
[61] BoG Statute, art 55A
[62] Act of the Executive Committee of the BoG 4/8-1-2013
[63] Law 3943/2011 (Government Gazette A/66/31-03-2011); Greek Code of Criminal Procedure, art 33
[64] Greek Code of Criminal Procedure, art 31
[65] Greek Code of Criminal Procedure, art 43
[66] Greek Code of Criminal Procedure, art 43

Decision EU/2016/1162 have, up until the moment of writing, been incorporated in national law. It may thus only be presumed that, logically, the public prosecutor is the relevant judicial authority for the purposes of initiating the investigation and potential prosecution of prudential offenses. If, on the other hand, the information transmitted by the ECB to the BoG pursuant to Article 136 of the SSM Framework Regulation concerns offenses that fall under the competence of the economic public prosecutor, I believe that in that case the "competent authority" for the purposes of Article 136 SSM Framework Regulation would be the economic public prosecutor.

3. The obtainment of information by the BoG

3.1 Introduction

BoG gathers information in its capacity as the prudential supervisor over LSIs, but also in its capacity as the ECB's assistant.[67] It is important to note in that respect that, unlike the Netherlands, which has introduced specific national legislation to facilitate cooperation of their NCA with the ECB and to place the ECB on an equal footing with DNB, to date, the Greek legislator has not made similar arrangements. That is so because it is generally perceived that the SSM Regulation, which anyway takes precedence over national law, constitutes a sound legal basis for the cooperation between the ECB and BoG and grants to the ECB all investigative powers anyway. It goes without saying that BoG can make use of its investigative powers for tasks conferred on it under national law which fall outside the scope of the ECB's direct supervision under the SSM system.

In its day-to-day work, the BoG distinguishes between "on-site" and "off-site" supervision. The on-site teams carry out on-site inspections, which are then summarized and forwarded to the "off-site" units. However, neither of those two units is a decision-making body. Any information gathered on-site and/or off-site is subsequently transmitted to the decision-making bodies. On the one hand, the Executive Committee typically adopts decisions of a more general application, i.e., addressed to the entire banking sector, while the Credit and Insurance Committee typically adopts individual decisions, such as administrative sanctions or measures.

The BoG is entrusted with all the information-gathering powers that the ECB and DNB have at their disposal. Below, I shall look at these in order and discuss the applicable legal safeguards.

3.2 Information requests, oral statements and applicable defense rights

The Greek NCA is empowered to monitor and assess banks compliance on an ongoing basis by requiring banks to provide information, report data, and provide written explanations on request.[68] In addition, according to Article 57 of the Prudential Supervision Act, for the exercise of its functions, the BoG shall gather information, conduct inspections, and investigations. To that end, it is enabled to request from natural or legal persons to provide all information that is necessary in order to carry out its tasks.[69] Furthermore, the Greek NCA can request from credit institutions established or located in Greece to submit documents,[70] it is empowered to examine books and records,[71] obtain written or oral

[67] Case T-122/15 *Landeskreditbank Baden-Württemberg — Förderbank* v *ECB* [2017] ECLI:EU:T:2017:337, para 72
[68] Prudential Supervision Act, art 4(3)
[69] Prudential Supervision Act, art 4(3)
[70] Prudential Supervision Act, art 57(3)(b)(aa)
[71] Prudential Supervision Act, art 57(3)(b)(bb)

explanations from any legal persons, their representative or staff[72] and interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.[73]

Information may be requested by the BoG – in accordance with national law – for the purposes of the BoG's task concerning the supervision of LSIs. Alternatively, the BoG is enabled to request information from significant credit institutions in its capacity as the assistant of the ECB. For instance, this would be the case when the ECB requests from BoG to carry out on-site verification activities and assess the day-to-day situation of a significant supervised entity,[74] or when the ECB's IIU would require the Greek NCA, by way of instructions, to make use of its investigatory powers under national law.[75]

There is no legal instrument specifying how the aforementioned powers are further operationalized, however general principles of administrative law, such as the principles of legality, proportionality, legal certainty, and legitimate expectations must always be observed when administrative authorities exercise their powers.[76] In practice, the BoG tends to request documents by a simple request, unless a formal investigation has been initiated, in which case information is requested on the basis of a "command-for-inspection" decision (*entoli eleghou*), specifying the subject matter of the investigation. The supervised credit institutions, natural persons, legal entities, or other market participants may not invoke banking or other secrecy when reporting to the BoG data and information which is necessary for the BoG to perform its supervisory tasks.[77]

In requesting information and in carrying out on-site inspections, the observance of the LPP is pivotal. That is so because requested documents (and/or documents that on-site inspections teams find at business premises) may be covered by LPP. Moreover, it is possible that information obtained in the course of ongoing supervision on the basis of the aforementioned powers, may at a later phase fall within the protective scope of the privilege against self-incrimination. Against the foregoing, the scope of LPP and of the privilege against self-incrimination in relation to the BoG's information-gathering powers are discussed below.

Legal Professional Privilege

LPP is laid down in a number of legal texts, but it also stems from general constitutional principles, most important the right to legal protection.[78] It has also been argued that LPP flows from Article 9 of the Constitution which lays down the confidentiality of letters and of communication.[79] According to the prevailing view, the legal interest protected by LPP is the right of every person to have and maintain secret events of both his private and public life, which is an expression of his so-called "personality rights" (*dikaioma stin prosopikotita*),[80] while it has also been argued that the legal interest protected by LPP provisions is the trust between the lawyer and his client, which is the cornerstone of the existence

[72] Prudential Supervision Act, art 57(3)(b)(cc)
[73] Prudential Supervision Act, art 57(3)(b)(dd)
[74] SSM Framework Regulation, art 90(1)(b)
[75] European Central Bank, "SSM Supervisory Manual" (2018) 102 < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?42da4200dd38971a82c2d15b9ebc0e65> accessed 3 September 2021
[76] Prevedourou 2014 (n 2)
[77] BoG Statute, art 55C
[78] Greek Constitution, art 20(1)
[79] See *inter alia* Panagiotis Philopoulos, *Poiniki Prostasia Aporritoy* (Sakkoulas 2015)
[80] Elisavet Simeonidou-Kastanidou, *I paraviasi tis epaggelmatikis ehemithias apo ton dikigoro* (Nomiki Bibliothiki 2003) 732

of the legal profession.[81] Additional LPP provisions are contained in hierarchically lower texts, such as the Lawyers' Code (*Kodikas Dikigoron*),[82] which constitutes statutory law.

A lawyer – and in that definition, in-house lawyers are also included – is obliged to maintain confidentiality with everything which his client has entrusted him.[83] Greek law does not, therefore, differentiate between in-house and external legal councels. Violation of professional secrecy constitutes a criminal offense; according to Article 371 of the Penal Code,[84] lawyers shall be punished either with a fine or with imprisonment of up to one year if they reveal secrets that their clients entrusted to them or secrets of which they became aware by virtue of their professional capacity. Finally, Greek law contains a prohibition of seizing documents from a lawyer's home; for as long as a lawyer is handling a case, law enforcement authorities are precluded from searching for and seizing documents, electronic storage means, and other items related to the pending case.[85]

LPP is not absolute and can, under exceptional circumstances, be limited. For instance, the act of revealing a client's secret is not punishable if the lawyer in question sought to preserve another legal duty, which prevails over the general obligation of professional secrecy.[86] However, it is unlikely that the legal interests that banking supervision aims at, would prevail over the general obligation of professional secrecy. Up until the memoment of writing,[87] there are no jurisprudential precedents dealing with legal professional privilege in administrative enforcement. In my view, this remarkable lack of case law can be attributed to the very strong protection that the LPP enjoys in the Greek legal order.

Privilege against self-incrimination

The power to request information and oral explanations may clash with the privilege against self-incrimination, particularly in view of the fact that supervised persons are generally under a duty to cooperate. As discussed earlier in this chapter (Section 2.1), the notion of punitive administrative proceedings is not (yet) deeply rooted in the Greek legal order. The reluctance of the Courts and the legislature to qualify certain administrative sanctions as criminal in nature means that, in principle, the privilege against self-incrimination is not recognized in Greek administrative law. In certain occasions, the right has been waived by persons subjected to administrative investigations and that is the reason why there exists – albeit scarce – case law dealing with this issue, which I shall discuss below. Given, therefore, the absence of a general privilege against self-incrimination provision in administrative law, the below section first discusses how the right is traditionally perceived in *stricto sensu* criminal law. Second, I delve into relevant case law originating from the enforcement of national competition, tax and customs law, with the aim of providing a synopsis of the current content of the privilege against self-incrimination in punitive administrative proceedings.

The privilege against self-incrimination constitutes a fundamental principle of criminal procedure. As such, it is enshrined in the Code of Criminal Procedure (GCCP). According to the relevant provision,[88]

[81] Aggelos Konstantinides, "Kathikon alithias, epaggelmatiko aporrito kai idiotikes ereunes tou sinigorou" (1997) 1 Poinika Xronika 619
[82] Law N. 4137/2013 (Government Gazette 208/A/27-9-2013) ("Lawyers' Code")
[83] Ibid, art 38; see also Supreme Court 1636/2012, Nomos 587404
[84] This provision also applies to clerks, doctors, midwives, nurses, pharmacists.
[85] Lawyers' Code, art 39
[86] Greek Criminal Code, art 371(3)
[87] After having conducted a search in the legal database "Nomos" on February 8th 2022
[88] Greek Code of Criminal Procedure, art 103A(1)

the suspect or the accused has the right to silence and the right not to incriminate himself. In addition, the same provision specifies that the exercise of the right to non-self-incrimination does not prevent the lawful gathering of evidence which exists independently of the will of the suspect or the defendant.[89] In addition, the provision explicitly refers to *lawfully* obtained evidence. Evidence existing independent of the suspect's will which was obtained unlawfully is still subjected to the exclusionary rules that the Greek law of evidence prescribes. Finally, the code of criminal procedure clarifies that the privilege against self-incrimination shall not be used for drawing adverse inferences against the suspect or the defendant.[90]

As regards the application of the privilege against self-incrimination in punitive administrative law, as already explained, the Council of the State only exceptionally recognizes the need for the application of traditional safeguards of criminal procedure in the field of punitive administrative sanctions. The assessment of whether a certain administrative fine is criminal in nature, in light of the Engel/Bonda criteria, is thus made on a case-by-case basis.

In a customs-related case, the question arose as to whether oral statements provided by a person in the course of non-punitive administrative proceedings could be used as evidence in subsequent punitive proceedings and whether such a use would infringe on the privilege against self-incrimination. With reference to the *Saunders* case, the Council of the State argued that, in deciding whether such information can be used in evidence, it must first be ascertained whether the information was obtained through the use of direct or indirect compulsion.[91] If information was not obtained through the use of compulsion and the person provided the statements on a voluntary basis, then the privilege against self-incrimination is not infringed.[92] It can therefore be deduced that, in the context of banking supervision, if such a right were to be recognized, it would only cover will-dependent information obtained under compulsion.

In another judgment related to tax proceedings, the key issue was the imposition of fines on the basis of information voluntarily provided to tax authorities in the course of an on-the-spot check and consequences thereof for the privilege against self-incrimination. The Council of the State responded that, as a general principle, persons subjected to tax inspections are under an obligation to disclose the requested information. While a taxpayer may exceptionally refuse, wholly or partially, the fulfillment of their obligation to cooperate, by relying on an overriding right, such as the right not to incriminate oneself, in any case, a refusal or omission on the taxpayer's part to provide the requested information or his inability to justify the amounts in question in his bank account, are facts that are taken into account in the assessment by the tax authority or, in case of an appeal, by the administrative court. The refusal to disclose requested information may lead the Court or the enforcement authority to infer from this silence the existence of an inaccuracy in the tax declaration which corresponds to tax evasion.[93] It is interesting that in justifying this articulation, the Council of the State cited paragraph 47 of the *John Murray* v *UK* case.[94] In my view this articulation is striking, seeing that the right to remain silent and

[89] Greek Code of Criminal Procedure, art 103A(2)
[90] Greek Code of Criminal Procedure, art 103(A)(3)
[91] Council of the State 689/2009, Nomos 482477
[92] Ibid, para 9
[93] Council of the State 884/2016, Nomos 670319, para 7
[94] *John Murray* v *United Kingdom* App no 18731/91 (ECtHR 8 February 1996); paragraph 47 reads: "On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the

the privilege against self-incrimination, by their very nature, encompass the idea that a Court must not draw adverse inferences based on the fact that the person at issue refused to answer questions. In the *John Murray* v *UK* case, which was cited by the Greek Council of the State, the ECtHR had explained that drawing adverse inferences was not problematic, but only insofar as proper safeguards were put in place, *inter alia*,[95] if the authorities had informed the suspect that adverse inferences could follow from the refusal to answer questions. However, this does not happen in the course of administrative procedure in the Greek legal order.

In the field of competition law enforcement, the Administrative Court of Appeals has explained that "the privilege against self-incrimination must be interpreted as meaning that economic undertakings cannot be required to admit that they have committed an infringement."[96] This articulation suggests that Greek Courts may be willing to follow the *Orkem* standard.[97] In 2009 – with reference to the *Orkem* and *Solvay* judgments – the Administrative Court of Appeals argued that while the privilege against self-incrimination aims at safeguarding the companies' rights of defense during the preliminary investigation [by the competition authority], it does not in any way restrict the Hellenic Competition Commission's investigating powers, particularly in view of the fact that the questions referred to by the applicant did not oblige the undertaking to confess participation in an unlawful agreement, but rather concerned the clarification of factual events.[98] From the foregoing, it follows that the Court indirectly recognized that economic undertakings are entitled to the protection developed by the CJEU in the *Orkem* judgment.

3.3 On-site inspections and the right to privacy

The BoG is empowered to carry out on-site inspections at the business premises of banks.[99] The right of the inviolability of the home is at this stage relevant. As a general remark, the right to privacy is enshrined in the Greek Constitution. According to Article 9 of the Constitution, every person's home "*is a sanctuary*" and private and family life of individuals is inviolable.[100] For that reason, no home search shall be made, except when and as specified by law and "*always in the presence of representatives of the judicial power*."[101] At first sight, this articulation appears quite restrictive, since the letter of the law requires presence of the judicial power *always*. However, in practice searches

accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.
Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative.
It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, as the Government have pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point.
Whether the drawing of adverse inferences from an accused's silence infringes Article 6 (art. 6) is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation."

[95] Ibid, para 51. See also David John Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (OUP 2009) 261
[96] Athens Administrative Court of Appeals 15/2010, Nomos 552165, para 8
[97] Case 374/87 *Orkem* v *Commission of the European Communities* [1989] ECLI:EU:C:1989:387
[98] Athens Administrative Court of Appeals 2410/2009, Nomos 563454, para 8
[99] Prudential Supervision Act, arts 4(3) and 57(3)(b)(dd)
[100] Greek Constitution, art 9(1)
[101] Greek Constitution, art 9(2)

carried out in the course of administrative inspections and controls do not require – as a general rule – the presence of the judicial power.[102]

Concerning the BoG's decision to carry out on-site inspections, the Prudential Supervision Act does not explicitly require the adoption of a formal decision before the performance of the inspection. However, it follows both from the general principles of administrative law and from practice, that before carrying out such an inspection, the BoG adopts a "command for an inspection" (*εντολή ελέγχου*). This decision specifies the subject matter and the scope of the envisaged inspection. It is worth noting that a "command for an inspection" is not an appealable act, as it does not produce legal effects (*μη εκτελεστή πράξη*). However, its compliance with Article 7 CFR/ 8 ECHR can be assessed by a Court *ex post*. There is no threshold or reasonable suspicion that has to be met before an administrative authority – and thus the BoG too – can carry out an inspection.[103]

In administrative law enforcement *ex ante* judicial authorization for the performance of an on-the-spot check is in principle not necessary. According to the Prudential Supervision Act, if senior managements or members of the Board of Directors or auditors or the employees of a supervised credit institution refuse or impede in any way the supervision conducted by the BoG, they may be punished with imprisonment of at least three months.[104] This provision suggests that the supervised entities as well as the natural persons working for them are under a duty to cooperate and provide all information requested by the supervisor. If they refuse to do so, they can be subjected to criminal liability. During the on-site inspection, inspectors can request, read, and take copies of any document they ask,[105] without prejudice – of course – to the legal professional privilege. Furthermore, they can obtain written or oral explanations[106] and interview employees on a voluntary basis.[107] Inspectors are not, however, enabled to exert physical force during an inspection, as that power is vested only in judicial authorities.

Concerning inspections and searches in the private home of natural persons, i.e., in non-business premises, sometimes administrative authorities are empowered to enter private homes too. This is the case when the administration has been granted special investigative powers of criminal law, as is the case with tax inspectors. However, no such powers have been vested in the BoG. Searches in the homes of natural persons, as well as night home searches[108] can only be carried out under the supervision of a public prosecution and following a prosecutorial order (*eisaggeliki paraggelia*).[109] The necessity of the on-site inspection can be judicially reviewed *ex post*, but the assessment is rather marginal, in the sense that the administrative judge will only check if the administration manifestly abused the "outer limits" of its discretion (*akra oria diakritikis efherias*).

[102] Theodoros Psychoyios, "Provlimatismoi gia tin kat'oikon erevna ton dioikitikon archon, kata to arthro 9 toy syntagmatos" (2015) Nomos, Section III A and case law cited therein
[103] See for instance in the field of tax inspections, Council of the State 173/2018, Nomos 718659, para 10
[104] Prudential Supervision Act, art 59(3)
[105] Prudential Supervision Act, art 57(3)(b)(bb)
[106] Prudential Supervision Act, art 57(3)(b)(cc)
[107] Prudential Supervision, art 57(3)(b)(dd)
[108] Greek Code of Criminal Procedure, art 254(1)
[109] Greek Code of Criminal Procedure, arts 251 and 255

4. The transfer of information by BoG to the ECB and to national judicial authorities

4.1 Introduction

Seeing that – in a composite setting – the use of SSM information either by the ECB or by Greek authorities, for the imposition of punitive sanctions, presupposes information transfers from one authority to another, this section looks into the different instances in which BoG transfers information to the ECB (vertical transmissions) and to national judicial authorities (internal transmissions).

4.2 The transfer of information by BoG to the ECB and to other NCAs

First of all, it shall be noted that whereas the Prudential Supervision Act contains numerous provisions on issues of cooperation between competent authorities (horizontal level), on the vertical level, there is no specific legal basis effectuating the vertical cooperation between the BoG and the ECB in the specific context of prudential supervision. Nevertheless, given that the SSM Regulation contains an obligation to cooperate in good faith and to exchange information within the SSM system,[110] it can be assumed that the EU-level legal provisions contained in the SSM Regulation and in the SSM Framework Regulation, were perceived as being sufficient legal bases and therefore, there was no need for creating additional legal bases in national law. What is more, in the BoG Statute, it is stipulated that the BoG forms an integral part of the European System of Central Banks (ESCB) and as a result it shall act in accordance with the ESCB statute and with the guidelines and the instructions of the European Central Bank.[111] It may therefore be concluded that this provision can – by analogy – be extended also to the field of banking supervision.

At the horizontal level, there is a plethora of provisions which lay down general and specific cooperation agreements with other Member States' competent authorities. These provisions may be relevant also for the vertical cooperation between the BoG and the ECB, seeing after the introduction of the SSM, the ECB has become the competent home and host supervisor.

i. Article 17 of the Prudential Supervision Act refers to the issue of granting authorization to credit institutions. If the requesting credit institution is a subsidiary of a bank authorized in another Member State, before granting authorization must consult with the competent authorities of the relevant Member States. Now that the ECB is the competent authority, it can be argued that this provision can also be used as a legal basis, under Greek law, for transmitting information to the ECB with respect to authorizations.

ii. Article 25 of the Prudential Supervision Act: In case of acquisitions which contain a transnational element, the BoG shall provide competent authorities of other Member States with any information which is necessary for the assessment of the proposed acquisition. It may also request from other authorities of other Member States to provide it with information in order for it to be able to assess the proposed acquisition/holding.

iii. Article 51 of the Prudential Supervision Act: This is a general provision which concerns cooperation with the competent authorities of other Member States in which banks have their head office and in addition they have established branches in Greece. According to this provision, the BoG shall exchange with these authorities "*all information likely to facilitate the supervision of institutions, in particular with regard to liquidity, solvency,*

[110] SSM Regulation, art 6(2)
[111] BoG Statute, art 2

deposit guarantee, the concentration of risks, other factors that may influence the systemic risk posed by the institution, administrative and accounting procedures and internal control mechanisms."[112] In addition to that, information can be exchanged for such purposes as the planning and implementation of recovery plans, as well as any prudential supervision measures that were taken in cases where a liquidity stress has occurred.[113] The Bank of Greece or the Hellenic Capital Market Commission, as competent authority of the home Member State, shall communicate and explain upon request to the competent authorities of the host Member State how information and findings provided by the latter have been taken into account. Where the Bank of Greece or the Hellenic Capital Market Commission, as competent authority of the home Member State, disagrees with the measures to be taken by the competent authorities of the host Member State, it may refer the matter to EBA and request its assistance in accordance with Article 19 of Regulation (EU) No 1093/2010.

iv. Article 53 of the Prudential Supervision Act: This article governs exchange of information between competent authorities of Member States in the specific case of on-site inspections. Before carrying out on-the-spot checks and inspections on branches operating on Greek territory, the BoG must first consult the competent authorities of the home Member State. What is more, after carrying out on-the-spot checks on such branches, the BoG must inform the NCA of the home Member State on the findings that are important for the risk assessment of the bank at issue or the stability of the Greek financial system.[114]

v. Article 54(3): According to Article 54(3) of the Prudential Supervision Act, the BoG may exchange with the competent authorities of other Member States information related to its tasks, as well as transmit information to the ESRB, EBA and ESMA. However, the law specifies than if such transmission takes place, professional secrecy applies also to these authorities and the transmitted information shall not be further disclosed without the consent of the BoG.

Article 54 of the Prudential Supervision Act lays down the professional secrecy standards that apply to the staff of the BoG and to experts acting on its behalf, whenever they carry out tasks related to the BoG's competence to exercise prudential oversight over credit institutions. As a general remark, supervisors are forbidden from disclosing to any persons or public authority confidential information received by them in the course of their duties.[115] This obligation is without prejudice to criminal law and criminal procedure, as well as Law No. 4557/2018 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

Disclosure in summary or aggregate form, so that individual credit institutions cannot be identified, is allowed. In addition, Greek law – which in this respect transposes almost *verbatim* the CRD IV provision – stipulates that in civil law proceedings and when a credit institution is under special liquidation, confidential information may be disclosed in civil law proceedings.[116]

[112] Prudential Supervision Act, art 51(1)
[113] Prudential Supervision Act, art 51(3)
[114] Prudential Supervision Act, art 53(4)
[115] Prudential Supervision Act, art 54(1)
[116] Prudential Supervision Act, art 54(1)

4.3 The transfer of SSM information by BoG to national judicial authorities

Concerning information transfers to national judicial authorities, which is of relevance in the cases covered by Article 136 of the SSM Framework Regulation and in cases where BoG is required by the law to inform national judicial authorities on the (potential) commission of criminal offenses, the code of criminal procedure provides some guidance.

In the Greek legal order, some offenses are prosecuted *ex officio* (αυτεπαγγέλτως), while for others, the public prosecutor can initiate an investigation only on the basis a formal complaint, such as a report or a lawsuit, filed by the person against whom the action was committed *(κατ'έγκλησηη*). An obligation, incumbent on public servants or those that have been assigned a public service, to inform judicial authorities on the commission of a criminal offense exists only with respect to crimes prosecuted *ex officio*.[117] The BoG and its employees fall under the scope of the provision. From the crimes related to banking supervision, fraud and forgery of documents are prosecuted *ex officio.* Therefore, if the BoG, in the course of its activities, comes across information suggesting that such offenses have been committed, it shall notify that information to the competent public prosecutor in writing.[118] The notification must contain all information that the BoG has at its disposal regarding the criminal act, such as the perpetrators and all the relevant evidence.

On the other hand, violation of professional secrecy, obstruction of supervision, and disloyalty are not prosecuted *ex officio*. This means that for those crimes, the BoG is not under an obligation to transmit information to the competent public prosecutor. Even if it does, the public prosecutor is not able to launch prosecution, as these crimes are prosecuted only on the basis of a formal complaint filed by the person against whom the unlawful actions were committed.

It should be noted that the law does not lay down any legal safeguards in the phase of information transfers from the administrative sphere to judicial authorities. In internal situations, that is not surprising, as for misdemeanors and felonies, as soon the public prosecutor launches prosecution, a preliminary investigation should at any rate take place,[119] for the purposes of collecting evidence and deciding whether the case should be tried by a competent criminal court. During the preliminary investigation, it goes without saying that the privilege against self-incrimination and LPP apply. In other words, while the transmission is not accompanied by any safeguards, the rights of the defense rights have to be observed in the next phase, namely the phase in which the information is being used as evidence.

Now that information transfers by BoG to the ECB and to Greek judicial authorities has been scrutinized, in the next section the analysis focuses on how Greek law regulates the use of SSM information.

[117] Greek Code of Criminal Procedure, art 38(1)(2)
[118] Greek Code of Criminal Procedure, art 38(2)
[119] Greek Code of Criminal Procedure, art 243

5. The use of SSM materials in Greek punitive proceedings

5.1 Introduction

Information gathered by BoG or by other SSM authorities and thereafter routed to BoG through the ECB,[120] can *inter alia* be used by BoG for the imposition of punitive sanctions. As we have already seen,[121] if a significant credit institution (legal person) violates a norm laid down in Greek law which transposes an EU Directive, or if a natural person has allegedly committed a violation of the applicable law, the ECB has only indirect sanctioning powers;[122] in that case, it shall request BoG to open sanctioning proceedings.[123] BoG enjoys discretion as to the outcome and the final decision is appealable before Greek Council of the State.[124]

In addition to SSM information being used for punitive sanctioning by BoG, as we have seen in Chapter III,[125] it is possible that SSM-generated information can also end up in the hands of Greek judicial authorities, through BoG.[126] In turn, this triggers the question of the use to which such information can be put by judicial authorities in Greece.

Against this background, in this section, the use of SSM information by BoG and by Greek judicial authorities is scrutinized, as well as the applicable legal safeguards. In the "use" as evidence phase of (punitive) law enforcement, the legal safeguards that inherently come into play are the privilege against self-incrimination, the *ne bis in idem* principle and the right of access to a court.

This section is structured as follows: first, I look into how BoG uses SSM information, by analyzing its sanctioning powers and the applicable legal safeguards. Second, I look into which limits Greek law imposes on the use by the ECB of BoG transmitted information. Third, I discuss the use to which SSM information can be put by Greek judicial authorities, as well as the applicable safeguards. Finally, given that the composite design of the SSM results in that information used for punitive purposes may have been gathered in another legal order, on the basis of foreign powers, I inquire into how judicial review of BoG decisions is organized within the Greek State and how Greek administrative and criminal Courts answer questions with regards to unlawfully obtained foreign evidence and/or evidence obtained abroad on the basis of divergent procedural standards. In other words, I assess the extent to which legal protection for violations of rights that took place in another legal order is sufficiently provided in a composite enforcement design.

5.2 The use of SSM materials by BoG and applicable legal safeguards

Before moving on to discussing the sanctioning powers of the BoG, I shall first clarify the two distinct situations in which the BoG may need to use SSM materials for the imposition of punitive sanctions.

In the first place, the Greek NCA may impose a sanction on a significant institution or on one of its employees, upon the ECB's request. In this situation, BoG may *inter alia* use as evidence information

[120] For instance, pursuant to Article 18(5) SSM Regulation
[121] Chapter III, Section 8.2
[122] SSM Framework Regulation, art 134(1)
[123] SSM Regulation, art 18(5)
[124] Prudential Supervision Act, art 64
[125] Chapter III, Section 7.3
[126] SSM Framework Regulation, art 136; Decision (EU) 2016/1162 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19) OJ L 192/73

transmitted to it by the ECB. Greek law regulates how confidential information received by the BoG in the course of its supervisory mandate can be *used*. Such confidential information can be used only in the course of the BoG's duties and only for four purposes:[127]

a) for the supervision of (re)insurance undertakings

b) for verifying that the requirements governing access to the activity of credit institutions are met

c) to facilitate supervision, especially as regards the monitoring of liquidity, solvency, concentration of credit risks, administrative and accounting procedures, and internal control mechanisms of the supervised entities

d) in court proceedings as evidence against the BoG's decisions or in court proceedings "*initiated pursuant to special provisions provided for in Union law adopted in the field of credit institutions"*

From the aforementioned provision it follows that where the BoG did not gather information in itself, but rather received it from – for instance – the ECB, such information can only be used for one of the four purposes discussed above (purpose limitation).

In the second place, the Greek NCA may impose a sanction on a less significant credit institution (or the natural persons employed by it) upon its own initiative. In this case, it is unlikely that the BoG will use information transmitted by another authority. It is therefore logical that with respect to LSIs, the BoG will use information that it obtained through the use of its own, national information-gathering powers. Now that this essential distinction has been made, in the next section, I discuss in detail the sanctioning powers of the Greek NCA.

5.2.1 BoG's sanctioning powers

The BoG Statute and the Prudential Supervision Act specify BoG's sanctioning powers vis-à-vis supervised credit institutions and natural persons. According to Article 56(1) of the Prudential Supervision Act, the BoG can impose penalties in four ways: a) directly; b) in cooperation with other authorities; c) by delegating tasks to other authorities, but under its responsibility; d) through the assistance of competent judicial authorities. It is worth mentioning that these sanctioning powers are "without prejudice to the provisions laid down in criminal law."[128] In addition, penalties may be imposed not only to legal persons, but also to natural persons, specifically to members of a bank's Board of Directors and to other natural persons who are responsible for a breach of the applicable law, if their act or omission occurred during the performance of their duties.[129]

The Statute of the BoG contains a general legal basis for the BoG's sanctioning competence vis-à-vis the credit institutions under its supervision. According to Article 55A of the BoG Statute, if credit institutions fail to comply with relevant law or obstruct the BoG's activities, the supervisory authority can impose:

a) a non-interest-bearing deposit with the Bank of Greece in an amount of up to forty per cent (40%) of the amount of the violation or, if the amount of the violation cannot be determined, up to GRD 3,000,000,000 (three billion drachmae) and for up to one (1) year;

b) a fine in favor of the Greek State, calculated either as a percentage of up to forty per cent (40%) of the amount of the violation or as a lump sum of up to GRD 300,000,000 (three hundred million drachmae) and, in the event of repetition, up to GRD 500,000,000 (five hundred million drachmae).

[127] Prudential Supervision Act, art 54(4)
[128] Prudential Supervision Act, art 57(1)
[129] Prudential Supervision Act, art 57(2) and BoG Statute, art 55A

In addition to the foregoing, more precise reasons and concomitant legal bases can be found in the Prudential Supervision Act. More specifically, the BoG can impose sanctions for the following reasons:

i. for carrying out the activities of a credit institution, such as for instance taking deposits or other repayable funds from the public, without being a credit institution[130]
ii. for commencing activities as a credit institution without having received prior authorization from the BoG[131]
iii. for acquiring directly or indirectly a qualifying holding in a credit institution or further increasing it, as a result of which the proportion of the voting rights or of the capital held would reach or exceed the thresholds that are laid down in relevant legislation or so that the credit institution would become its subsidiary, without notifying in writing the BoG or against the BoG's opposition[132]
iv. for breaching the requirements relating to the proportion of the voting rights or of the capital held in qualifying holdings, with the result that the credit institution would cease to be a subsidiary, without notifying in writing the Bank of Greece[133]
v. for failing to comply with the obligation to notify the BoG of any change in the identities of the natural persons controlling legal persons and holders of a qualifying holding[134]

For the abovementioned reasons, the BoG is empowered to impose the below sanctions:

i. issue a public statement identifying the natural person or supervised entity responsible and the nature of the breach[135]
ii. issue a cease and desist order addressed to the natural or legal person at issue[136]
iii. for legal persons, impose administrative pecuniary penalties of up to 10% of the total annual net turnover[137]
iv. for natural persons, impose administrative pecuniary penalties of up to 5 million euros[138]
v. if the BoG is able to determine the amount of benefit derived from the breach, it can impose administrative pecuniary fines of up to twice the amount of such benefit[139]
vi. to suspend the voting rights of a shareholder[140]

Article 59(1) of the Prudential Supervision Act, provides more reasons for which the BoG may impose sanctions on credit institutions. Most of these reasons relate to either violations of reporting obligations or to the provision of incomplete or inaccurate reports.[141] According to Article 59(2), in the cases referred to in Article 59(1), as well as in any other case of violation of Regulation (EU) No 575/2013 (CRR), of the Prudential Supervision Act and of the regulatory acts issued pursuant to the CRR, the BoG can impose by a decision *all or any* of the following administrative penalties and other administrative measures:

[130] Prudential Supervision Act, art 58(1)(a)
[131] Prudential Supervision Act, art 58(1)(b)
[132] Prudential Supervision Act, art 58(1)(c)
[133] Prudential Supervision Act, art 58(1)(d)
[134] Prudential Supervision Act, art 58(1)(e)
[135] Prudential Supervision Act, art 58(2)(a)
[136] Prudential Supervision Act, art 58(2)(b)
[137] Prudential Supervision Act, art 58(2)(c)
[138] Prudential Supervision Act, art 58(2)(d)
[139] Prudential Supervision Act, art 58(2)(e)
[140] Prudential Supervision Act, art 58(2)(f)
[141] Prudential Supervision Act, art 59(1)

a) a public statement identifying the natural persons or institution responsible as well as the nature of the breach[142]
b) a cease and desist order addressed to the responsible natural or legal person[143]
c) withdrawal of the authorization of the credit institution[144]
d) in the case of a legal person, administrative pecuniary penalties of up to 10% of the annual net turnover;[145]
e) in the case of a natural person, administrative pecuniary penalties of up to EUR 5 million[146]
f) pecuniary penalties of up to twice the amount of the profits gained or losses avoided because of the breach, where those can be determined[147]

When determining the type of the administrative penalty or measure and the exact amount of a pecuniary penalty, the BoG takes into account the type, gravity, and duration of the breach, the degree of liability of the legal or natural person responsible for the breach, the financial strength of the natural or legal person responsible for the breach, the amount of profits gained or losses avoided to the extent that they can be determined, and the losses of third parties by the breach to the extent that these can be determined.[148]

5.2.2 BoG's sanctioning powers and applicable defense rights

Before the adoption of any measure adversely affecting the interests of a person, the BoG must grant the right to be heard and the right to have access to the file.[149] Furthermore, the final decision must respect the obligation to state reasons,[150] as well as the unwritten general principles of proportionality, legality, and legitimate expectations. The legal framework makes no reference to additional rights.

This, admittedly, remarkable lack of additional safeguards, such as the privilege against self-incrimination and the *ne bis in idem*, is not surprising for a Greek administrative lawyer. As also explained previously, according to the leading school of thought, which is still dominant up until the moment of writing, administrative proceedings – save in exceptional circumstances – do not require the observation of criminal safeguards. In principle, the privilege against self-incrimination is not afforded in the course of punitive administrative proceedings. Even if it were to be afforded, there are indications that the Greek administrative Courts would apply the more limited *Orkem* rule.[151]

5.2.3 Judicial review of BoG final decisions and preceding investigative acts

Now that the applicable defense rights have been discussed, the next logical step is to inquire into how persons whose rights may have been violated – particularly in a different legal order – can be granted the right of access to a court. In that light, I first discuss internal situations, i.e., judicial review of BoG decisions that were not adopted pursuant to a composite procedure. Thereafter, I discuss the judicial review by Greek Courts of BoG final decisions that have been adopted pursuant to a composite procedure.

[142] Prudential Supervision Act, art 59(2)(a)
[143] Prudential Supervision Act, art 59(2)(b)
[144] Prudential Supervision Act, art 59(2)(c)
[145] Prudential Supervision Act, art 59(2)(e)
[146] Prudential Supervision Act, art 59(2)(f)
[147] Prudential Supervision Act, art 59(2)(g)
[148] Prudential Supervision Act, art 62
[149] Law 2690/1999 (Government Gazette 45/A/9-3-1999), arts 5 and 6
[150] Ibid, art 17
[151] Athens Administrative Court of Appeals 15/2010, Nomos 552165, para 8

5.2.3.1 BoG sanctioning decisions and the right of access to a court

BoG final decisions, such as supervisory and sanctioning decisions, are subject to action for annulment before the Greek Council of the State.[152] The action for annulment shall be lodged within a period of sixty days, beginning on the day following the notification of the contested act or its publication.[153] Decisions of the BoG can be appealed by their addressees, be they natural or legal persons, as well as by those whose legal interests, even non-pecuniary legal interests, are affected by the NCA decision.[154]

Decisions can be appealed only for four reasons,.[155] Interestingly, these reasons coincide with the reasons laid down in Article 263 TFEU:

a) Lack of jurisdiction of the administrative authority that issued the act: Lack of jurisdiction exists when a non-competent body adopts an administrative act.

b) Infringement of an essential procedural requirement (*παράβαση ουσιωδώς τύπου*): Infringements of essential procedural requirements exist when a procedure that led to the adoption of a final decisions was not properly followed.[156] According to settled case law, the legality of a final decision is affected only if an *essential* procedural requirement was infringed. Inversely, the violation of a *non-essential* procedural requirement will not result in the annulment of the final decision of the NCA. Examples of infringements of essential procedural requirements are not having granted the right to be heard,[157] or more generally not having granted defense rights,[158] defects in the composition of a decision-making body,[159] the non-inclusion of a justification in the text where this is required by law,[160] such as for instance not providing a sufficient justification in the inspection decision, *et cetera*. I am of the opinion that in case a supervised credit institution wants to argue that an on-site inspection preceding the adoption of a sanctioning decision was characterized by an essential procedural error, they would have to invoke this reason in their action for annulment, in which case the administrative judge would need to assess whether the procedure was followed in accordance with the law.

c) Violation of a substantive legal provision: This situation covers the violation of any substantive legal norm, written or unwritten. If it is found that a substantive legal provision was violated, the administrative judge is not, however, allowed to substitute the decision of the administrative body, but can only limit himself to examining whether the administration exceeded its discretion. The extent to which discretion has been exceeded is assessed by reference to certain general principles that the administration must always observe when exercising its discretion, such as the principle of proportionality, good administration, and the protection of legitimate expectations. In that respect, if the administrative judge finds that a violation of a substantive

[152] Prudential Supervision Act, art 63
[153] Presidential Decree 18/1989, art 46
[154] Presidential Decree 18/1989, art 47(1)
[155] Presidential Decree 18/1989, art 48
[156] Konstantinos Gogos, *Diadikastika Sfalmata kai Akirosi ton Dioikitikon Praxeon* (Nomiki Vivliothiki 2017) 34
[157] Council of the State 2180/2013, Nomos 604592
[158] Evgenia Prevedourou, "Dioikitiko Dikonomiko Dikaio – Oi logoi akirosis" (November 2020), para 18 < https://www.prevedourou.gr/το-ένδικο-βοήθημα-της-αίτησης-ακύρωση/> accessed 14 September 2021
[159] Council of the State 320/2006, Nomos 403265
[160] Council of the State 332/2001, Isokratis 25/01/2001, para 5

legal provision took place, he can only annul the contested decision and refer the case back to the administration.

d) Misuse of powers: Misuse of powers refers to the situation in which an administrative act is, as such, legal, but was issued for a purpose manifestly different from that for which foreseen by the legislator.[161] The idea behind this reason for annulment lays in that each administrative body exists exclusively for the fulfillment of a certain objective of public interest. An administrative decision must therefore serve a public interest and not private interests.

Now that the criteria for exercising one's right of access to a (administrative) court have been explained, the next logical step is to inquire into the extent to which the right is effectuated in the case of final punitive decisions adopted by the BoG, but adopted pursuant to a composite enforcement procedure.

5.2.3.2 Judicial review of BoG sanctioning decisions adopted pursuant to composite enforcement procedures

How do composite enforcement procedures, ending with a BoG sanction, typically materialize? As explained in Chapter III,[162] following an EU investigation, the ECB may request an NCA, such as BoG, to open sanctioning proceedings (top-down request).[163] Alternatively, an NCA may also ask the ECB to request it to open proceedings sanctioning proceedings (bottom-up request).[164] Irrespective of whether the request is top-down or bottom-up, relevant evidence is logically transferred by the ECB to the national level. Such flows of evidence may at a certain point result in that information obtained outside the contours of the Greek State, either on the basis of EU law powers (vertical enforcement procedures) or obtained in another legal order, on the basis national law powers, and thereafter channeled to Greece through the ECB (diagonal enforcement procedures), are used as evidence in Greek punitive proceedings.

Vertical and diagonal composite enforcement procedures, give rise to a series of questions. Let us, for instance, assume that the BoG used the aforementioned information as evidence for the imposition of a punitive sanction: is the right of access to a court of the addressees of BoG decisions sufficiently ensured? How does the reviewing court deal with unlawfully obtained foreign evidence? Even if the gathering was lawful, can BoG use as evidence materials lawfully obtained in another jurisdiction on the basis of lower procedural safeguards if Greek law accords higher protection? A typical example of such a discrepancy would be the higher level of protection afforded to in-house legal counsels under Greek law when compared to the EU law standard, but the same considerations apply *mutatis mutandis* to all defense rights. In order to answer those questions, and in line with principle of equivalence will likely also govern similar situations with an EU dimension,[165] it is essential to first inquire into how they play out in internal situations, i.e., what are the consequences for the Greek (administrative) law of evidence if information has been obtained in violation of the right to privacy or of defense rights or if the privilege against self-incrimination was not afforded from the moment that the case became criminal in nature.

[161] Prevedourou 2020 (n 158) para 29
[162] Chapter III, Section 8.2
[163] SSM Regulation, art 18(5)
[164] SSM Framework Regulation, art 134(2)
[165] Although with respect to composite SSM enforcement procedures, an additional element has to always be taken into account, namely that the administrative judge must also apply the principle of effectiveness of EU law.

As a general remark, similarly to the Netherlands, up until the moment of writing case law dealing with the aforementioned questions specifically in relation to BoG and prudential supervision, does not exist. But even more generally, to date, the lawfulness of evidence obtained by an EU enforcement authority or by another national competent authority and later used for punitive purposes by a Greek competent authority, has never been questioned. For those reasons, the discussion is limited to internal situations and to the opinions that have been raised by academics.

The Greel code of administrative procedure[166] prescribes a *numerous clausu*s of the means of proof that are admissible in proceedings before administrative Courts: autopsy, expertise, documents, confessions of the parties, explanations of the parties, witness statements and judicial presumptions (*dikastika tekmiria*).[167] Evidence is assessed freely, either independently or in combination, unless a *lex specialis* provides differently.[168] Below, I discuss in order the three (composite) scenarios that – from the perspective of the legal protection dimension of fundamental rights – are of interest to this dissertation:

a) Divergent standards between legal orders

Here, I shall discuss the situation in which legal orders set different standards with respect to how defense rights are to be protected. For instance, we have already seen that, under Greek law, the LPP extends to all member of a bar association, i.e., both to in-house and external lawyers. Now let us assume that information was obtained by the ECB on the basis of the EU-level notion of LPP and that information was later used by the BoG as evidence for the imposition of a punitive sanction. Does the fact that EU law (or also other national laws) and Greek law set different standards – both in compliance with the CFR – in respect of how the LPP is to be protected, affect the admissibility of that information as evidence in national punitive proceedings? How do the Greek Courts deal with such arguments?

To date, there is no case law dealing with that type of question. In my opinion, the Greek administrative judge would not perceive the aforementioned situation as a problematic one for at least two reasons. First of all, both standards are in compliance with minimum fundamental rights standards. Second, the administrative judge may not perceive the divergent standards are a problem in view of the principle of the effectiveness of EU law. Be that as it may, it is currently not certain how national Courts would deal with arguments concerning vertically and diagonally divergent standards of defense rights.

b) Lawfully obtained evidence, yet used in violation of the rights of the defense

Concerning the situation in which information was obtained lawfully, in the course of the non-punitive phase of an enforcement procedure and was subsequently introduced as evidence in the punitive part of that procedure, thus used in an "unfair" way: in principle, this was not a matter of concern for the administrative judge; up until the last decade, it was generally perceived that the punitive nature of certain fines is not enough to necessitate the application of criminal law safeguards, like the privilege against self-incrimination. From scarce case law it can be concluded that the reviewing Court *may* – and only on a case-by-case basis – find problematic the posing of directly incriminating questions.[169] However, it shall be stressed that those judgments were delivered more than a decade ago, in 2009. I am of the opinion that if similar questions were to be brought today before the administrative Courts, in view of the recent *DB Consob* case,[170] the outcome would most likely be different, particularly as

[166] Law 2717/1999 (Government Gazzette 97/A/17-05-1999) ("Greek code of administrative procedure")
[167] Greek Code of Administrative Procedure, art 147
[168] Greek Code of Administrative Procedure, art 148
[169] Athens Administrative Court of Appeals 2410/2009, Nomos 563454, para 8
[170] Case C-481/19 *DB* v *Consob* [2021] ECLI:EU:C:2021:84

regards the applicability of the privilege against self-incrimination to natural persons, like senior managers.

More specifically, it may be argued that the *DB Consob* case could prove to be a turning point and could be read as meaning that NCAs, like the BoG, must not use for punitive purposes vis-à-vis natural persons incriminating information obtained by the ECB or another NCA under legal compulsion for non-punitive purposes.[171] In any case, unless such questions are actually brought before national Courts, the picture is still blurred, especially in light of the fact that the *DB Consob* case concerned an internal enforcement procedure and not a composite enforcement procedure.

c) Unlawfully obtained evidence

Concerning the situation in which information was obtained by the ECB or by another NCA unlawfully, i.e., in violation of the right to privacy or a defense right, and later used by the BoG for the imposition of a punitive sanction, in the absence of relevant case law, the following observations can currently be made: in internal situations, the key question that has to be answered is the extent to which a violation during the obtainment phase amounts to an infringement of an *essential* procedural requirement and – if it does – whether that infringement caused to the addressee of the *decision* irreparable harm.[172]

Violation of the right to privacy could[173] amount to an infringement of an essential procedural requirement: according to Article 19(3) of the Greek Constitution: "Use of evidence acquired in violation of the present article [secrecy of correspondence] and of Articles 9 [right to privacy] and 9A [protection of personal data] is prohibited." It has been argued that this provision constitutes a "Grundnorm" and is directly applicable in all procedures, be they administrative, criminal or civil and vis-à-vis all authorities.[174] Courts must *ex officio* exclude evidence obtained in violation of the right to privacy.[175] Therefore, even though the particular question discussed here has not been tested by Greek administrative Courts, I would argue that evidence gathered by (foreign) administrative law enforcement authorities in violation of the right to privacy and the secrecy of correspondence, would amount to a violation of an essential procedural requirement. Violation of a defense right in the obtainment phase could also amount to an infringement of an essential procedural requirement. Think, for instance, of evidence obtained in violation of LPP.

What does the foregoing then mean for vertical and diagonal composite SSM procedures that lead to an imposition of a punitive fine by the BoG? Is the affected party's right of access to a court sufficiently safeguarded? I do not think that a clear-cut answer can be derived at this moment. In the first place, questions relating specifically to composite enforcement procedures that take place under the auspices of an EU law enforcement authority, whereby information is obtained in another legal order and used as evidence for punitive purposes by a Greek administrative authority, have not yet been brought before Greek Courts. If we were to extrapolate the internal rules to composite enforcement procedures, the answer would be that evidence obtained in a legal order in violation of the right to privacy and/or of the

[171] Ibid, para 58
[172] Council of the State 4447/2012, Nomos 592724
[173] I use the word "could" because that particular question has not yet been tested by an administrative court.
[174] Dimitrios Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart Publishing 2019) 32; Julia Stranga-Iliopoulou, *Hrisi paranomos ktithenton apodiktikon meson kai dikeoma iperaspisis tou katigoroumenou* (Sakkoulas, 2003) 63; Konstantinos Chrysogonos, *Atomika kai Koinonika Dikaiomata* (2nd ed, Sakkoulas 2002) 245
[175] Multi-membered Court of First Instance of Athens 4370/2011, Nomos 612834, Section III; Supreme Court (E' Criminal Branch) 42/2004, Nomos 361328, para 4

rights of the defense, would have to be excluded from a domestic procedure. There are also indications that the EU Courts also embrace that view and would not consider exclusion of unlawfully obtained evidence to be incompatible with the principle of the effectiveness of Union law.[176]

Notwithstanding the aforementioned thoughts, it is important to note that excluding evidence from a domestic procedure presupposes that the lawfulness of the gathering of the evidence was tested in the first place. The question that then comes to the fore is the extent to which Greek Courts will test the gathering of the evidence, or whether they will not do so and instead apply the principles of mutual trust and of sincere cooperation and therefore assume that the procedures in another Member State or at the EU level complied with EU fundamental rights standards.

To summarize, in internal situations, it clearly follows that evidence obtained in violation of the right to privacy and/or of the rights of the defense amount to a violation of an essential procedural requirement thereby affecting the legality of the final act. However, in the absence of relevant case law extrapolating those internal rules to situations in which the evidence was unlawfully obtained by an EU authority or by another NCA, it is currently not clear whether the internal rules would be applied to composite procedures or whether the administrative judge will be inclined to apply the principles of sincere cooperation and of mutual trust and thus not test the lawfulness of the obtainment.

5.2.4 *Ne bis in idem* between the ECB and BoG

A legal provision forbidding the combination of two punitive administrative sanctions for the same facts or act is not currently in force. In my opinion, the reason behind the lack of such a provision is that the legal system is gradually starting to accept the criminal nature of administrative fines. In that respect, the Courts are mostly concerned with the relationship between punitive administrative sanctions and criminal sanctions. In other words, once this becomes well-established, a *ne bis in idem* provision specifically prohibiting the combination of two punitive administrative sanctions for the same acts or facts will likely be legislated. However, for the time being this is not an issue with which the national legislator seems to be concerned.

5.3 The use of SSM materials by Greek judicial authorities and applicable legal safeguards

5.3.1 Introduction

In this section, I will look at the issue of how Greek judicial authorities could[177] use information that has been transmitted to them by BoG, either on the basis of Article 136 SSM Framework Regulation or on the basis Decision 2016/1162, in accordance with national law. Furthermore, the applicable safeguards will also be discussed.

5.3.2 Criminal law sanctions for violations of prudential norms

Criminal Courts could potentially use SSM information to impose criminal law sanctions. As already indicated (*supra* Section 2.1.2), it cannot be excluded that prudential requirements can also be enforced

[176] Case C-746/18-*Prokuratuur* [2021] ECLI:EU:C:2021:152, para 44

[177] I use the term "could" here, because there has not been a known case yet in which Greek judicial authorities actually used information transmitted to them by BoG on the basis of Article 136 SSM Framework Regulation or on the basis of Decision 2016/1162. In that respect, this section discusses how such information could potentially be used by Greek judicial authorities.

through ordinary criminal law. The crimes of fraud, forgery of documents, and disloyalty are relevant in that respect.

With respect to fraud, the type of the criminal sanction depends on the amount of the (financial) damage. If the damage was less than EUR 120.000, it is considered a misdemeanor, but if the financial damage exceeded EUR 120.000, it is considered a felony and the act is punishable with imprisonment of up to ten years and a financial penalty.[178] The provisions on forgery of documents[179] and on disloyalty[180] follow the same logic and provide for the same thresholds and penalties

Additionally, natural persons, specifically the governor or president of a credit institution, the members of the Board of Directors, auditors, managers of sections, and employees of supervised entities may be punished with imprisonment or a pecuniary penalty or imprisonment and a pecuniary penalty, unless another provision lays down a graver penalty, in the below two situations: a) for failing to enter a material transaction in the credit institution's books or for intentionally misrepresenting a material transaction;[181] b) for providing to the BoG false or inaccurate reports or data.[182] Furthermore, Greek law states that in case any of the abovementioned natural persons oppose the supervisory powers of the BoG or obstruct supervision carried out by the BoG, they shall be punished with imprisonment of at least three (3) months.[183]

It should be noted that Article 136 SSM Framework Regulation and ECB Decision 2016/1162 have not been introduced in some way into the [184]Greek legal order. The EU legal texts thus remain the guiding texts. It remains unknown how the public prosecution services, investigating magistrates and criminal judges would treat evidence that they obtained by the ECB through BoG, even though, arguably, thanks to the principle of equivalence, they would have to treat them in the same way as they would treat evidence obtained by BoG in internal situations.

5.3.3 The use of SSM materials by Greek judicial authorities an appicable defense rights

According to the relevant provision contained in the Greek Code of Criminal Procedure ("GCCP"),[185] a suspect or an accused enjoys the right to silence and the right to not incriminate himself. The exercise of the right to non-self-incrimination does not prevent the lawful gathering of evidence that exists independently of the will of the suspect or the defendant.[186] According to Article 273(2) GCCP, in the course of investigations carried out by the investigative magistrate, a suspect has to the right to refuse to answer questions.[187] The same right applies to the trial phase; therefore, when confronted by the criminal judge, a suspect has to right to refuse to answer questions.[188] Finally, the privilege against self-incrimination in the area of *stricto sensu* criminal law should be clearly communicated to the suspect during all stages of criminal procedure ("Miranda warning").[189]

[178] Greek Penal Code, art 386(1)
[179] Greek Penal Code, art 216
[180] Greek Penal Code, art 390
[181] Prudential Supervision Act, art 59(3)(a)
[182] Prudential Supervision Act, art 59(3)(b)
[183] Prudential Supervision Act, art 59(3)
[184] Prudential Supervision Act, art 59(3)
[185] Greek Code of Criminal Procedure, art 103A(1)
[186] Greek Code of Criminal Procedure, art 103A(2)
[187] Greek Code of Criminal Procedure, art 273(2)
[188] Greek Code of Criminal Procedure, art 366(3)
[189] Greek Code of Criminal Procedure, arts 101, 103, 104, 105

5.3.4 The use of SSM materials by Greek judicial authorities and the right of access to a court

To what extent can a Greek judge remedy violations of rights that took place abroad, by EU or foreign administrative organs? Answering this question is essential because information initially obtained by an SSM authority for supervisory purposes could end up in national criminal proceedings. To ensure effective and complete fundamental rights protection, questions raised by defendants concerning irregularities in the obtainment or using phase, must logically be heard and remedied.

From the analysis in Chapter III, it follows that SSM information can end up in national criminal proceedings in the following ways: a) Greek criminal investigative authorities may utilize ECB Decision EU/2016/1162, i.e., they may request from the ECB the disclosure of confidential information, for the purposes of national criminal investigations; b) the Greek NCA may transmit in its own motion criminally relevant information to national criminal investigative authorities in accordance with the provisions stemming from national law (see Chapter III, Section 7.3); c) the ECB may make use of Article 136 SSM Framework Regulation and transfer information to BoG. BoG may further transmit that information to the competent public prosecutor. Against this background, it is important to look into how the Greek legal order deals with the admissibility of information obtained by national administrative authorities as evidence in criminal proceedings and how the lawfulness and the fairness of evidence obtained abroad, by foreign administrative authorities, is assessed by Greek criminal Courts.

To begin with, the means of proof that are most often used in a criminal trial are indications, autopsy, expert opinions, admission of guilt by the accused, witness statements, and documents.[190] At the same time, according to Article 179 GCCP, in criminal procedure "all means of proof are allowed."[191] Therefore, while the most common means of proof are prescribed in the law, other means are also admissible, particularly in light of the fact that the ultimate goal of criminal procedure is to find the "substantive truth" (*antikeimeniki aletheia*). As no relevant case law exists to date, it is not completely clear what form SSM information would take in practice. However, in my view such information will most probably be reflected in a document signed by the BoG and thereafter transmitted to the competent public prosecutor.

Moving on to the issues that are of interest to this dissertation, i.e., the admissibility as evidence of information obtained by the ECB or by other NCAs unlawfully or on the basis of lower procedural standards or obtained lawfully but used in an unfair manner, it is important to stress at the outset that, according to the Constitution[192] and the code of criminal procedure, unlawfully obtained evidence shall not be taken into account.[193] Prohibitions on the use of evidence are distinguished between constitutional, criminal and procedural, primary and secondary.[194] Depending on how severe a violation is, it will lead either to absolute or to relative nullity. Absolute nullity results in that the procedure has to be repeated, this time with a different composition.

In line with my analysis in Chapter IV, when examining the synergies between SSM gathered information and their use in national criminal proceedings, two distinctions shall be made. In the first

[190] Greek Code of Criminal Procedure, art 178
[191] Greek Code of Criminal Procedure, art 179
[192] Greek Constitution, art 19(3)
[193] Greek Code of Criminal Procedure, art 177(2)
[194] Alexandros Kostaras, "Agiazei o skopos ta mesa stin poiniki diki? H i poiniki dikonomiki axiologisi ton paranoma apoktimenon i paranoma chrisimopoioumenon apodeiktikon stoixeion" (1984) EEN, 175 et seq.

place, information obtained by administrative authorities, like SSM authorities, before a case became criminal in nature. For example, at the information-gathering stage, the privilege against self-incrimination was not afforded, since the obligation to cooperate prevailed over the privilege against self-incrimination, and the gathered information is now used in an unfair way as evidence in Greek criminal proceedings. Second, information unlawfully collected by administrative authorities, i.e., in violation of an essential procedural rule or the right to privacy, and later used as evidence in Greek criminal proceedings.

With respect to the first situation, in a decision delivered in 2004 by the Supreme Court, it was decided that taking into consideration and using as evidence information given by the defendant in the course of an administrative inquiry, before he acquired the status of the defendant, infringed his privilege against self-incrimination.[195] That led to absolute nullity of the procedure. In academia, too, the prevailing view is that will-dependent information obtained by administrative authorities abroad, in a phase during which the obligation to cooperate was incumbent upon the current defendant, cannot be used as evidence in *stricto sensu* criminal proceedings in the Greek legal order, as that would violate the privilege against self-incrimination.[196] In other words, whereas the gathering may be completely lawful according to the foreign law,[197] problems may arise if the lawfully obtained evidence is now used in an unfair way[198]

With respect to the second situation, i.e., evidence obtained in violation of defense rights or the right to privacy, the code of criminal procedure follows the "fruit of the poisonous tree" doctrine[199] and therefore provides that the use as evidence of information obtained through the commission of an unlawful act is prohibited.[200] This idea is closely linked to the principle of "ethical proof" (*archi tis ethikis apodixis*). It is not possible to provide a clear-cut answer as to how this prohibition would apply in the particular context of the SSM and in a scenario in which information was obtained unlawfully by the administrative authorities of another legal order. To my knowledge,[201] such questions have not yet been tested by the Greek Courts. In academia it has been submitted that evidence gathered by foreign authorities must be used in a Greek criminal trial only if the same evidence could have been lawfully gathered by Greek authorities, in the context of a domestic procedure.[202]

To summarize, one may observe a remarkable lack of case law dealing with evidence obtained by foreign authorities and used in Greek criminal proceedings. Nevertheless, if the rules that are applicable to internal situations were to be applied also to situations in which evidence unlawfully obtained by an SSM authority is later used by Greek judicial authorities for the imposition of a criminal sanction, national law would dictate that the use of evidence obtained in violation of the right to privacy or the rights of the defense leads to nullity of the procedure.

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[195] Supreme Court (Criminal Branch) 1/2004, Nomos 361404
[196] Giorgos Triantafyllou, *Diethnis Dikastiki Sindromi stin Poiniki Apodixi – Oi genikes arches* (P.N. Sakkoulas 2009) 282
[197] Supreme Court (Criminal Branch) 216/1988, Nomos 60716
[198] Triantafyllou 2009 (n 196) 293
[199] See, Robert Pitler, "The Fruit of the Poisonous Tree Revisited and Shepardized" (1968) 56 California Law Review 579
[200] Greek Code of Criminal Procedure, art 177(2); this prohibition can be set aside under very exceptional circumstances, which – however – are not relevant in view of the subject matter of this dissertation.
[201] After having conducted a thorough research on case law in the database of Nomos.
[202] Triantafyllou 2009 (n 196) 321

5.3.5 *Ne bis in idem* between an SSM authority and Greek judicial authorities

Greek law foresees a double-track enforcement system, meaning that a combination of an administrative penalty and of a criminal sanction for the same act is not forbidden. However, seeing as criminal liability of legal persons under Greek law is not conceivable, the risk for *ne bis in idem* violations in cases of combinations of an administrative and a criminal sanction is evident only between an NCA and Greek judicial authorities, as the ECB has no direct sanctioning powers when it comes to natural persons.[203]

Following the seminal judgments of the CJEU, which confirmed the compatibility of double-track enforcement systems with Article 50 CFR, but within the parameters discussed in Chapter III,[204] in a recent judgment[205] the Council of the State noted that Greek law does generally not contain rules which ensure coordination of the punitive administrative and the *stricto sensu* criminal proceedings in order to reduce to what is strictly necessary the additional burden imposed on defendants by the accumulation of the two sanctions.

In my view, the fact that in internal situations the two proceedings are currently not coordinated suggests that – most likely – double proceedings, whereby an SSM authority imposes a punitive administrative sanction and a national judicial authority a criminal sanction, will not be coordinated either, unless specific legislation coordinating the administrative and the criminal procedure is effectuated. That said, as a matter of Greek law, it is currently unclear how *ne bis in idem* protection, at the interface between administrative and criminal law, is to be provided.

6. Concluding remarks

This chapter constitutes the second building block of the bottom-up analysis of this dissertation. I have looked into how Greece regulates the protection of fundamental rights in the interactions of BoG with the ECB, under the framework of the SSM, the tasks and the powers of the authorities which are involved directly (BoG) and indirectly (judicial authorities) in the enforcement of prudential law and the applicable legal safeguards available to supervised entities. Attention was also paid to the role of criminal law in the enforcement of prudential legislation.

Even though I will return to discussing elements of this chapter which, from a comparative perspective, deserve more attention, it is essential to pinpoint a number of overarching conclusions already. The Greek NCA enjoys very similar information-gathering powers to the ECB and to DNB. This can arguably be attributed to the fact that information-gathering, as well as sanctioning powers, have been minimally harmonized by means of the Directive CRD IV. With respect to the applicable safeguards, the fact the concept of punitive administrative law is still developing, criminal law safeguards in the course of BoG punitive proceedings are, in principle, not applied. When it comes to judicial review of final BoG decisions and the possibility of indirect review of preceding investigative acts that took place in a different legal order, by other authorities, the main conclusion that follows from the preceding analysis is that – as regards EU acts – Greek Courts do not have the competence to invalidate acts of EU organs. As regards foreign acts, in the absence of relevant case law it is not clear whether the Greek administrative judge will look into potential complaints or "simply" give way to the effectiveness of EU law doctrine. It is therefore not entirely clear whether the right of access to a court of an addressee of a punitive Bog decision which is the result of a composite procedure, is sufficiently safeguarded.

[203] SSM Framework Regulation, art 134(1)
[204] Chapter III, Section 8.3.1; See also Case C-524/15 *Menci* [2018] ECLI:EU:C:2018:197, para 63
[205] Council of the State 259/2020, Nomos 768395, para 10

With respect to possibilities for criminal enforcement of prudential offenses, even though the links between the SSM and national criminal justice are not as clear as in the Dutch legal order, criminal enforcement for violations of prudential norms whose application SSM authorities oversee are possible and the applicable regime would be the general penal code. Punitive administrative and criminal proceedings for the same facts/acts are, in principle, not subject to coordination

Chapter VI: The protection of fundamental rights in composite SSM enforcement procedures

1. Introduction

Chapter II laid down the normative framework of this PhD dissertation, namely fundamental rights and the different ways in which they cast a safety net for natural and legal persons. I furthermore argued that the institutional design of the SSM has caused a revolution of the way in which EU prudential banking legislation is currently supervised and enforced. As a result of those institutional innovations, what happens in one legal order often directly influences and affects another legal order. That, in turn, brings to the fore the question whether the perception of fundamental rights as a state-oriented concept fits the composite enforcement picture. In the words of Meyer, "the idiosyncratic complex structures in which EU agencies operate challenge traditional human rights doctrines, which have evolved in a nation-state setting. Actions taken and administrative tools used by the agencies involved often do not fit classical ECHR categories anymore, adding thereby to the urge to start rethinking entrenched doctrinal concepts."[1] Against this background, I embarked on a journey to find out whether SSM composite enforcement procedures result in unwarranted interferences with supervised persons' fundamental rights.

Chapters III, IV, and V have provided the building blocks for ultimately answering the evaluative part of the dissertation's main research question. Now that the protection of fundamental rights in composite SSM enforcement procedures have been looked at from both a top-down and a bottom-up perspective, the aim of this chapter is to synthesize the findings of the former four chapters and to ultimately assess – in light of my assessment framework – whether fundamental rights problems do exist.

In doing so, I shall first bring together the main findings concerning the different types of composite enforcement procedures that are evident inside the SSM system (Section 2). In Section 3, I shall pay attention to the interactions of the SSM with criminal law enforcement at the national level. After the different composite qualities of the SSM have been highlighted and analyzed, the next step consists of assessing whether fundamental rights problems do occur at the interface between different legal orders, i.e., inside the SSM (Section 4) and at the interface between administrative law enforcement by the SSM and criminal law enforcement by national judicial authorities (Section 5).

2. SSM composite enforcement procedures

In order to assess the degree of discretion that SSM authorities may have, which may in turn affect the legal certainty, the effectuation of defense rights and legal protection regimes, for analytical purposes, the composite aspects of the Single Supervisory Mechanism have been approached through the prism of "obtainment," "transfer," and "use." Whereas the previous chapters looked at these phases first from a top-down perspective and subsequently from a bottom-up perspective by studying the Netherlands and Greece, the below analysis synthesizes the findings of the aforementioned chapters and evaluates them through the lens of the definition of "composite law enforcement" that I introduced in Chapter II.[2]

[1] Frank Meyer, "Protection of fundamental rights in a multi-jurisdictional setting of the EU" in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU Agencies* (Edward Elgar Publishing 2020) 145-146
[2] Chapter II, Section 2.3

2.1 The institutional design of the Single Supervisory Mechanism

In recent years, the enforcement of EU (micro) prudential legislation has changed fundamentally. As we have seen in Chapter II, the most common method of enforcing EU law is that of decentralized or indirect implementation, which implies that the EU acts as a norm setter and Member States are responsible for implementing and enforcing those norms and for offering legal redress for violations of rights stemming from Union law. The SSM is one of the various policy areas[3] that recently moved away from this traditional outlook on EU law enforcement.

Whereas before 2014 enforcement was taking place indirectly, after the introduction of the SSM, the European Central Bank has been entrusted with exclusive competences,[4] for the implementation of which, direct enforcement powers have been bestowed upon it. However, in executing its exclusive mandate, the EU watchdog is assistedby its 19 institutional national counterparts, i.e., the national competent authorities ("NCAs") of the euro area Member States. For the Netherlands, that is the Central Bank of the Netherlands (DNB) and for Greece, the Bank of Greece (BoG). On the one hand, we therefore witness the conferral of an exclusive mandate on an EU institution, for the operationalization of which the EU authority has been granted direct enforcement powers, like the power to request information,[5] to carry out on-site inspections,[6] to receive oral explanations,[7] to impose supervisory measures[8] and sanctions for violations of Union law[9] and ECB decisions.[10] On the other hand, in discharging its mandate, the ECB is often assisted by the NCAs, which are characterized by a strong institutional embedment in the EU legal framework.[11]

The aforementioned innovations in the institutional design of EU prudential law enforcement imply that the different phases of a single enforcement procedure, such as the obtainment and the use of information, often take place in different legal orders. In turn, this has resulted in a complex legal landscape that often consists of tasks, powers, safeguards, and remedies that are a composite of EU and national elements. In that respect, in this work "composite law enforcement" was meant to indicate EU and national law enforcement authorities, organizationally independent, but in a relationship characterized by (decisional) interdependence, operating in a functional EU territory, wherein they obtain, transmit, and use information for punitive purposes, through combinations of procedures and structures, for the attainment of common EU goals.[12]

In the framework of prudential law enforcement, compositeness is certainly evident inside the SSM system (i.e., interactions between the ECB and NCAs). Inside the SSM, for the attainment of the EU-wide goal of financial stability,[13] the ECB and NCAs often carry out enforcement action jointly in different legal orders. As a result, it is often the case that within one and the same procedure, the content of enforcement powers, procedural safeguards and legal remedies are defined by both EU and national law(s). Given that such composite proceedings can start as non-punitive, but they may end up with an

[3] Miroslava Scholten and Michiel Luchthman, *Law Enforcement by EU Authorities* (Edward Elgar 2017)
[4] Case C-450/17 P *Landeskreditbank Baden-Württemberg* v *ECB* [2019] ECLI:EU:C:2019:372, para 49
[5] SSM Regulation, art 10
[6] SSM Regulation, art 12
[7] SSM Regulation, art 11(1)(c)
[8] SSM Regulation, art 16
[9] SSM Regulation, art 18(1)
[10] SSM Regulation, art 18(7)
[11] SSM Regulation, art 6(1)
[12] Chapter II, Section 2.3
[13] SSM Regulation, recital 2

imposition – either by the ECB or by NCAs – of a punitive sanction,[14] the nexus between non-punitive and punitive administrative enforcement taking place in different legal orders and the need for their coordination, come to the surface.

Composite SSM enforcement procedures often have significant ramifications for national systems of criminal enforcement, formally taking place outside the SSM ecosystem, yet presenting *de facto* close links to SSM administrative enforcement. Owing to the fact that – in principle – Member States enjoy enforcement autonomy and thus remain free to impose criminal penalties for violations of prudential legislation,[15] national (non-SSM) authorities, entrusted by Member States with tasks in the domain of criminal justice, are often simultaneously competent to enforce EU prudential legislation, by means of criminal law. As a result, the close connection between administrative law enforcement, which primarily takes place that the Union level, and enforcement through criminal law at various Member States, as well as the need for their coordination, come to the fore.

The foregoing analysis implies that in addition to the ECB, which has been entrusted with exclusive competences, and – as an EU institution – is clearly bound by the CFR,[16] NCAs and national judicial authorities enforcing EU prudential legislation – including national legislation transposing EU Directives – are also bound by the CFR, since they act within the scope of Union law. In that regard, as confirmed by the CJEU in the seminal *Åkerberg Fransson* case, when Member States act within the scope of Union law, they must respect the fundamental rights defined by the CFR.[17] Furthermore, while, when implementing Union law, Member States enjoy procedural autonomy, at the same time, the level of fundamental rights protection offered by the CFR and the primacy, unity, and effectiveness of EU law must not be compromised.[18]

Even though the ECB has been entrusted with exclusive competences to carry out specific micro-prudential tasks over euro-area banks, the implementation of the ECB's exclusive competence takes place through composite organizational structures and procedures. Irrespectively of the composite structure/*modus* at issue, all SSM authorities act within the scope of Union law and are therefore bound by the CFR level of fundamental rights protection.

Against this background, the next sections bring together the main findings concerning the specific composite structures that are evident within and outside the SSM. In doing so and in line with all the preceding chapters, for analytical purposes, I structure my analysis along the phases of the obtainment of information, the transfer of information, and the use of information.

2.2 The obtainment of information by the SSM

The ECB obtains information directly and indirectly through the NCAs. The various direct and indirect *modi operandi* bring to the fore the different composite features of the ECB's obtainment of information. In the below two sections, I present – in order – the different structures that are evident in the information-gathering phase of composite SSM enforcement procedures.

[14] SSM Regulation, art 18(5)
[15] CRD IV, art 65(1)
[16] CFR, art 51(1)
[17] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 21
[18] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, para 60

2.2.1 Direct obtainment of information by the ECB

The joint supervisory teams (JSTs), the on-site inspection teams (OSIs) and the independent investigating unit are the ECB's organizational structures that have been established by EU law[19]and have at their disposal direct information-gathering powers. These three organizational structures are discussed below.

2.1.1.1 Joint Supervisory Teams

JSTs are responsible for the day-to-day supervision of significant banks. They are composed of ECB officials and of staff members employed by the relevant NCAs, hence they are discussed together.

JSTs are embedded within the ECB's Directorate General micro-prudential supervision I and Directorate General micro-prudential supervision II.[20] One JST is allocated to each significant bank. Each team is composed of staff members coming from the ECB and from the NCAs of the Member States in which the significant banks, their subsidiaries or significant cross-border branches are established.[21] Therefore, staff members from multiple NCAs can be part of one and the same JST. JSTs' main tasks revolve around the preparation of the Supervisory Evaluation Program (SEP), i.e., a tentative outline shared with each significant credit institution, which lays down the main planned supervisory activities for the next ten months.[22] In addition, JSTs are responsible for the performance of ongoing supervision and the organization of the Supervisory Review and Evaluation Process (SREP).[23] JSTs perform the bulk of their tasks during the monitoring stage of law enforcement,[24] while – albeit indirectly – they also take part in the sanctioning stage, since they often prepare draft supervisory decisions.[25]

In carrying out their tasks, JSTs avail themselves of a number of information-gathering powers, which are laid down in the SSM Regulation. These include the power to request information,[26] to examine books and records,[27] to obtain written or oral explanations from credit institutions or their representatives or staff,[28] and the power to interview persons who consent to be interviewed.[29] Interestingly, even though JSTs carry out day-to-day supervision, the aforementioned powers have been included in the SSM Regulation under the heading of "general investigations."[30] However, despite that heading, it seems that the SSM Regulations do not attribute to JSTs an investigative function. A strict reading of the SSM legal framework reveals that investigations commence from the moment that ECB,

[19] SSM Framework Regulation, arts 3, 144 and 124
[20] European Central Bank, "Organisational structure" < https://www.bankingsupervision.europa.eu/organisation/structure/html/index.en.html> accessed 13 May 2021
[21] SSM Framework Regulation art 3
[22] European Central Bank, "SSM Supervisory Manual" (2018) 64 et seq < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?42da4200dd38971a82c2d15b9ebc0e65> accessed 3 September 2021
[23] CRD IV, Section III
[24] Ton Duijkersloot, Argyro Karagianni and Robert Kraaijeveld, "Political and judicial accountability in the EU shared system of banking supervision and enforcement" in Scholten and Luchtman 2017 (n 3) 31

[25] ECB *Supervisory Manual* (n 22) 18
[26] SSM Regulation, art 10
[27] SSM Regulation, art 11(1)(b)
[28] SSM Regulation, art 11(1)(c)
[29] SSM Regulation, art 11(1)(d)
[30] SSM Regulation, art 11

i.e., JSTs or OSITs, refer a suspicion to the independent investigating unit (IIU).[31] That being said, it would have perhaps been wiser to refer to those types of enforcement powers as "powers for monitoring compliance" instead of "investigative powers."

In addition to the aforementioned EU law powers, which are available to all JST members, less clear is whether DNB and BoG staff members taking part in JSTs, in addition to the enforcement powers stemming from EU law, can make use of national law powers and/or carry out tasks relating to the remaining national tasks that do not fall within the ECB's competence.[32] This lack of clarity can be particularly problematic from the perspective of the legal certainty dimension of the right to privacy, which requires that credit institutions know the content of JSTs and OSITs investigative powers.

2.1.1.2 On-site inspection teams

As far as OSITs are concerned, similarly to JSTs, their composition is a mix of ECB officials and staff members employed by the pertinent NCAs.[33] The ECB may also decide to hire external experts.[34] OSITs constitute another prime example of a composite structure carrying out enforcement tasks. A head of mission (HoM) is appointed by the ECB from among ECB and NCA staff members.[35] OSITs work in close cooperation with JSTs, but they are organizationally independent. Concerning the question of when OSIs are triggered, the ECB carries out a formal planning for on-site inspections at least annually. Thus, inspections are in principle planned, i.e., they are not carried out due to a suspected violation,[36] but are part of the supervisory evaluation program. Supervised entities are thus generally aware of OSIs in advance.[37] However, OSIs may also take place on an *ad hoc* basis, especially if there is an incident which requires prompt supervisory action.[38] Typically, such *ad hoc* inspections are unannounced.[39]

Like JST members, OSIT inspectors have the power to request documents, examine books and records and take copies or extracts thereof, and obtain written or oral explanations from supervised persons, their representatives or staff, and interview any other person who consents to be interviewed, all in order to collect information relating to the subject matter of the OSI.[40] In addition, as is further specified in the ECB's "guide to on-site inspections," OSITs typically engage in observations, information verifications, targeted interviews, walk-throughs, sampling examinations, confirmation of data, and model testing.[41] Even though by their very nature administrative inspections are typically deployed in

[31] SSM Framework Regulation, art 123
[32] The view that there is currently unclarity as to the content of the powers of NCA staff members participating JSTs is also shared by Laura Wissink, "Challenges to an Efficient European Centralised Banking Supervision (SSM): Single Rulebook, Joint Supervisory Teams and Split Supervisory Tasks" (2017) 18 European Business Organization Law Review 431
[33] SSM Regulation, art 12; SSM Framework Regulation, art 144
[34] European Central Bank, "Guide to on-site inspections and internal model investigations" (September 2018) 8 <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.osi_guide201809.en.pdf> accessed 4 March 2020 ("Guide to on-site inspections")
[35] SSM Framework Regulation, art 144(2)
[36] Daniel Segoin, "The investigatory powers, including on-site inspections, of the ECB, and their judicial control," in Chiara Zilioli and Karl-Philipp Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar Publishing 2021) 301
[37] Guide to on-site inspections (n 34) 3
[38] Guide to on-site inspections (n 34) 6
[39] Guide to on-site inspections (n 34) 6
[40] SSM Regulation, art12(2) in combination with art 11(1)
[41] Guide to on-site inspections (n 34) 11-12

response to a suspicion,[42] it appears that the ECB does not consider them as being investigations in the strict sense of the word. That impression of mine follows from that fact that, according to the SSM Framework Regulation, if during an inspection the OSIT suspects a violation, the case shall be referred to the IIU for investigation.[43]

Similar to national JST members and the question of which information-gathering powers they have at their disposal, the legal framework is silent as to whether OSIT members employed by NCAs can – during the course of EU inspections – make use of additional powers they may have in accordance with their national law.

As it follows from the foregoing analysis, JSTs and OSITs share a similar composition. In terms of overall responsibility, the ECB directs the tasks of JSTs and OSITs and it is responsible for their composition. National staff members perform tasks under the name of the ECB and – in principle – they apply EU law. Therefore, functionally, NCA staff become part of the EU structure.[44] At the same time, national members do remain national "servants," since their employment relationship is with an NCA and not with the ECB. When it comes to the application of procedural safeguards, because the acts of JSTs and of OSITs are imputed to the ECB, procedural safeguards of supervised persons are defined by EU law. By the same token, legal remedies can be sought only before the EU Courts.[45]

2.1.1.3 The independent investigating unit

The independent investigating unit (IIU) comprises the third EU-level organizational structure that has been created by the ECB and which has direct information-gathering powers. The IIU is part of the Enforcement and Sanctions Division of the ECB's Directorate General Micro-Prudential Supervision 4.[46] It is an internal independent body, which is composed of investigating officers, appointed by the ECB.[47] These officers must not be involved or have been involved in any way for the past two years in the supervision or authorization of the bank under investigation.[48] This is in line with the requirement of separation between the investigative and sanctioning (prosecution) phases.[49]

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[42] This is also evidenced by the fact that where JSTs enter into business premises, the ECB must not check whether national law permits such an entry. On the other hand, before the performance of on-site inspections, the ECB must check with how national law complies with the inviolability of the home. If national law so requires, the ECB must apply for an *ex ante* judicial warrant. Such types of safeguards are typical to punitive investigations.

[43] Duijkersloot, Karagianni and Kraaijeveld (n 24) 32

[44] See also, Luchtman and Vervaele 2017, who refer to those types of composite organizational structures as "organleihe" in the sense that "the (national) authority also becomes a part of the EU structure in legal terms; participating states lose control over their authorities, which act as the extended arm of the EU authority." Michiel Luchtman and John Vervaele, "*Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)"* (Utrecht University 2017) 250 < http://dspace.library.uu.nl/handle/1874/352061> accessed 13 December 2021

[45] TFEU, art 263

[46] European Central Bank, "SSM Supervisory Manual-European banking supervision: functioning of the SSM and supervisory approach" (2018) 102 < https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?42da4200dd38971a82c2d15b9ebc0e65> accessed 29 January 2021 ("SSM Supervisory Manual")

[47] SSM Framework Regulation, art 123(1)

[48] SSM Framework Regulation, art 123(2)

[49] *Dubus* v. *France* App no 5242/04 (ECtHR 11 June 2009)

For the purpose of investigating suspected infringements, the IIU can exercise all the powers that the ECB has on the basis of the SSM Regulation.[50] It may thus request documents, hold interviews, carry out on-site inspections *et cetera*. In addition, the investigating offices can access all the information and documents in the hands of the ECB and of the NCAs in the course of ongoing supervision.[51] According to the ECB's supervisory manual, the IIU "can also (…) require the NCAs, by way of instructions, to make use of their investigatory powers under national law."[52] In that respect, in addition to the direct information-gathering powers provided for by EU law, the IIU can also indirectly receive information obtained by NCAs under national law.

By contrast to JSTs and OSITs, the IIU is composed only of ECB employees. The potential composite qualities of the IIU are then of relevance only to the extent that the Unit requests from NCAs to obtain information on the basis of their national investigative powers and later uses that information as evidence to submit a proposal for a complete draft decision to the supervisory board.[53] In that situation, I would argue that the obtainment of information by the NCAs is currently governed by national law, i.e., powers and legal safeguards. On the other hand, if the IIU decides to gather information on the basis of the powers that are contained in the SSM Regulation, powers, and applicable legal safeguards are defined by Union law.

2.2.2 Indirect obtainment of information by the ECB

The analysis in the previous three chapters (III, IV, and V) leads me to the conclusion that the EU legal framework contains a number of legal bases that enable the ECB to gather information indirectly, i.e., through its institutional national counterparts. The different possibilities are brought together below.

In the first place, EU law dictates that even though the ECB is responsible for the day-to-day supervision of SIs, NCAs assist the ECB in the fulfillment of its day-to-day tasks through the preparation and implementation of acts related to the ECB's tasks under the SSM Regulation and through assistance in verification and on-site activities.[54] In the Netherlands, a specific legal basis to effectuate or rather facilitate EU law has been introduced,[55] whereas in Greece no such legal basis exists.

When DNB and BoG gather information for the fulfillment of the ECB's tasks, for example during an on-site activity, it is not clear whether the NCAs powers and procedural safeguards are defined by national law – which should however not render the application of Union law ineffective – or by EU law. Concerning judicial control of such NCA actions, in principle, such judicial control takes place at the national level. However, if NCAs' actions are merely preparatory, the possibility of judicial review at the national level is cut off and an eventual ECB decision based on NCA preparatory actions will be judicially reviewed by the EU Courts.[56]

A second legal basis that grants to the ECB indirect information-gathering powers is Article 9(1) SSM Regulation. That provision enables the ECB to issue instructions vis-à-vis NCAs and request them to make use of their powers in accordance with their national law. Obviously, this power is useful when

[50] SSM Framework Regulation, art 125(1)
[51] SSM Framework Regulation, art 125(3)
[52] SSM Supervisory Manual (n 46) 102
[53] SSM Framework Regulation, art 127(1)
[54] SSM Regulation, art 6(3); SSM Framework Regulation, art 21(1); SSM Framework Regulation, art 90(1) See also, Kamerstukken II 2014-2015, 34049, no 3, 7
[55] Chapter IV, Section 3.2
[56] Case C-219/17 *Berlusconi and Fininvest* [2018] ECLI:EU:C:2018:1023

the ECB does not have, by virtue of EU law, a certain power. However, the analysis of the Greek legal order did not reveal any additional information-gathering powers being available to the NCA besides the ones that are available to the ECB. In the Netherlands, an example of a power that is available to an NCA, but not to the ECB, is the power of DNB to appoint a bankruptcy trustee (*curator*) to Dutch credit institutions.[57] However, this is a supervisory power and not an information-gathering power. Another interesting finding is the fact that it is legally possible that the Dutch public prosecution services gather information, for instance through the interception of telecommunications, and thereafter transfer it to DNB,[58] which could use it for the imposition of a punitive sanction, or could likely also transfer it to the ECB. In the domain of competition law, Dutch Courts have confirmed that this is legally possible, i.e., that information gathered by the public prosecution services can be transferred to an administrative authority, which can use it in the context of punitive proceedings.[59] In that sense, it can be argued that this is an additional information-gathering power, which is available to the Dutch NCA and not to the ECB. It is thus not inconceivable that information obtained by DNB through that channel could also indirectly become available to the ECB. Of course, my argument here is not that the ECB will instruct DNB to request the public prosecution services to intercept telecommunications and share the report with DNB. My point is rather that the design of the system is such that this type of information could potentially also reach the ECB.

A third legal basis granting to the ECB indirect information-gathering powers concerns the situation in which a person obstructs the conduct of an ECB on-site inspection. In that case, the relevant NCA must afford – in accordance with its national law – the necessary assistance to the ECB, facilitating ECB access to the bank's business premises. Such assistance includes the sealing of business premises, books, or records.[60] Where coercive powers are not available to the NCA, the latter shall use its powers to request the necessary assistance of other national authorities, for instance the police.[61] From the foregoing, it follows that the ECB cannot access business premises by force. Therefore, if a supervised entity opposes an ECB inspection, national authorities can exert force to "open the door" and carry out inspections without the permission of the credit institution's management.[62] Logically, that also implies that, within the context of the same legal provision, information gathered by NCAs in the course of such procedures will later be transferred to the ECB.

The aforementioned situation resembles the well-known mechanism of mutual administrative assistance (MAA); NCAs applying national law carry out enforcement tasks in their own name but for the fulfillment of the ECB's mandate under the SSM Regulation. Subsequently, given that the consequences of the actions of the assisting NCA is imputed to that authority and not to the ECB, the inviolability of the home and procedural safeguards are defined by national law and judicial review for the exercise of national powers will take place at the national level.

2.3 Top-down and bottom-up information transfers inside the SSM for enforcement purposes

At the intersection between the "obtainment" and "use" phases, there is – logically – an in-between phase in which information that is necessary for the ECB or and NCA for enforcement purposes, but is

[57] FSA, art 1:76. See also, De Nederlandsche Bank, "Benoeming Curator" <https://www.toezicht.dnb.nl/2/50-202174.jsp> accessed 4 June 2021
[58] Wjsg, art 39f
[59] Trade and Industry Appeals Tribunal 9 July 2015, ECLI:NL:RBROT:2013:CA3079
[60] SSM Regulation, art 11(2)
[61] SSM Regulation, art 12(5)
[62] Case C-46/87 *Hoechst* v *Commission* [1989] ECLI:EU:C:1989:337, paras 31-32; Case C-94/00 *Roquette Frères* [2002] ECLI:EU:C:2002:603, para 58

not directly available to the authority that needs it, is transferred to it. For analytical purposes, I distinguish between a) top-down transfers, i.e., information transferred from the ECB to an NCA, which may also contain information gathered by another NCA through the indirect channels discussed in the previous sections, and b) bottom-up transfers, i.e., information transferred by an NCA to the ECB for enforcement purposes. The various possibilities are discussed below. Before I move on to discussing the different situations evident in the SSM, it is worth noting that both the ECB and NCAs are under a general obligation to exchange information, which is incumbent on the SSM authorities by virtue of Article 6(2) SSM Regulation. Departing from that general obligation dictated by EU law, below I discuss the different points in time in which information transfers take place, following the legal analysis in Chapters III, IV, and V.

2.3.1 Information transfers from the ECB to the NCAs for enforcement purposes

According to Article 18(5) SSMR, if the ECB is not competent to impose a penalty directly, i.e., in situations not covered by Article 18(1) SSM Regulation, it can require NCAs to open proceedings with a view to taking action in order to ensure that appropriate national penalties are imposed. The ECB's organizational unit that typically utilizes the aforementioned legal provision is the IIU.[63] Obviously, whenever the IIU addresses such a request to an NCA, the request will also be accompanied by a transmission of all the relevant evidence on the basis of which the IIU concluded that a violation has likely taken place.

2.3.2 Information transfers from the NCAs to the ECB for enforcement purposes

From a bottom-up perspective, it is also logical that whenever NCAs obtain information that concerns significant institutions, that information should then be transferred to the ECB.

In the Netherlands, the transfer of information from DNB to the ECB is not without any limits. The laws of the Netherlands allow for the transmission of confidential information provided a number of conditions are met,[64] the most striking condition being that providing confidential data or information [to the ECB] is not incompatible with Dutch law or public order.[65] In Greece, on the other hand, we cannot find a legal basis specifically concerned with information transfers to the ECB. The SSM Regulation is in fact perceived as a solid legal basis to that effect.

2.4 The use of SSM obtained information by the ECB and by NCAs for punitive purposes

After information transfers have taken place, SSM authorities can *inter alia* use transferred information for enforcement purposes. It should be mentioned at the outset that although the ECB, DNB and the BoG can use information gathered in another legal order for both non-punitive[66] and for punitive purposes, in line with the delineation presented in Chapter I, here I shall focus on the main comparative findings concerning how EU, Dutch, and Greek law regulate (if at all) conditions surrounding the use of information gathered in another legal order as evidence in punitive administrative proceedings. Of particular interest is, of course, the question whether the studied legal frameworks contain fundamental rights guarantees in the "use" phase, especially in view of the fact that the materials to be used for enforcement purposes have often been obtained in another legal order.

[63] SSM Supervisory Manual (n 46) 102
[64] FSA, art 1:90(1)
[65] FSA, art 1:90(1)(c)
[66] See, Chapter I, Section 4.

2.4.1 The use of information obtained by the NCAs in ECB punitive proceedings

The punitive sanctions that are foreseen in the EU legal framework and can be imposed by the ECB's Governing Council[67] are the following: first, for breaches of directly applicable Union law, such as for instance provisions contained in the CRR, the ECB may impose administrative pecuniary penalties up to 10% of a credit institution's annual turnover.[68] Second, for breaches of ECB Regulations or decisions, the ECB may impose pecuniary fines up to EUR 500 000.[69]

The EU-level legal framework is, however, silent on fundamental rights issues surrounding the use of information – obtained by another organizational structure or by an NCA – as evidence. By means of an example, the EU-level legal framework that applies to the competence are of EU competition law enforcement, explicitly states that – for the purposes of applying EU antitrust law – the EU Commission and national competition authorities "*shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information*,"[70] while the relevant Regulation also foresees that "the rights of defense enjoyed by undertakings in the various systems can be considered as sufficiently equivalent."[71] In other words, the EU legal provision explicitly and unequivocally enables EU and national authorities to use information circulated among them in evidence for the imposition of punitive sanctions, disregarding – in essence – any procedural differences that may exist across the different EU legal systems, by introducing the presumption that defense rights of legal persons are protected in a sufficiently equivalent manner in all EU Member States. A similar provision was not included in the SSM legal framework.

2.4.2 The use of information obtained by the ECB or another NCA in DNB and BoG punitive proceedings

Upon the conclusion of an investigation by the ECB's independent investigating unit (IIU), which is competent to autonomously investigate breaches of supervisory rules and decisions, the ECB may request NCAs to open sanctioning proceedings.[72] Both DNB[73] and BoG[74] can impose punitive fines for violations of their national laws transposing Directive CRD IV on both national and legal persons.

This composite *modus* of interaction between the ECB and the NCAs resembles to a significant extent the model of ECB instructions addressed to NCAs (Article 9 SSM Regulation) the difference in this case being that NCAs enjoy discretion as to the outcome of the sanctioning proceedings.[75] The requested NCA, i.e., the NCA of the home Member State, carries out enforcement action in its own name and on the basis of its national law and powers, for the fulfillment of the ECB's mandate under the SSM Regulation. Defense rights are thus determined by national law, decisions are imputed to the NCA and

[67] See, Chapter III, Section 5.2.3, where I have discussed the ECB decision-making process in depth.
[68] SSM Regulation, art 18(1)
[69] SSM Regulation, art 18(7) in combination with art 2 of Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions OJ L 318
[70] Regulation 1/2003, art 12(1)
[71] Regulation 1/2003 recital 16
[72] See, Chapter III, Section 7.2.1
[73] See, Chapter IV, Section 5.2.1
[74] See, Chapter V, Section 5.2.1
[75] Laura Wissink, Ton Duijkersloot and Rob Widdershoven, "Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection" (2014) 10 Utrecht Law Review 92, 103

judicial control takes place at the national level, given that the ECB's request constitutes only a preparatory step and, as such, it is non-reviewable.[76]

The circumstances under which this specific model is utilized are quite straightforward: whenever the ECB is not competent to impose sanction directly. This is generally the case when the legal basis of the alleged violation is laid down in national law and when the envisaged sanctions are aimed at natural persons.[77] In that case, sanctioning competences lay with the NCA of the home Member State, i.e., the Member State from which the credit institution has received authorization.

The EU-level legal framework does not provide any further guidance as to whether NCAs shall admit in evidence any information transmitted to them by the ECB. Turning to the national legal orders studied in this dissertation, one may observe a common trend: the absence of national legislation dealing with fundamental rights and the admissibility and use as evidence in punitive administrative proceedings of information gathered either by the ECB, on the basis of EU law powers (vertical composite procedures), and/or information gathered by another NCA and channeled to the DNB or BoG through the ECB (diagonal composite procedures).

If we were to apply the principle of equivalence, that would result in the following observations. In the Netherlands, incriminating information gathered under legal compulsion for non-punitive purposes, i.e., in the context of ongoing supervision, must not be used as evidence for the imposition of a punitive sanction. In Greece, the situation is less clear, as the privilege against self-incrimination is only exceptionally taken into consideration in the context of national punitive administrative proceedings. With respect to the LPP, both the Netherlands and Greece offer the same protection to both independent and employed (in-house) lawyers. These observations suggest that, at least in theory, both NCAs would need to exclude from evidence information gathered in another legal order on the basis of lower procedural standards. At the same time, the principle of effectiveness of EU law holds that national enforcement action falling within the scope of national law should not render the application of EU law excessively difficult or virtually impossible.[78]

In short, the foregoing discussion suggests that it is currently unclear whether the studied Member States impose any limits on the admissibility of evidence transferred to the by the ECB and – if they would do so – whether that would be in compliance with general principles of EU law or not.

2.5 Intermediate remarks

The picture presented above ties in with the definition of composite law enforcement procedures that I introduced in Chapter II;[79] the ECB and NCAs are organizationally independent, but at the same time they are characterized by a relationship of decisional interdependence, in the sense that one legal order must often provide input for the adoption of a decision by another legal order. Within a functional EU territory, which comprises the 19 euro area Member States, SSM authorities obtain, transmit, and may

[76] Case T-193/04 *Tillack* v *Commission*, ECLI:EU:T:2006:292
[77] SSM Framework Regulation, art 134(1)
[78] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* EU:C:1976:188; see also Rob Widdershoven, "National Procedural Autonomy and General EU Law Limits" (2019) 12 Review of European Administrative Law 5
[79] "EU and national law enforcement authorities, organizationally independent, but in a relationship characterized by (decisional) interdependence, operating in a functional EU territory, wherein they obtain, transmit and use information for punitive purposes, through combinations of procedures and structures, for the attainment of common EU goals," Chapter II, Section 3.2

use information, through a combination of structures and procedures. Such jointly generated information can *inter alia* be used by both levels for the imposition of punitive penalties. In carrying out enforcement actions, the ECB and NCAs act under the scope of EU law and they work toward the realization of a common EU-wide goal, i.e., financial stability.

Composite enforcement procedures raise the question of which law applies in each segment of the procedure. While it is clear that, when gathering information directly, the ECB applies EU law powers and legal safeguards, less clear is under which circumstances the ECB chooses to deploy the indirect information-gathering powers, as well as which law applies in the context of such indirect obtainment of information by the NCAs for the execution of the ECB's mandate. By means of an example, assuming that the ECB asks from DNB to request information from a Dutch credit institution, it is currently not clear whether DNB will apply the EU-level protection of LPP or the more generous national protection. In turn, as will be explained below (Section 4), these unclarities also raise questions from the perspective of legal certainty, procedural fairness, and legal protection.

Concerning the applicable law in the phase in which the ECB may use information gathered by and SSM authority in order to impose a punitive sanction directly, the applicable law is EU law. On the other hand, if the ECB requests an NCA to open sanctioning proceedings, the request shall be addressed to the NCA of the home Member State, which shall apply its own national law. Particularly problematic from the perspective of fundamental rights would be a situation in which an NCA gathered information in a legal order in which X procedural standards were applied and the same information is then used for the imposition of a punitive sanction in another legal order where procedural standards offer wider protection. How will the court reviewing the final decision assess evidence in terms of its fairness? I shall come back to answering that particular question in Section 4 below.

In this section, I have discussed the architecture of the "inner SSM circle" and I have discussed the different composite structures and procedures that are evident therein. But what about the interactions of the SSM system with criminal law enforcement at the national level? That is the subject matter of the next section.

3. Interactions between the SSM and national criminal law enforcement

In some euro area Member States, including the ones studied here,[80] violations of certain prudential substantive norms are punished through both administrative and criminal law.[81] In other words, on the administrative side, the responsibility for the enforcement has been entrusted to the ECB and, on the criminal side, those Member States still enjoy enforcement autonomy. As a result, a number of closely interlinked proceedings[82] that take place in different legal orders and in which both SSM and national judicial authorities are involved will often take place. Information gathered under administrative law powers either by the ECB or by an NCA in one legal order may then serve – depending on the laws of

[80] Chapter IV, Section 2.1; Chapter V, Section 2.1.2
[81] CRD IV, art 65(1)
[82] One should be reminded that combinations of non-punitive and punitive proceedings are deemed to be sufficiently or closely interlinked when they concern the same facts, or the nature of the information sought is essentially the same or the authorities involved in the two sets of proceedings are the same. In its case law, the ECtHR has in fact been confronted with various examples where such sufficiently interlinked proceedings run in parallel or consecutively. Furthermore, as has been consistently articulated by the same court, where the (domestic) legislator fails to coordinate such interlinked proceedings, violations of fundamental rights may occur. This term ("closely interlinked proceedings") has also been explained in Chapter II, Section 3.3.4.3

the receiving legal order – as intelligence or evidence for the imposition of criminal sanctions on legal and/or natural persons that are subject to SSM supervision.

In the remaining part of this section, I shall bring together the different possibilities that follow from the previous analysis of the EU, Dutch, and Greek legal frameworks and ultimately see whether information obtained by the ECB for the purposes of banking supervision can be transferred to judicial authorities in national legal orders. If so, what are the different mechanisms that determine where such information is to be transferred and whether EU and/or national laws clarify how ECB transferred information can be used in national criminal proceedings?

3.1 Enforcement of prudential legislation through criminal law in the Netherlands and in Greece

The two national legal orders studied here present notable differences concerning the role that criminal law plays in the enforcement of prudential banking legislation. In the Netherlands, the synergies between administrative enforcement by DNB and criminal enforcement by judicial authorities are rather straightforward. The Economic Offenses Act (*Wet op de economische delicten*) lists specific provisions contained in the FSA or in EU Regulations that constitute also a criminal offense, within the meaning of the EOA.[83] Examples are the refusal to cooperate,[84] operating a credit institution without a license,[85] the non-provision of supervisory information to DNB or the provision of false information,[86] and the obtainment of a qualifying holding without the approval of DNB or the ECB.[87] As can be seen, the nature of these provisions is such that information in the hands of SSM authorities, for instance supervisory reporting which may contain false statements, will also be useful for the Dutch judicial authorities. As in the Netherlands the imposition of a punitive administrative and of a criminal sanction for the same material facts is prohibited, DNB, the public prosecution services and the Fiscal Intelligence and Economic Investigation Service engage in a mutual consultation, so as to decide whether a case will be handled by means of administrative or criminal law. Finally, it is worth noting that, in the Netherlands, both natural and legal persons can be subject to criminal liability.

In Greece, there is no specialized regime dealing with the enforcement of prudential legislation through criminal law, but that does not mean that criminal law plays no role at all. If a natural person breaches prudential legislation, provisions of the general penal code (*poinikos kodikas*), such as disloyalty of bank executives,[88] forgery of documents,[89] and fraud,[90] in case – for instance – a natural person has intentionally provided false statements for the purposes of obtaining a bank authorization,[91] could be triggered. Again, in these situations, supervisory reporting with which credit institutions have to provide the ECB may often be relevant for judicial authorities investigating the aforementioned offenses. Greek law does not foresee criminal liability of legal persons. All in all, we see that contrary to the Netherlands, when it comes to prudential legislation in particular, in Greece the links between administrative law and criminal law are less straightforward, but still existent.

[83] Economic Offenses Act, art 1(2)
[84] FSA, art 1:74
[85] FSA, art 2:3a para. 1
[86] For instance, FSA, art 3:77; FSA, art 3:297
[87] For instance, FSA, art 3:77; FSA, art 3:297
[88] Greek Penal Code, art 405
[89] Greek Penal Code, art 215
[90] Greek Penal Code, art 386
[91] Prudential Supervision Act, art 59(a)

As, in one way or another, criminal law enforcement plays a role in both jurisdictions, in the next section I explain the different channels through which national judicial authorities and SSM authorities can potentially interact with each other.

3.2 National judicial authorities requesting information obtained by an SSM authortiy

The ECB recognizes the likelihood that SSM confidential information in the hands of the ECB or in the hands of NCAs are often relevant for ongoing criminal investigations at the national level. It has therefore adopted a Decision which lays down the modalities applicable to requests of supervisory information by national criminal investigating authorities and the circumstances under which such information can be transferred to them, either by the ECB or by NCAs. In short,[92] when national judicial authorities request confidential information gather by an SSM authority, should the ECB decide to transfer that information, such transfers take place through NCAs, provided that Union or national law allows so and that there are no overriding reasons for refusing its disclosure.[93] Once the SSM confidential information is in the hands of national judicial authorities, questions relating to its use, applicable defense rights, and remedies, are determined solely by national law. In turn, as will be explained more in depth in Section 5, the fact that the use of such information for enforcement purposes is defined by national law may jeopardize the composite protection of defense rights, notably the privilege against self-incrimination. Indeed, if the ECB is enabled to exercise legal compulsion at the EU level, but at the same time the same information, initially obtained for purposes of ongoing supervision, can "simply" end up in the hands of national judicial authorities, without EU law imposing specific limits as to its transfer and use, the composite effectuation of defense rights may be undermined.

The analysis of the legal orders of the Netherlands and of Greece showed that, even though EU law anticipates that national judicial authorities may request from the ECB supervisory information, which may be relevant also for criminal law enforcement purposes, Dutch and Greek laws have not incorporated the said ECB decision in their national laws. In that respect, more specific modalities concerning how the aforementioned decision works, from a bottom-up perspective, are not currently known.

3.3 Spontaneous transfers of criminally relevant information from the ECB to national judicial authorities

In addition to bottom-up requests, the ECB may also spontaneously transmit upon its own initiative criminally relevant information to the national level. More specifically, where carrying out its tasks under the SSM Regulation, the ECB has reason to suspect that a criminal offense may have been committed, "it shall request the relevant NCA to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law."[94] From that provision, it follows that, in obtaining information from supervised entities for the purposes of ongoing supervision, the ECB may often come across information that may be relevant for criminal law enforcement purposes at the national level. The ECB could in fact come across such information either directly or indirectly. Directly, in the context of JST, OSIT, or IIU activities. Indirectly, where – for instance – the critical information was gathered by an NCA, upon the ECB's request, the information was transferred to the ECB and turns out that it is relevant for criminal law enforcement purposes in another Member State.

[92] See also Chapter III, Section 7.3.1
[93] See Decision ECB/2016/1162, art 2(1) and 3(1)
[94] SSM Framework Regulation, art 136

A top-down transmission of criminally relevant information takes place, with the NCAs playing the role of the intermediary[95] between the ECB and the national judicial authorities. It is worth noting that the EU-level legal framework does not contain further guidance as to how the receiving legal order is to be determined, neither what status the transferred information shall have in the receiving jurisdiction. In other words, in the first place, assuming that the nature of the case is such that more than one national legal orders may be competent to prosecute, it is currently unclear to which legal order the ECB must transfer that information. In the second place, EU law does not regulate whether the transferred information can be used at the national level as evidence or whether it should merely serve as starting information/intelligence, thereby imposing on national judicial authorities an obligation to initiate their own investigation. Obviously, that is a matter to be determined by national law and so are the applicable defense rights and legal remedies.

The analysis of the Dutch and the Greek legal orders showed that national law does not contain specific provisions to regulate the interactions of national criminal law enforcement with EU law enforcement authorities. Therefore, the principles of effectiveness and equivalence find application, meaning that judicial authorities will most likely treat ECB information in the same way as they would treat information gathered by DNB and BoG respectively. In any case, the effectiveness of EU law must be ensured.

3.4 National judicial authorities transferring criminal information to an NCA

In certain Member States, like in the Netherlands, national judicial authorities are gathered on the basis of criminal law powers[96] which may then transfer information to their local NCA. The NCA may further use it for punitive sanctioning.[97] Of course, what is particularly interesting in the context of the SSM is not the fact that the public prosecution services of the Netherlands may transfer such information to DNB. After all, that is an internal matter and the law – accompanied by appropriate safeguards – provided for that opportunity before the creation of the SSM. The interesting part would be the situation in which the public prosecution services of the Netherlands use – for example – their powers to intercept telecommunications. Assuming that the report contains evidence that senior management of a significant credit institution in the Netherlands is providing false supervisory reporting and the report is subsequently transferred to DNB, it may be the case that DNB may further transfer that to the ECB. One should be reminded here that Dutch law imposes conditions on information transfers to the ECB. The information would thus be transferred only to the extent that the transfer is not incompatible with Dutch law or public order.[98]

3.5 Intermediate conclusion

The foregoing analysis accentuates a number of potential scenarios and dynamics in which administrative and criminal proceedings taking place in different legal orders – either concurrently or

[95] Decision (EU) 2016/1162, art 2(1)
[96] See Trade and Industry Appeals Tribunal 9 July 2015, ECLI:NL:CBB:2015:193, in which the National Criminal Investigation Department (*De Rijksrecherche*) made use of its powers to intercept telephone conversations. The Public Prosecutor gave the national competition authority (ACM) permission to use the intercepted reports. ACM used the wiretaps in its investigation. Ultimately, it imposed of a number of punitive fines on certain undertakings for violations of the cartel prohibition.
[97] Trade and Industry Appeals Tribunal 9 July 2015, ECLI:NL:CBB:2015:193
[98] FSA, art 1:90(1)(c)

consecutively – have become "sufficiently interlinked."[99] In fact, both Article 136 SSM Framework Regulation and Decision ECB/016/1162 hint at this possibility. While administrative enforcement of prudential legislation (by the SSM) and criminal law enforcement in the national legal orders go hand in hand, their interconnectedness is not yet recognized and regulated in a sufficient manner neither by the EU legislator nor by the national legal orders studied here. As a result, even though SSM-generated information is regularly exchanged between various authorities and legal orders, vertically and diagonally, at the same time no formal legal provisions coordinating the tasks and the powers of the different authorities have been established. In other words, an organizational or functional unity between administrative and judicial authorities, whose tasks may often overlap – and which both act within the scope of Union law – is currently missing. In turn, as will be explained more in depth in Section 4 below, the lack of mechanisms coordinating EU administrative enforcement and national criminal law enforcement may affect complete fundamental rights protection.

4. The protection of fundamental rights in composite SSM enforcement procedures

In Section 2 above, using the analytical lens of obtainment of information, transfer of information and use of information (for punitive purposes), I have showed the different ways in which certain SSM enforcement procedures are composite. The normative framework of this dissertation, introduced in Chapter II, is fundamental rights. Now that the reader has become familiar with what the relevant authorities do and how they do it, the next logical step is to assess that through the lens of my normative yardstick, i.e., fundamental rights and the three predominant ways[100] in which the specific fundamental rights accomplish their protective function. In other words, the below section assesses whether fundamental rights issues arise where EU and national legal orders and authorities interlock.

I first discuss the right to privacy in composite SSM procedures and issues of legal certainty and legal protection therein. Next, I pay attention to the two defense rights studied in this dissertation and discuss issues of legal certainty, procedural fairness and legal protection. Third, I assess the extent to which the *ne bis in idem* principle is sufficiently safeguarded in composite SSM enforcement procedures.

4.1 The right to privacy in composite SSM enforcement procedures

The right to privacy, as protected by Articles 7 CFR/Article 8 ECHR, holds that every person has the right to respect for his private and family life, his home, and his correspondence. The right to privacy grants persons a safe space of their own, within which they can freely develop and carry out their personal and professional activities. However, owing to the fact that law enforcement authorities often need to obtain information in order to establish violations of the law, the right can be limited for the purposes of effective law enforcement. For instance, the power to carry out on-site inspections at business premises, a power vested in the ECB, DNB and BoG interferes with the inviolability of the home dimension of the right to privacy. However, as long as the interference is provided for by law, it is necessary and serves a public interest, limitations to the right to privacy, by means of on-site inspections, can still take place.

[99] *Chambaz v Switzerland* App no 31827/96 (ECtHR 15 April 2012) para 43; see also, Michiel Luchtman, Argyro Karagianni and Koen Bovend'Eerdt, "EU administrative investigations and the use of their results as evidence in national punitive proceedings" in Fabio Giuffrida and Katalin Ligeti (eds) *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (ADCRIM Report, University of Luxembourg 2019) 36 et seq < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021

[100] Legal certainty, legal protection, procedural fairness.

The legal certainty dimension of the fundamental right to privacy refers to the following: the right to privacy ensures that a person knows the content of his or her right, including – albeit in broad strokes – the situations under which limitations to that person's right may occur. Limitations will in turn not be deemed unlawful as long as the law offers a (reasonable) degree of legal certainty about the applicability of such limitations. In that respect, a law must be sufficiently precise, foreseeable and adequately accessible.[101]

The legal protection dimension of the right to privacy shields a person against disproportionate or arbitrary intervention in that person's private sphere, by obliging the State to define with reasonable clarity the scope of the exercise of executive discretion.[102] The more severe the interference with the right to privacy, the stricter the procedural safeguards that must be afforded to the persons concerned.[103] Such safeguards typically take the form of *ex ante* or *ex post* legal control, in which the judiciary tests the necessity, legality and proportionality of the law enforcement action that interferes with privacy.[104]

What novel issues related to the legal protection element of the right to privacy emerge when EU and national laws interlock? I shall now examine each function and issues thereof in order.

4.1.1 The right to privacy and issues of legal certainty

4.1.1.1 Issues of legal certainty with respect to the applicable law

In Chapter II, I explained that the legal certainty threshold set by the right to privacy would be met when credit institutions are able to roughly assess the content of the ECB's investigative powers ("reasonable expectation"). Do, then, credit institutions have a reasonable expectation of their privacy? In other words, do they now on the basis of which – substantive and procedural – rules SSM authorities can gather information? If they do, is that law sufficiently precise, foreseeable, and adequately accessible, as the right to privacy demands?

Before I move on to examining those questions, I shall state from the outset that the overarching position I take is that – in a vertical setting – and particularly between the EU and the Netherlands and the EU and Greece, I do not notice any significant issues of privacy – related legal certainty. There are, of course, certain gray zones, which I shall explain below, but overall, I do not consider that credit institutions lack legal certainty concerning the content of SSM investigative powers.

To begin with, the EU-level legal framework is fully harmonized: the SSM Regulation[105] provides for a wide range of information-gathering powers. These powers are available both to ECB officials and to NCA officials participating in JSTs and in OSITs. However, the EU-level legal framework is silent as to whether NCA staff members participating in such mixed EU teams, in addition to the powers

[101] *Silver and Others* v *the United Kingdom* App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECtHR 25 March 1983) paras 87-88
[102] *Kruslin* v. *France* App no 11801/85 (ECtHR 24 April 1990) para 35
[103] Pieter van Dijk, Godefridus van Hoof, Arjen van Rijn, Leo Zwaak (eds), *Theory and Practice of the European Convention of Human Rights* (5th edn, Intersentia 2018) 745-746; *Société Colas Est and Others* v. *France* App no 37971/97 (ECtHR 16 April 2002); Case C-46/87 *Hoechst* v *Commission* [1989] ECLI:EU:C:1989:337, para.48
[104] Jed Rubenfeld, "The right of privacy" (1989) 102 Harvard Law Review 737
[105] SSM Regulations, arts 10, 11, 12 and *inter alia* Silvia Allegrezza and Ioannis Rodopoulos, "Enforcing Prudential Banking Regulations in the Eurozone: A Reading from the Viewpoint of Criminal Law" in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* **(**Hart Publishing 2017)

enshrined in the SSM Regulation, can also make use of national, more intrusive, information-gathering powers. Is that a problem? Well, in the particular context of the ECB, DNB, and BoG, not so much, as the two specific NCAs studied here do not have at their disposal any additional and/or more intrusive information-gathering powers compared to those that are already available to the EU officials. In that sense, a credit institution that has been authorized in Greece and operates through branches in the Netherlands, would not have a hard time assessing the scope and content of JST and OSIT information-gathering powers.

However, the fact that legal certainty in the specific relationship between the ECB, DNB, and BoG is shielded does not completely rule out a potential issue of legal certainty with respect to the applicable law in a vertical setting. Let me explain my point with reference to the following hypothetical example.[106] As already discussed, the SSM Regulation[107] dictates that whenever, according to national law, an on-site inspection requires an *ex ante* judicial authorization, such authorization shall be applied for. Let us now assume that a credit institution is incorporated under the law of Member State A and operates through branches also on Member States B and C. For the performance of an on-site inspection, the laws of Member States B and C do not require *ex ante* judicial authorization. On the other hand, the law of Member State A does require *ex ante* judicial authorization. The ECB could potentially choose to carry out an on-site inspection in any Member State, that is, not necessarily at the home Member State (A), but also at the premises of a branch in Member State B or C. Up until the moment of writing, there are no specific criteria for choosing in which jurisdiction the inspection will take place. Is it not less burdensome for the ECB to inspect on the territory of Member State B or Member State C, instead of having to follow the rather time-consuming procedure of requesting *ex ante* authorization by the judicial authorities of Member State C?

My point is not that the ECB will deliberately circumvent the applicable law. My argument is rather that – when it comes to the foreseeability of the applicable law in on-site inspections – the design of the system is not completely airtight. Reliance on national law, in tandem with the fact the criteria for the aforementioned choices are not entirely clear, could potentially create problems of privacy-related legal certainty. While the sanctioning legal order is always clear, namely the Member State of establishment, the law that is applicable to the preceding parts of a composite enforcement procedure, may not always be entirely clear, thereby leading to privacy-related legal uncertainty.

4.1.2 The right to privacy and issues of legal protection

4.1.2.1 The organization of judicial control of SSM on-site inspections

The most straightforward example in which privacy-related legal protection issues are evident in the SSM, concerns the specific example of on-site inspections. Before moving on to discussing the relevant issues, it is important to first reiterate in which ways the power to carry out on-site inspections interferes with the right to privacy and how legal protection is currently organized within that context.

When SSM authorities carry out on-site inspections they logically need to enter business premises. Entering business premises interferes with the inviolability of the home element of the right to

[106] The example used here is partially based on the article of Rijsbergen & Scholten: Marloes van Rijsbergen and Miroslava Scholten, "ESMA inspecting: the implications for judicial control under shared enforcement" (2016) 7 European Journal of Risk Regulation 569
[107] SSM Regulation, art 13(1)

privacy.[108] Once entry has been secured, the obtainment of information – through information requests – containing confidential or privileged correspondence, is a second act that interferes with the right to privacy. Think for instance an on-site inspection team requesting to access to all email communications of a senior manager. The email history may also contain correspondence that falls within the notion of that person's private life.

To counterbalance a potential loss of legal certainty, there is a need for legal protection. Member States have quite some leeway in determining how to test interferences with Articles 7 CFR/8 ECHR. According to the case law of the CJEU and the ECtHR studied in Chapter II, legal systems can either choose to have in place a mechanism of *ex ante* judicial control[109] of the *stricto sensu* proportionality of the inspection decision, or, opt for full *ex post* judicial review, after the adoption of a sanctioning decision, in which case the reviewing court shall also examine the proportionality of the inspection decision[110] and likely also the separate interferences with privacy that may have taken place in the meanwhile.

However, in the EU legal order and particularly in composite SSM enforcement procedures, the picture is somewhat different. In essence, there is no common EU standard, owing to the fact that the SSM Regulation refers back to national law; more specifically, before carrying out an on-site inspection and/or before requesting the assistance of national authorities for the "opening of doors,"[111] the ECB should receive *ex ante* authorization by the national judicial authority of the respective Member State, only if national rules so require.[112] The reviewing national judicial authority is only allowed to control that the ECB decision is authentic and to carry out an excessiveness and arbitrariness test.[113] More specifically, it shall determine that "the [national] coercive measures envisaged are neither arbitrary nor excessive [as a matter of the right to privacy] having regard to the subject matter of the inspection."[114] This could – for instance – be the case where "the evidence sought is so peripheral, that the intervention in the sphere of the private activities of a legal person which a search using law enforcement authorities entails necessarily appears manifestly disproportionate and intolerable in light of the objectives pursued by the investigation."[115]

In carrying out such an assessment, in accordance with the principle of sincere cooperation,[116] the reviewing national court may ask the ECB for explanations, such as why it suspects that an infringement has taken place, details on the seriousness of the suspected infringement, and the involvement of the persons subject to the coercive measures.[117] It is not, however, competent to review the necessity of the inspection or demand to gain access to the ECB's file, as the lawfulness of the ECB's decision can only be reviewed by the CJEU.[118]

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[108] Case C-94/00 *Roquette Freres* [2002] para 29; *Colas Est and Others v. France* (n 103) para. 41
[109] *Funke* v *France* App no 10828/84 (ECtHR 25 February 1993
[110] Case 583/13 P *Deutsche Bahn and Others* v *Commission* [2015] ECLI:EU:C:2015:404
and *Delta pekárny* App no 97/11 (ECtHR 2 October 2014)
[111] The latter is applicable when supervised entities oppose an on-site inspection. Article 12(5), SSM Regulation
[112] See critically, Duijkersloot, Karagianni and Kraaijeveld 2017 (n 24) 47-48
[113] *Roquette Frères* (n 108); see also Wissink, Duijkersloot, Widdershoven 2014 (n 75).
[114] SSM Regulation, art 13(2)
[115] *Roquette Frères* (n 108), para 80
[116] TFEU, art 4(3)
[117] SSM Regulation, art 13(2)
[118] Ibid

The foregoing is a clear example of a composite approach to the protection of the right to privacy. The extent to which such an approach manages to ensure the protection of the right to privacy in composite SSM procedures is questionable. As I will explain below in my discussion of different possible (vertical and diagonal) scenarios, as a result of the fact that the EU framework depends on the laws of the various national legal orders, which enjoy a margin of discretion as to how they will comply with the inviolability of the home, ultimately, there may be instances where excessiveness and arbitrariness (i.e., *strico sensu* proportionality) will not be checked.

Moving to the national legal orders which are studied here, in the Dutch legal order, on-site inspections are not based on a formal decision, since they constitute a *de facto* measure.[119] A *de facto* measure cannot be appealed before the administrative authority or before administrative Courts.[120] However, irregularities that may have occurred on the supervisor's part in the course of an on-site inspection, can be raised by the bank in the judicial proceedings that follow the imposition of a sanction, if the sanction was based on information that was seized in the course of that inspection.[121]

The Greek Act on Prudential Supervision also does not require the adoption of a formal decision before the performance of an inspection, but it follows both from general administrative law and from practice, that before carrying out such an inspection, the BoG adopts a decision called "command for an inspection," which states the details of the supervisors (names, capacity *et cetera*), the date and the place where the inspection shall take place. *Ex ante* judicial authorization for the performance of an on-the-spot check by BoG is in not necessary, but the proportionality of the inspection can be the subject of *ex post* judicial review of a sanctioning decision, in which case the Council of the State confines itself to reviewing the appropriateness and the necessity of the inspection.[122]

As can be seen, the national legal orders studied here follow a similar approach regarding how they test violations of the inviolability of the home: *ex post*, i.e., after the imposition of a penalty. These rules fit the legal systems in question. However, the fact that the ECB relies on national law is problematic in many senses. Below, I discuss a number of different scenarios in order to highlight how different composite SSM procedures can affect privacy-related legal protection.

4.1.2.2 Vertical (bottom-up) issues of privacy – related legal protection

In this scenario, the ECB imposes a punitive sanction, on the basis of evidence gathered during an EU on-site inspection in the Netherlands, which does not check *ex ante* the compliance of the inspection decision with Articles 7 CFR/8 ECHR. The Dutch credit institution opposed the inspection: therefore, the ECB requested DNB's assistance.[123] DNB "opened the door" and ECB proceeded with its investigation. Based on evidence found in that inspection, the ECB imposed a punitive sanction.

As an act of Union law, the ECB decision to carry out an OSI can be directly challenged by the addressees before the General Court within a period of two months, starting from the moment that they

[119] Ibid
[120] It is possible, however, for a bank to bring a claim before Dutch civil courts, on the basis of general tort law. See, Article 6:162 of the Dutch Civil Code (*Burgerlijk Wetboek*); see Hague Court of Appeal 12 February 2019, ECLI:NL:GHDHA:2019:470; see however Council of State 12 February 2020 ECLI:NL:RBAMS:2019:320, wherein an information request in international tax matters, which as such does not qualify as an appealable decision under the GALA, was considered to be an appealable "legal judgment" (*rechtsoordeel*),
[121] Wissink, Duijkersloot and Widdershoven 2014 (n 75) 110
[122] Wissink, Duijkersloot and Widdershoven 2014 (n 75) 110
[123] SSM Regulation, art 12(5)

were notified.[124] However, in my view, it is not a given that the EU Courts can in this case – in the absence of *ex ante* review in the Dutch legal order – test the "national part," namely the assistance offered by Dutch competent authorities; after all, this part is concerned with national coercive measures. Furthermore, it may well be the case that the CJEU may even apply the principle of sincere cooperation and assume that in the execution of the Dutch coercive measure,[125] national authorities complied with EU law and EU fundamental rights standards.[126]

From the foregoing, it follows that where for carrying out an investigation an EU authority depends on national coercive powers, the necessity of which is tested *ex post,* and that investigation results in an EU sanction, it may be the case that the excessiveness and arbitrariness of the national coercive measures may never be tested *ex ante*, i.e., before the interference took place. Therefore, to offer effective legal protection against disproportionate interferences with the right to privacy, the EU Courts would, according to the existing case law,[127] need to carry out a full *ex post* review.[128] In other words, in addition to testing the contested elements of the sanctioning decision, they would also need to ensure that the preceding coercive measures were not arbitrary and that they were proportionate in light of the subject matter of the investigation. However, in my view, it is questionable whether the CJEU is well-positioned to conduct such a full *ex post* assessment. Can the CJEU really reconstruct all the facts that are relevant to assess the non-excessiveness and non-arbitrariness of an inspection that may have often taken place years before? I am not convinced that the CJEU can "simply" carry out such a single judicial review without at least some input by the competent national court and I shall now explain why.

Even though the CJEU's exclusive competence to review final decisions of EU institutions, like those of the ECB, is certainly not questionable, at the same time, in light of Article 263 TFEU, it is not a given that the CJEU has the same competence with respect to the application of national law.[129] In the situations discussed under this section, i.e., the testing of the "national part" of an EU on-site inspection, that national part could either play the role of a question of law or a question of fact or even both. Prek and Lefevre explain that a question of fact refers to "the factual situation being adjudicated upon,"[130] while a question of law refers to situations in which "national law is relevant for the major premise."[131] In my view, the aforementioned example, i.e., national coercive measures during an EU on-site inspection, contains elements that can be perceived as both questions of fact and of law. More specifically, in the first place, the reviewing judge would have to assess the facts in light of arbitrariness and excessiveness and that might also involve the question of what, in accordance with the national law in question, constitutes arbitrariness and excessiveness (question of law). In the second place, examining the precise circumstances and facts (question of fact) of an on-site inspection that likely took place years ago is not a straightforward task.

[124] TFEU, arts 263(4) and 263(6)
[125] Which may be reviewed at the national level by means of the *kort geding* procedure. See, Chapter IV, Section 3.3
[126] See also, Case C- 469/15 P *FSL and Others* v *Commission* [2017] ECLI:EU:C:2017:308, para 32
[127] *Deutsche Bahn* v *Commission* (n 110) para 32
[128] Ibid
[129] Enrico Gagliardi and Laura Wissink, "Ensuring Effective Judicial Protection in Case of ECB Decisions Based on National Law" (2020) 13 Review of European Administrative Law 41, 49; Filipe Brito Bastos, "An Administrative Crack in the EU's Rule of Law: Composite Decision-Making and Nonjusticiable National Law" (2020) 16 European Constitutional Law Review 63, 74
[130] Miro Prek and Silvere Lefevre, "The EU courts as 'national' courts: National law in the EU judicial process" (2017) 54 Common Market Law Review 369, 383
[131] Ibid, 373

Against the foregoing, I am of the opinion that in composite SSM enforcement procedures that end with a punitive EU Decision, partially or wholly based on input provided by an NCA, a "single judicial review," as advocated by the CJEU in the *Berlusconi* case, may not be such a realistic exercise, particularly in the absence of an impartial assessment of the facts and an assessment of arbitrariness and excessiveness by a national court. The involvement of national Courts should thus be ensured.

4.1.2.3 Vertical (top-down) issues of privacy – related legal protection

While the previous section looked at how the legal protection dimension of the right to privacy is ensured in composite enforcement procedures that end with an EU punitive decision which is based on – formal or less formal – input stemming from an NCA, in this section I discuss the inverted scenario: a composite enforcement procedure that ends with a national punitive decision, contains ECB input and potential disputes with regards to respect for the right to privacy by the ECB arise. The claims have to now be checked by the national reviewing court.

Let us then assume that the ECB adopted a decision[132] to carry out an unannounced on-site inspection at the premises of a Dutch credit institution in the Netherlands. The ECB obtained evidence on the basis of Union law powers and the IIU made the assessment that a breach of a legal provision contained in the CRD IV had taken place. However, as the ECB did not enjoy direct sanctioning powers, it requested from the NCA of the Member State of establishment (DNB) to open sanctioning proceedings.[133] DNB decided to impose a punitive fine. The credit institution appeals the decision before the Dutch national court and complains that the purpose of the EU inspection was not sufficiently demarcated[134] and that the ECB essentially engaged in a fishing expedition, which is prohibited under Union law.[135]

Can the Dutch Courts[136] remedy potential violations of the right to privacy? That is only possible through the preliminary reference procedure. National Courts cannot invalidate the acts of EU organs as this would undermine the unity of EU law. Thus, where the validity of a Union act is at stake, the national court would need to act in accordance with Article 267 TFEU and make a reference for a preliminary ruling before the CJEU.[137] Should the CJEU invalidate the ECB act, the national court may prohibit the use of information obtained by the ECB as evidence or apply relevant national rules and practices that deal with the weighting and the assessment of such material.[138]

To conclude, the preliminary reference procedure serves as an indirect mechanism of review of the legality of ECB acts. That leads me to the conclusion that in vertical top-down enforcement procedures, privacy-related legal protection is sufficiently safeguarded.

4.1.2.4 Diagonal issues of privacy-related legal protection

In this section I will discuss the situation in which violations of the right to privacy take place by an NCA in one legal order and the complaints are raised before a national court in legal order B.

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[132] SSM Framework Regulation, art 143(2)
[133] SSM Regulation, art 18(5)
[134] In essence, the credit institution complaints that the ECB violated Article 143(2)(a) of the SSM Framework Regulation, which reads that the inspection decision must specify at least the subject matter and the purpose of the on-site inspection.
[135] *Deutsche Bahn* v *Commission* (n 110)
[136] The same considerations apply *mutatis mutandis* to the Greek courts too.
[137] Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452, para 15
[138] Case C-746/18 *Prokuratuur* [2021] ECLI:EU:C:2021:152, para 43

Let us assume that the BoG carries out verification activities[139] at the premises of a Dutch credit institution which operates through a branch in Greece. Shortly after, the Greek NCA transmitted information that it obtained in the course of those activities to the ECB. The IIU reaches the conclusion that the parent undertaking located in the home country (the Netherlands) is violating prudential requirements concerning internal governance arrangements.[140] As the ECB does not – in this example – enjoy direct sanctioning powers, it transmits the relevant file to the Dutch NCA and requests from it the opening of sanctioning proceedings. The Dutch NCA imposes a punitive penalty based also on the information that had been obtained by BoG on the basis of verification activities.[141] Before the Dutch Courts, the credit institution argues that the BoG's acts were illegal.

The question that comes to the fore is whether the Dutch court can test the "Greek part" of the composite enforcement procedure. While it is true that the Courts in the Netherlands could – in principle – assess the lawfulness of the obtainment of facts in another Member State, they are under no obligation to do that. [142] As it follows from the analysis in Chapter IV, Dutch Courts are not in principle concerned with violations of Article 8 ECHR by foreign enforcement authorities, unless the violation was exceptionally flagrant (the *zozeer indruist* criterion).[143] In fact, if the irregularity that took place in the Greek legal order was not manifestly improper, [144] in view of the principle of mutual trust, the Dutch court may even be required to assume that procedures in Greece comply with EU law and the CFR.[145] The downside of that is that the national court reviewing a final decision, which is the end result of a diagonal composite procedure, may not check any potential unlawful action or disproportionate interference with the right to privacy, which may have taken place in the information-gathering stage in another legal order.

Let us now assume that the Dutch court decided to test the lawfulness of the gathering and concluded that the gathering was indeed unlawful. Can it disregard/exclude the evidence? Or will such an exclusion undermine the principles of the primacy, unity, and effectiveness of EU law? In the case *Prokuratuur*, the CJEU advocated that in light of the principle of effectiveness, national laws may prohibit the use of such information as evidence.[146] Alternatively, national Courts may also apply national rules and practices governing the assessment and weighting of evidence gathered contrary to Article 7 CFR /8 ECHR or they may consider whether that material is unlawful in the determination of a sentence. [147] Can this case law, which was developed in the context of indirect enforcement, apply *mutatis mutandis* to the problem at issue, namely to diagonal composite enforcement procedures? I would argue that the judgment is particularly useful, at least to the extent that it signals that the CJEU will most probably allow national Courts to attach a lower weight or to even disregard evidence obtained abroad in violation of the right to privacy, without that undermining the principle of the effectiveness of Union law. However, for legal protection to be fully ensured, before reaching the exclusion phase, a

[139] SSM Framework Regulation, art 90(1)
[140] CRD IV, art 74
[141] SSM Framework Regulation, art 90(1)
[142] As argued by Mazzotti and Eliantonio, that could "amount to an unacceptable intrusion on its [that other State's] sovereignty," Paolo Mazzotti and Mariolina Eliantonio, "Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnellan, and the Constitutional Law of the Union" (2020) 5 European Papers 41, 43
[143] Supreme Court 21 March 2008, ECLI: NL: HR: 2008: BA8179, para 3.4.1
[144] I.e., the "exceptional circumstances" criterion, articulated by the CJEU in Opinion 2/13 [2014] ECLI:EU:C:2014:2454, para 192
[145] Ibid
[146] *Prokuratuur* (n 138) para 43
[147] Ibid

national court must have previously decided to test the compliance of foreign administrative action with Article 7 CFR/8 ECHR and, should it find, the gathering violated the right to privacy, attach a lower weight to the evidence or even exclude it. In the Dutch legal order, even though case law dealing specifically with diagonal EU enforcement procedures does not exist, the existing case law[148] indicates that the Dutch Courts will rarely tick the first box, namely test compliance of foreign administrative action with the right to privacy, let alone ticking the second box, namely disregard evidence obtained abroad in violation of the right to privacy or attach of a lower weight to such evidence.

Let me now the discuss the inverted scenario. Information was (unlawfully) gathered by DNB, transferred to the ECB, which thereafter transferred it to the BoG, also requesting from it the opening of sanctioning proceedings. BoG, relying to a significant extent on information that had been collected by DNB in the Netherlands, imposes a punitive sanction. What will the Greek Courts do with claims of illegality? Will they examine them? That is really unclear at the moment, as relevant case law does not currently exist. However, in internal situations, the key question that has to be answered is the extent to which a violation during the obtainment phase amounts to an infringement of an *essential* procedural requirement and – if it does – whether that infringement caused to the addressee of the final decision irreparable harm.[149] Violation of the right to privacy could[150] amount to an infringement of an essential procedural requirement. Let us say that the Greek court does find that an essential procedural requirement had been violated. What shall it do? The answer to the question is, again, not clear. In my view, it would need to disregard the critical piece of evidence, as Article 19(3) of the Greek Constitution explicitly states that "*Use of evidence acquired in violation of the present article* [secrecy of correspondence] *and of Articles 9* [right to privacy] *and 9A* [protection of personal data] *is prohibited*." Would that be undermining the effectiveness of Union law? On the basis of the aforementioned *Prokuratuur* case,[151] it appears that disregarding evidence collected in violation of the right to privacy would not undermine the effectiveness of Union law.

4.1.3 Intermediate conclusions

The various vertical and diagonal scenarios discussed above show that privacy-related legal protection is generally not at stake in vertical composite SSM procedures. The CJEU seems to be ready to carry out a single judicial review of composite procedures that end with an ECB decision and contain preparatory input by an NCA,[152] though it is yet to be seen against which standards such a review will take place. At the same time, in the inverted scenario, namely top-down vertical enforcement procedures that end with an NCA fine but are based on ECB input, legal protection is also shielded; should concerns concerning unlawful gathering come to the fore, the reviewing national court can always make use of the preliminary ruling reference procedure.

With respect to diagonal composite enforcement procedures, there are more gray zones concerning how privacy-related legal protection works. Even though there is – in principle – no rule that precludes national Courts from reviewing the legality of acts of foreign law NCAs, in many cases national Courts may abstain from testing earlier segments of a composite procedure, as that could be perceived as an unacceptable interference with that other Member State's sovereignty.[153] In some jurisdictions, like the

[148] Supreme Court 21 March 2008, ECLI: NL: HR: 2008: BA8179
[149] Council of the State 4447/2012, Nomos 592724
[150] I use the word "could" because that particular question has not yet been tested by an administrative court.
[151] *Prokuratuur* (n 138)
[152] *Berlusconi and Fininvest* (56) para 49
[153] Mazzotti and Eliantonio (n 142)

Netherlands, national Courts may test the legality of foreign acts only where there are indications of particular flagrant violations of rights. In other cases, Member States may in fact apply the principle of mutual trust and not inquire at all into such issues. Whereas the added value of mutual trust – especially in the AFSJ – is unquestionable, at the same time, we see that in the absence of a horizontal mechanism whereby national Courts can cooperate and pose questions to one another, the application of mutual trust could sometimes lead to an undesirable effect, whereby the full judicial oversight of all segments of a composite procedure may fall between the cracks.

4.2 Defense rights in composite SSM enforcement procedures

As mentioned previously, in the context of punitive law enforcement, the rights of the defense accomplish their protective function by – among others – offering (procedural) legal certainty, by ensuring procedural fairness and by affording legal protection. In the below sections, I assess the extent to which these three protective dimensions of defense rights are sufficiently safeguarded in composite SSM enforcement proceedings.

4.2.1 Defense rights and legal certainty: the example of the legal professional privilege

The legal certainty which is embedded in the rights of the defense is concerned with "*the certainty that legal persons have the opportunity to affirm their legal situation in a court procedure according to a predetermined set of procedural rules*."[154] Translated to the SSM setting, that means that SSM procedures that may lead to the imposition of a punitive penalty must allow the persons involved to foresee the procedures they will face along the way. By means of a concrete example, if EU investigations can lead to national punitive sanctions, once involved in such punitive proceedings, the person concerned should be able to know the composite content of his LPP, i.e., how that ought to protected at the interface of different legal orders. The below discussion explains why this may not always be the case and why the current case law does not convincingly resolve issues of defense-rights related legal certainty in composite enforcement procedures.

4.2.1.1 Divergent standards between legal orders

As we have already seen, in the context of banking supervision, credit institutions are under an obligation to cooperate and disclose information requested banking by supervisors. In addition to requesting information, in the context of on-site inspections, supervisors are also empowered to look for, read and – depending on the authority– copy documents and computer data. Documents containing internal communication between a bank and its in-house lawyers, but also its external legal counsels, are thus likely to be discovered during an on-site inspection. The degree of protection that a given legal order accords to LPP is, then, particularly important, because during dawn raids, information and documents covered by LPP will not be read and/or copied. Even if a credit institution waives LPP, but the supervisors disagree and consider certain information as not being legally privileged and thus read or take books/records off-site, the credit institution is still able to contest the OSIT action by filling an action for annulment before the CJEU,[155] stating that some of the read, copied, or seized information is legally privileged.[156] What degree of protection do the studied legal orders then afford?

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[154] Elina Paunio, "Beyond Predictability-Reflections on legal Certainty and the Discourse Theory of Law in the EU Legal Order" (2009) 10 German Law Journal 1469, 1474

[155] Assuming of course that the on-site inspection was carried out by an ECB on-site inspection team.

[156] Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v *Commission of the European Communities* [2007] ECLI:EU:T:2007:287, para 48

As far as the EU legal order is concerned, the ECB legal framework does not explicitly contain an LPP provision. A recital in the SSM Regulation expresses the following postulation: "*legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisers, in accordance with the conditions laid down in the case law of the Court of Justice of the European Union*."[157] The recital refers to the *AM & S* v *Commission,*[158] *Hilti*[159] and *Akzo Akcros Chemicals*[160] cases, which – taken together – suggest that the LPP applies in ELEA procedures that can negatively impact the interests of investigated persons, even if those procedures are of a non-punitive nature. Furthermore, the same case law confirms that LPP protection extends to written communication exchanged between an external independent lawyer and his client for the purposes of the latter's defense.[161] Internal notes which report or summarize the content of the aforesaid written communications are also covered.[162] Finally, communication with in-house legal counsels is not covered by LPP; according to the CJEU, given that lawyers are in an employment relationship with the economic undertaking, they are not sufficiently independent.[163]

As to the protection accorded by the LPP, in the Netherlands, all lawyers who are members of the bar association; therefore, both external and in-house lawyers, fall under the protective scope of LPP.[164] Natural persons, such as experts hired by a lawyer, are entitled to a right of non-disclosure, derived from the lawyer.[165] Documents in the hands of clients, such as banks, in respect of which lawyers can invoke LPP, also benefit from a derived right of non-disclosure.[166] It is not clear from the law or from soft law instruments whether, in assisting the ECB for the supervision of significant institutions, DNB applies the broader Dutch protection. LPP can be set aside only in exceptional circumstances, such as when a lawyer is being suspected of a serious criminal offense.[167]

In the Greek legal order, LPP may be invoked by all lawyers who are members of Bar Associations, therefore both by external and in-house legal counsels. Protection extends to all data, written and electronic, obtained in the course of legal practice.[168] From the moment that a lawyer waives LPP, the local bar association is the only competent body to decide whether the LPP claim is valid. The protection offered by LPP is not absolute and it can be limited, albeit only by judicial authorities, for reasons related to an overriding public interest, as is the prevention and the suppression of economic crime.[169] In assisting the ECB, it is not clear either whether BoG applies the broader Greek protection or the narrower EU protection.

As it can be seen, the content of LLP in the EU-NL-GR differs: more generous protection in the national legal orders, narrower scope in the EU legal order, while there are also procedural differences as to how

[157] SSM Regulation, recital 48
[158] Case C- 155/79 *AM & S* v *Commission* [1982] ECLI:EU:C:1982:157
[159] Case T- 30/89 *Hilti* v *Commission* [1990] ECLI:EU:T:1991:70
[160] Case C- 550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECLI:EU:C:2010:512 ("Akzo Akcros")
[161] *AM & S* v *Commission* (n 158) para 23
[162] *Hilti* v *Commission* (n 159) para 18
[163] *Akzo Akcros* (n 160) para 43
[164] Advocatenwet, art10a(e); Council of the State 15 March 2013, ECLI:NL:HR:2013:BY6101
[165] Supreme Court 12 February 2002, ECLI:NL:HR:2002:AD4402, paras 3.2.3 and 3.4
[166] Kamerstukken II 2005/06, 29 708, no 32, 42
[167] Supreme Court 22 November 1991, ECLI:NL:HR:1991:ZC0422
[168] Lawyers' Code, art 38
[169] Athens Misdemeanor Council 1966/2014, Nomos 66301

LPP can be waved. Furthermore, it is not currently certain which LPP standard NCAs have to apply when assisting the ECB.

The foregoing differences ought to be read in conjunction with the raison d'être of ELEAs generally, and of the ECB in particular. One of the key reasons as to why supervision was entrusted to an EU institution pertains to its ability to operate across a functional EU territory. Indeed, to effectively discharge its tasks, the ECB must be able to gather information in one Member State and introduce it in another or use it itself for enforcement purposes. However, for this to be attainable, it is necessary that there be at a minimum degree of uniformity in the legal framework.[170] As it follows from the foregoing analysis, at least a minimum level of procedural harmonization does not currently exist. While, coincidentally, in the Netherlands and in Greece, in-house lawyers are covered by the LPP, in other Member States, such as Germany, only external lawyers fall within the scope of LPP.[171]

To make the problem of legal certainty in a vertical setting more concrete, I shall develop the following example. Let us assume that an EU on-site inspection team inspected a Dutch credit institution in the Netherlands. The team acquired internal communication between a manager of a Dutch bank and its in-house lawyers. Relying to a significant extent on that communication, the ECB's independent investigating unit determines that the bank has violated certain requirements that are contained in national law (FSA). Subsequently, the ECB makes use of Article 18(5) SSM Regulation, forwards the evidence to the DNB and requests from it to open sanctioning proceedings. The Dutch NCA, relying on that evidence, imposes a punitive sanction.[172] From the perspective of legal certainty, the fact that proceedings are composite, but the scope of LPP protection is determined only in the "gathering" legal order, makes the requirement of knowing your rights and obligations quite challenging.

Now, let us assume that the ECB had not decided to carry out an OSI but had instead requested DNB to carry out certain on-site activities. In this scenario, the same information would not have been gathered, as LPP – as defined nationally – would block DNB's access to that information. Again, from the perspective of legal certainty that is also problematic. In other words, that the fate of the self-same internal communication should depend on whether it is an NCA or an EU OSIT which attempts to have access to it is not in compliance with the legal certainty dimension of LPP.

Whereas the aforementioned example concerns vertical relationships, similar considerations could also arise in diagonal composite enforcement procedures. While the particular example of the Netherlands and of Greece does not lend itself to clearly highlight my argument, that does not mean that the problem is not there. Imagine that in a legal order (let us call it A) in-house lawyers are not covered by the LPP, while in legal order B, they are. The NCA of Member State A collects internal communications between an in-house lawyer and the credit institution at the premises of a branch of a credit institution incorporated under the laws of Member State B. Shortly after, the NCA of Member State A transfers the information to the ECB. The ECB's independent investigating unit considers that a violation took place, but as it is not directly competent to sanction, it transfers the evidence to the NCA of Member State B which relies on that evidence for the imposition of a punitive fine. Is that in compliance with the general principle of legal certainty, which is embedded into the rights of the defense? In my opinion, this is not in line with the principle of legal certainty. While the authority which is competent for the

[170] See Michiel Luchtman, *Transnationale rechtshandhaving-Over fundamentele rechten in de Europese strafrechtelijke samenwerking* (Boom juridisch 2017) 24
[171] Martin Böse and Anne Schneider, "Germany" in Luchtman and Vervaele 2017 (n 44) 75-76
[172] According to the CRD IV Directive, NCAs receiving information by another NCA [or the ECB] can use it for the imposition of penalties, CRD IV, art 54(b)

imposition of the fine is clear, the content of the LPP is defined by the law of the legal order in which the information has been gathered. A defense strategy cannot thus be effectively prepared. It appears to me that in the absence of common standards of defense rights in composite SSM enforcement procedures, the aforementioned problems cannot be easily resolved.

4.2.1.2 Is Akzo Akcros the answer to legal certainty concerns in composite enforcement procedures?

Some of the aforementioned issues were brought before the CJEU in the *Akzo Akcros* case,[173] which serves as an excellent point of departure to explain why I do not consider its reasoning to be entirely suitable for this research and why a new integrated approach concerning defense rights' related legal certainty should be sought in the case of composite SSM procedures.

In the UK, in-house legal counsels are covered by LPP, while under EU law they are not.[174] In 2003, the EU Commission carried out a dawn raid at the premises of Akzo, in England. The EU Commission applied the EU standard of LPP. Akzo complained, arguing that it is unacceptable that the fate of the same internal document should depend on whether it is the UK competition authority or the EU Commission the authority that attempts to seize it. The undertaking therefore claimed before the CJEU that this was contrary to the principle of legal certainty, which demands *inter alia* that "*rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them*."[175] In other words, the CJEU was essentially asked if, the fact that EU and national laws apply different standards in their respective spheres of application, gives rise to a legal certainty problem.

Both the Court and the Advocate General responded in the negative. According to the Advocate General, the principle of legal certainty and the rights of defense do not require that EU and national law should ensure the same level of protection. National legal principles and national fundamental rights protection may not extend beyond national spheres of competence.[176] Even though it is indeed inconvenient for the persons involved, that discrepancy between EU and national law stems from the division of powers between the EU and the Member States in *competition* law. Enforcement of national competition law and Articles 101 and 102 TFEU comprise two distinct spheres of competence and thus rules on defense rights may vary according to that division of powers.[177] The Court furthermore added that, since 1982, it is clear to economic undertakings that in antitrust investigations carried out for the enforcement of EU competition law, companies cannot invoke the secrecy of the correspondence between the company and its internal lawyers.[178] Interestingly, this judgment has led ECN authorities, such as the Dutch ACM, to essentially apply two different standards: in the enforcement of national competition law, the wider Dutch LPP is applied, while in the enforcement of EU competition law, the more limited EU standard is applied.[179]

Can this judgment be applied *mutatis mutandis* to the SSM? I do not believe so. The enforcement of EU competition law does not present as strong composite elements as the SSM does. First of all, the

[173] *Akzo Akcros* (n 160)
[174] *AM & S Europe* (n 158) paras 21 and 24
[175] Case C-550/07 P - *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECLI:EU:C:2010:512, Opinion of Advocate General Kokott, para 124
[176] Ibid, para 133
[177] *Akzo Akcros* (n 160) para 102
[178] This follows from the case *AM & S Europe Limited* v *Commission of the European Communities* (n 158)
[179] See, Rob Widdershoven and Paul Craig, "Pertinent issues of judicial accountability in EU shared enforcement" in Scholten and Luchtman 2017 (n 3) 339

division of institutional competences between the EU and the national levels are markedly different in the two policy areas. In the domain of competition law, the CJEU portrays the EU and national competences as related, yet, institutionally separated. In that regard, a separation between enforcement of national competition law and enforcement of EU competition law by NCAs is – according to the Court – conceivable. In other words, the discrepancy between EU and national procedural standards is not due to unclarity of either EU or national law, but rather due to the way in which the competences between the EU and the national level have been divided.[180]

On the other hand, in the case of the SSM, such a strict separation between EU and national spheres of competence is, in my view, not possible. As shown previously (Section 2), in the SSM system, authorities are very often characterized by decisional interdependence and they carry out enforcement actions in different legal orders through – primarily – joint teams; in that respect, the various legal orders comprise a functional unity, to such an extent that it is not – in my view – possible to institutionally segregate the EU and national levels.

In addition to that, in the SSM enforcement system, even though the ECB has been entrusted with exclusive competences, at the same time, a big percentage of the applicable law is contained in national laws implementing EU Directives. On the other hand, in the area of competence of EU competition law, the substantive legislation is to be found in the TFEU (Articles 101 and 102). On top of that, for discharging its exclusive mandate, the ECB relies to a significant extent on NCAs,[181] not only in ongoing supervision but also for sanctioning. On the other hand, as a matter of EU competition law, there is no necessity that EU investigations *must* be followed up at the national level, while in the SSM framework, all violations that have their legal basis on EU Directives and violations that concern natural persons must be followed up by NCAs.[182] In that regard, while an EU competition case can start and end as a purely EU procedure, many ECB investigations lead to national measures or sanctions. In those cases, it is far from clear whether the more restricted EU LPP principle should still apply.[183]

To sum up, the *Akzo Akcros* line of reasoning cannot – in my view – be applied *mutatis mutandis* to the SSM setting; the differences, in terms of division of competences and enforcement design, between the two policy domains outweigh their similarities.

4.2.2 Defense rights and procedural fairness: the example of the privilege against self-incrimination

Procedural fairness is concerned with how persons are treated in legal processes. While there is a collective social interest in having authoritative legal standards properly applied,[184] at the same time the State must also respect the interests of the people affected by them. In that regard, procedural fairness not only entails that the truth is found, but also that the procedures toward the discovery of the truth are carried out "in a fair and inclusive way."[185] The procedural fairness dimension of defense rights is generally satisfied when persons subject to punitive proceedings are enabled to effectuate a minimum

[180] *Akzo Akcros* (n 160) paras 3-9
[181] See, European Court of Auditors, "Single Supervisory Mechanism – Good start but further improvements needed" (2016) Special Report no 29 < https://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf> 59-60
[182] SSM Framework Regulation, art 134(1)
[183] See also, Widdeshoven and Craig 2017 (n 179) 339
[184] Denis Galligan, *Due Process and Fair Procedures: A study of Administrative Procedures* (OUP 1997) 52
[185] Michiel Luchtman, "Transnational Investigations and Compatible Procedural Safeguards" in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart Publishing 2017) 192

set of defense rights – and thereby protect their legitimate interests – before an authority that exercises unilateral decision-making power.[186]

In Chapter II, I explained that, in the context of composite SSM enforcement proceedings, in order to assess whether procedural fairness is sufficiently ensured, the critical question that one needs to answer is whether supervised entities are able to effectuate their defense rights from the "gathering" all the way to the "use as evidence" phase of an enforcement procedure. For instance, when the different segments of one procedure take place in different legal orders, as is the case in the SSM, the law must provide for rules which ensure that incriminating information gathered in one legal order under compulsion for non-punitive purposes will not be used in another legal order as evidence for the imposition of a punitive sanction. In the below section, I assess whether procedural fairness in the SSM is sufficiently ensured. In doing so, I will focus on the specific example of the privilege against self-incrimination.

4.2.2.1 The privilege against self-incrimination in composite SSM enforcement proceedings

The privilege against self-incrimination prohibits law enforcement authorities from using improper compulsion against a person to produce information or evidence that would incriminate him or her.[187] The privilege generally covers only will-dependent information, such as oral statements and more generally subjective judgments. Information that can be acquired by SSM authorities when supervised entities are under a duty to cooperate and which exists independently of their will, such as documents or data obtained pursuant to a formal decision or a judicial warrant, does not therefore fall within the protective scope of the privilege against self-incrimination.[188]

In combinations of proceedings by law enforcement authorities, there are generally two scenarios in which the privilege against self-incrimination can be violated. First, when there is a punitive investigation that follows up on a non-punitive one. The privilege against self-incrimination can, then, be jeopardized if evidence obtained in the non-punitive investigation, where persons are always under an obligation to cooperate, is used, in an incriminating way, in a subsequent punitive procedure.[189] Second, a non-punitive investigation runs in parallel with a punitive investigation, but legislation does not forbid the use as evidence, in the punitive procedure, of the information gathered by the authorities in the non-punitive procedure, thereby destroying the very essence of the privilege against self-incrimination.[190] As it can be seen, in both scenarios, the same facts and the same information can be relevant for different purposes, proceedings, and even authorities.

In Chapter II, I posited that in order to determine whether procedural fairness – as embodied in the privilege against self-incrimination – is sufficiently safeguarded in the SSM, one would need to assess the following points. First, it would have to be determined whether sufficiently interlinked proceedings do take place within the SSM. And should the answer to that question be in the positive, the next critical issue is whether the law provides for rules to coordinate the two sets of (consecutive or parallel) proceedings. By now, it must have hopefully become more than clear that the different segments of a composite SSM enforcement procedure are sufficiently interlinked. In other words, what happens in one legal order has significant repercussions for what happens in another legal order. Consider, for

[186] Marta Michałek, *Right to defence in EU competition law: The case of inspections* (University of Warsaw, Faculty of Management Press 2015) 53
[187] *Saunders* v *UK* App no 19187/91 (ECtHR, 17 December 1996) para 68
[188] Ibid, para 69
[189] Ibid
[190] *Chambaz* v *Switzerland* (n 99); *Martinnen* v *Finland*, App no 19235/03 (ECtHR 21 April 2009)

example, the situation in which a credit institution, which is supervised on a day-to-day basis by a JST, is sanctioned by an NCA in a subsequent national procedure.[191] A different example, a diagonal one. Operational information gather by the NCA of Member State A at the premises of a branch of a credit institution established in Member State B, may be used as evidence in punitive proceedings in Member State B. All of these examples come to prove that in the SSM, the same facts and the same information can be relevant for different proceedings and authorities. Thus, in the words of the ECtHR, the ECB, and the NCA procedures are *suffisamment liées (sufficiently interlinked)*.[192]

Now that we know that the different segments of composite SSM enforcement procedures are often sufficiently interlinked, the next step consists of assessing whether combinations of non-punitive and punitive procedures are sufficiently coordinated. In the specific context of the SSM, the protection of the privilege against self-incrimination could be compromised where evidence obtained in non-punitive procedures, such as JSTs' ongoing supervision, during which supervised entities (and the natural persons employed by them) are under an obligation to cooperate, is used in an incriminating way in a subsequent punitive procedure, either at the EU level or at the national level.[193] In other words, when the different segments of a composite procedure take place in different legal orders, but the application of privilege against self-incrimination in a composite setting is not regulated and therefore information can flow freely between different authorities and legal orders, the very essence of the privilege against self-incrimination and therefore also the fairness of the proceedings as a whole could be destroyed.[194]

The existing case law of the CJEU does not deal with the application of the privilege against self-incrimination in composite enforcement procedures, nor with the coordination of their non-punitive and punitive segments. The most important jurisprudential precedent is the *Orkem* judgment, which tells us that an EU authority "*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."*[195] In other words, the limit set by the privilege against self-incrimination is that – in the course of punitive proceedings – the ECB cannot pose directly incriminating questions. As a matter of EU law, it is thus not clear whether all will-dependent incriminating information, gathered for instance by JSTs in a non-punitive phase, can be used in future punitive phases. In addition to that case law, from the recent *DB* v *Consob* judgment, we learn that, as far as natural persons are concerned, the privilege against self-incrimination extends to all will-dependent incriminating information and not only to admissions of guilt. [196]

Despite the fact that the picture emerging from CJEU case law is not crystal clear, at least not with respect to composite procedures taking place in different legal orders, at the same time it shall not be forgotten that there is a legal obligation to interpret EU rights in line with ECHR, as interpreted by ECtHR.[197] In the EU legal order, the privilege against self-incrimination falls under the scope of the presumption of innocence and the rights of defense (Article 48 CFR), whose meaning and scope shall be the same as the corresponding provisions in the ECHR (Article 6).[198] Therefore, since the ECB and

[191] SSM Regulation, art 18(5)
[192] *Chambaz* v *Switzerland* (n 99); *Martinnen* v *Finland*, App no 19235/03 (ECtHR 21 April 2009) para 43
[193] *Saunders* v *United Kingdom* (n 187)
[194] *Chambaz* v *Switzerland* (n 99); *Martinnen* v *Finland* (n 192)
[195] Case 374/87 *Orkem* v *Commission of the European Communities* [1989] ECLI:EU:C:1989:387, para 35
[196] Case C-481/19 *DB v Consob* [2021] ECLI:EU:C:2021:84, para 40
[197] CFR, art 52(3)
[198] Article 52(3), CFR

NCAs act within the scope of Union law, they must take into consideration also the case law of the ECtHR.

From ECtHR case law, it follows that when faced with the dilemma of how to protect the privilege against self-incrimination in combinations of sufficiently interlinked proceedings, legislators (and Courts) are essentially left with two choices: a) require that will-dependent information requested for purposes of ongoing supervision cannot be subsequently used as evidence for punitive sanctioning (*Saunders*) or b) remove the element of compulsion from the monitoring stage and enable the ECB – and any other authority taking part in composite SSM structures – to use for punitive purposes any information obtained at the monitoring stage of enforcement.[199] In that way, protection of the privilege against self-incrimination at the interface between different legal orders, punitive administrative, and non-punitive administrative enforcement will be ensured.

Below, I look into all the different scenarios and assess the extent to which the aforementioned protection of the privilege against self-incrimination is ensured.

a) The protection of the privilege against self-incrimination in combinations of non-punitive and punitive ECB procedures

In this scenario, the privilege against self-incrimination may be violated at the EU level.[200] One may think of the following situation. As mentioned previously, JSTs responsible for the day-to-day supervision of significant banks have a very strong information-gathering position,[201] owing to the fact that in ongoing supervision, supervised banks are under an obligation to cooperate with the ECB. JSTs are thus enabled to obtain a wide range of operational information, including will-dependent incriminating information. If a JST notices irregularities, it shall pass the relevant information to the IIU, which is part of the ECB's Enforcement and Sanctions division.[202]

Since there is no formal provision that precludes the ECB from using incriminating information gathered in ongoing supervision as evidence for the imposition of punitive sanctions, the *Saunders* type of problem, is a real possibility. Indeed, at the moment of writing, as a matter of EU law, the way in which legal persons privilege against self-incrimination should be protected at the interface of such proceedings is not clear. At the same time, the SSM legal framework imposes on banks an obligation to cooperate,[203] if necessary even under threat of fines.[204] Therefore, it is not inconceivable that incriminating information, gathered in the course of ongoing supervision, may be used by the ECB's operational units – such as the IIU – as evidence to establish a breach and to thereafter submit to the ECB's supervisory board a draft decision[205] for the imposition of a punitive sanction. Persons are then

[199] Michiel Luchtman, Argyro Karagianni and Koen Bovend'Eerdt, "EU administrative investigations and the use of their results as evidence in national punitive proceedings" in Fabio Giuffrida and Katalin Ligeti (eds) *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (ADCRIM Report, University of Luxembourg 2019) 13-16 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021

[200] See also, Wissink, Duijkersloot and Widdershoven 2014 (n 75) 113

[201] Giulia Lasagni, "Banking Supervision and Criminal Investigation, Comparing EU and US Experiences" (*Springer International Publishing* 2019); Duijkersloot, Karagianni and Kraaijeveld (n 24) 2017; Silvia Allegrezza and Olivier Voordeckers, "Investigative and Sanctioning Powers of the ECB in the Framework of the Single Supervisory Mechanism – Mapping the Complexity of a New Enforcement Model" (2015) 4 EUCRIM 151

[202] SSM Framework Regulation, art 124

[203] Wissink, Duijkersloot and Widdershoven 2014 (n 75) 114

[204] SSM Regulation, art 18(7)

[205] SSM Framework Regulation, art 126(1)

faced with the following dilemma: cooperate with the JST and incriminate themselves, or refuse to cooperate and take the risk of severe sanctions?

To sum up, whereas the privilege against self-incrimination should be afforded to supervised persons from the moment that the ECB's operational structures entertain reasons to suspect that the applicable rules have been violated, and that such violation could lead to a punitive fine, the SSM legal framework does not clearly lay down the privilege against self-incrimination. Even though the IIU should somehow respect the privilege against self-incrimination – as it constitutes one of the rights of the defense under the CFR and a general principle of EU law – it may often be the case that supervised persons may not be able to fully effectuate their right not to incriminate themselves. The preceding analysis therefore leads me to the conclusion that the EU legislator has not regulated in a sufficient manner the interactions between non-punitive and punitive enforcement carried out by at the EU level. As a consequence, the concept of procedural fairness may at times be undermined.

b) The protection of the privilege against self-incrimination in vertical top-down composite enforcement procedures

In the second scenario, the privilege against self-incrimination is likely to be violated when ECB investigations are followed up at the national level, in other words, whenever the ECB concludes its own investigation and requests an NCA to open the sanctioning proceedings.[206]

The ECB is competent to impose sanctions only for breaches of directly applicable EU law. Therefore, if a JST or an OSIT suspects that a supervised entity has breached provisions contained in (national laws implementing) EU Directives, the ECB is in that case not competent to impose a sanction directly. While the JST/OSIT would still refer the matter to the independent investigating unit, if the latter maintains that a violation did occur, it would then need to request DNB or BoG to open sanctioning proceedings and transfer the necessary evidence. Since the NCA enjoys discretion as to the outcome of those proceedings,[207] the procedure will logically be carried out in accordance with national law. Let us then take a look at the national legal orders studied here, in order to highlight a number of potentially problematic situations.

As follows from the analysis in Chapter IV,[208] under Dutch law, will-dependent information obtained under compulsion in the non-punitive part of an enforcement procedure cannot generally be used for the imposition of a later punitive sanction. The Dutch legislature has thus chosen to keep the element of compulsion during the monitoring stage, by having in place a threat of a fine (*boete*), in case a supervised person refuses to cooperate. However, such legal compulsion is offset through a prohibition of using as evidence in punitive proceedings will-dependent information obtained under compulsion in the course of the non-punitive procedure. That being said, the Netherlands has chosen to follow the *Saunders* rule.[209] Since the sanctioning procedure is carried out in accordance with national law, DNB would then – arguably – have to exclude ECB incriminating information from evidence.

Turning to the Greek legal order, if in a given case the ECB requests BoG to open sanctioning proceedings, because in the course of BoG's punitive proceedings the privilege against self-incrimination is in principle not afforded to supervised persons, this would lead to a situation in which

[206] SSM Regulation, art 18(5)
[207] Chapter III, Section 7.2.1
[208] Chapter IV, Section 3.2
[209] See Luchtman, Karagianni and Bovend'Eerdt 2019 (n 199)

supervised entities are under an obligation to disclose to the ECB incrimination information which can later be used for sanctioning purposes in the Greek legal order. The privilege against self-incrimination may in this case also be violated. Again, because it seems that at the moment of writing, the Greek legal order – in this particular policy area – falls below the ECHR standard.[210] For that reason, anticipation of future punitive proceedings already at the EU level – and accompanying safeguards – seem essential.

How can the aforementioned findings more generally be assessed in light of procedural fairness? Coincidentally, in the Netherlands, the privilege against self-incrimination would likely be protected. However, the example of the Greek legal order clearly shows that leaving the composite protection of the privilege against self-incrimination to the sanctioning legal order does not always work well. In my view, owing to the fact that the aforementioned EU and national procedures are characterized by a functional unity, the EU legal framework (and thereby SSM supervisors acting on the basis of EU law powers), ought to take stock of potential future punitive proceedings already at the information-gathering stage, by restricting the use of will-dependent incriminating information from follow-up punitive proceedings. Inversely, if legal provisions that distinguish between the non-punitive and the non-punitive phases of a procedure are not in place, persons may not always enjoy procedural fairness in the punitive phase of a composite enforcement procedure. Of course, even in the absence of EU rules, NCAs may also decide to exclude will-dependent evidence for punitive purposes. But even in that case, the problem still remains that whereas the proceedings, which take place in different legal orders, comprise a "composite unity," the fact that questions of exclusion or non-exclusion are essentially left at the discretion of the NCA at issue, does not tie in well with the vision of a composite protection of fundamental rights.

c) The protection of the privilege against self-incrimination in diagonal composite enforcement procedures

In the third scenario, the critical question is the extent to which the procedural fairness dimension of the rights of the defense, like the privilege against self-incrimination, can be ensured in diagonal composite enforcement procedures. Issues of procedural fairness in such procedures can be explained by means of the following example. Let us imagine that DNB obtains information on-site, at the premises (in the Netherlands) of a branch of a significant Greek credit institution. The information was collected for the purposes of ongoing supervision and it was subsequently transferred to the ECB. The relevant JST suspects a violation of the law and informs the independent investigating unit. Upon conclusion of its investigation, the independent investigating unit requests from BoG the opening of sanctioning proceedings and transfers also the relevant file. How should BoG assess the critical piece of evidence? As a matter of Dutch law, the use of incriminating information, obtained under compulsion in ongoing supervision, for the imposition of a punitive sanction would contravene the privilege against self-incrimination [211] and could – as a corollary – render the procedure unfair. On the other hand, in the

[210] An analysis of the judicial dialogue between the Greek Council of the State and the ECtHR concerning the former's reluctance to accept that administrative proceedings can be criminal in nature and thereby in need of stricter procedural safeguards, exceeds the scope of this dissertation. The interested reader may *inter alia* consult the following sources: Meletis Moustakas, *I archi ne bis in idem kai to elliniko dioikitiko dikaio* (Sakkoulas 2018); Evaggelos Argyros (ed), *To Europaiko Dikastirio Dikaiomaton tou Anthropou kai to Symboulio tis Epikratias se Diarki Dialogo* (Sakkoulas 2018); Evgenia Prevedourou, "I efarmogi tis archis ne bis in idem stin periptosi soreutikis epivolis dioikitikon kyroseon – Me aformi tin apofasi StE 1091/2015" (2015) 6 Theoria & Praxi Dioikitikou Dikaiou 524

[211] See Michiel Luchtman, *European cooperation between supervisory authorities, tax authorities and judicial authorities* (Intersentia 2008)108-109; Lonneke Stevens, *Het nemo-teneturbeginsel in strafzaken: van zwijgrecht tot containerbegrip* (Wolf Legal Publishers 2005) 123 et seq; Oswald Jansen, *Het*

Greek legal order, the privilege against self-incrimination is in principle not afforded in punitive administrative banking supervision proceedings. Procedural fairness in diagonal composite enforcement proceedings may thus be undermined. This is yet another reason as to why, in my opinion, anticipation of future punitive proceedings in the EU level legal framework – and the incorporation of accompanying safeguards – seem essential.

4.2.3 Defense rights and issues of legal protection

Defense rights-related legal protection is deemed to be met when – *ex post* – a court is competent to rule on the fairness of a procedure as a whole. For example, assuming that the privilege against self-incrimination was violated by a law enforcement authority, legal protection will be met when the reviewing Court – irrespective of whether it is the CJEU or a national Court – can rule on the lawfulness of the evidence and, should it consider that evidence was gathered or used in violation of the right to a fair trial, exclude or disregard the critical piece of evidence in order to ultimately offer effective legal protection.

In the below sections, I discuss a number of different scenarios, which show that – in composite enforcement procedures – the legal protection dimension of defense rights may sometimes be at stake.

4.2.3.1 Legal protection and divergent standards of defense rights

In this section, I shall discuss the situation in which information is (lawfully) obtained in one legal order on the basis of x procedural standards and later used in another legal order, which provides for higher standards with respect to defense rights. In explaining potential problems arising in that context, I shall use – as an example – the legal professional privilege.

a) Vertically divergent standards in top-down enforcement procedures and issues of legal protection

Let us assume that an OSIT gathers information, applying the EU-level LPP standard. *Inter alia*, it collects emails which contain internal communication between a bank and in-house lawyers. At a later stage, the ECB requests DNB or BoG to open sanctioning proceedings and it furthermore transmits this critical piece of information. DNB or BoG imposes a punitive sanction. The decision is contested before the Dutch or Greek administrative Courts and the addressees of the decision argue that the decision was based on the basis of lower procedural standards, seeing that under Dutch and Greek law, the wider LPP protection would probably block access to the same information.

The foregoing example brings to the fore the question of how a national court should deal with materials obtained lawfully, but on the basis of lower standards, i.e., lower that the national standards applied in purely domestic cases. The EU legislator and the EU Courts have not provided yet answers to such composite questions,[212] neither do the national legal orders studied in this dissertation. Having said so, the Greek administrative judge reviewing a BoG decision based on EU materials, will likely apply the principle of the effectiveness of EU law and thus admit the critical information as evidence, despite the fact that it was gathered on the basis of lower procedural safeguards. If the same judge is of the opinion

handhavingsonderzoek. Behoren het handhavingstoezicht, het boeteonderzoek en de opsporing verschillend te worden genormeerd? Een interne rechtsvergelijking (Ars Aequi Libri 1999) 104-105

[212] In the *Akzo Akcros* case, discussed earlier in this Chapter (section 4.2.1.2), the view of the CJEU, namely that the applicable standard is the EU standard, cannot in my view be applied *mutatis mutandis* here. In competition law, the institutional competences are markedly different, whereas the SSM comprises a highly integrated system of law enforcement.

that the fact that evidence was gathered on the basis of lower standards is problematic from the viewpoint of procedural fairness, he would probably need to refer a question to the CJEU, asking whether excluding the piece of evidence would be contrary to the EU principle of effectiveness.

The Dutch administrative judge would exclude the aforesaid evidence only if he finds a violation of Article 6 ECHR.[213]As long as the EU level of protection (or the protection offered in the gathering State) is in conformity with Articles 47, 48 CFR/6 ECHR, it is highly unlikely that concerns about evidence gathered – either by the ECB or by another NCA – on the basis of divergent defense rights standards would succeed. After all, according to Article 54 of Directive CRD IV, banking supervisors are enabled to use confidential information transmitted to them by other NCAs to impose penalties.[214]

b) Vertically divergent standards in bottom-up enforcement procedures and issues of legal protection

In composite bottom-up enforcement procedures that end with an ECB sanction, but where decisive input was provided by the NCA of a legal order that provides for higher protection compared to the EU standard, legal protection issues could potentially arise. While the CJEU, i.e., the court reviewing final ECB decisions, has signaled that in composite bottom-up SSM procedures, it will be carrying out a "single judicial review,"[215] it remains unclear on the basis of which standards – EU or national – such a single review will take place (see Chapter III, Section 7.2.3).

c) Diagonally divergent standards and issues of legal protection

National laws may set different standards with respect to the protection of defense rights. From the perspective of legal protection, the questions that come to the fore are how the national court of Member State B, reviewing a final decision adopted by the NCA of Member State B, should treat materials obtained by the NCA of Member State A on the basis of lower standards of defense rights? Does the principle of the effectiveness of Union law require the reviewing judge to admit as evidence information obtained in another Member State, on the basis of lower standards of defense rights? Or, could he also disregard that evidence, even if that would render the application of EU law ineffective?

The aforementioned problem does not play out in the particular context of this dissertation, as in both the Dutch and the Greek legal orders the content of LPP is quite aligned. Protection extends to all communication exchanged between lawyers and their clients. With regard to the personal scope of the LPP, the protection afforded by both legal orders to lawyers, extends not only to external legal counsels, but also to in-house lawyers, as long as they are members of a bar association.[216] While, coincidentally, the LPP standards in the here studied legal orders do not diverge, that does not diminish the potential diagonal problems with respect to the legal protection function of defense rights. The argument I am rather trying to bring forward is that, where enforcement procedures are composite, but defense rights standards diverge and the law does not offer guidance as to how Courts should deal with such questions, legal protection – and as I already argued legal certainty too – could be undermined.

[213] Ton Duijkersloot, Aart de Vries and Rob Widdershoven, "The Netherlands" in Giuffrida and Ligeti 2019 (n 199) 207
[214] CRD IV, art 54(b)
[215] *Berlusconi and Fininvest* (n 56) para 51
[216] Chapter IV, Section 3.2 and Chapter V, Section 3.2

4.2.3.2 Legal protection and evidence obtained in violation of defense rights

In this section, I shall discuss the situation in which information is obtained in legal order A in violation of defense rights and is used in legal order B for punitive sanctioning. In doing so, I discuss three distinct situations: first, composite procedures in which information is obtained by the ECB unlawfully and that information is later used by an NCA for the imposition of a punitive sanction (top – down). Second, composite procedures in which information is unlawfully obtained by an NCA and that information is later used by the ECB as evidence, for the imposition of a punitive sanction (bottom-up). Third, I discuss diagonal procedures, in which information is gathered unlawfully in legal order A and is then used in legal order B as evidence for punitive purposes.

a) Vertical top-down composite enforcement procedures

In this scenario, a final punitive decision is adopted by an NCA,[217] let us say DNB, on the basis of ECB input. More specifically, in the course of an *ad hoc* on-site inspection, which was triggered by a suspicion, an OSIT copies certain personal notes of a bank's manager from which it transpired that the bank is violating governance arrangements. The independent investigating unit transfers a file to DNB which – among others – contains also the aforesaid incriminating information. DNB imposes a punitive sanction. Before the reviewing Dutch court, the credit institution complains that the evidence had been gathered in violation of its defense rights. How is the legal protection dimension of defense rights secured in this composite enforcement procedure? As we have seen again in the preceding analysis, the national reviewing court cannot invalidate the ECB's preparatory act.[218] It could, however, disregard the critical piece of evidence[219] or make a reference for a preliminary ruling, questioning the validity of the preparatory act. Either way, the bank's right of access to a court is sufficiently safeguarded.

b) Vertical bottom-up composite enforcement procedures

In this scenario, one or more NCAs provide the input for a final ECB decision, but that input was obtained illegally, i.e., in violation of the rights of the defense.

Bottom-up SSM procedures are quite common in the case of authorizations to take up the business of a credit institution, in withdrawals of authorizations and in the assessment of the acquisition of a qualifying holding.[220] But besides those non-punitive procedures, where one NCA actually prepares a formal (draft) decision, it is also conceivable that the ECB takes all sorts of enforcement decisions (partly) based on less formalized input provided by one or more than one NCAs.[221] For example, DNB carries out verification or on-site activities,[222] using Dutch powers and the ECB, based on DNB's results, opens a sanctioning procedures that ends with an EU sanction.

The example above triggers the question of the extent to which supervised entities can enjoy legal protection, where a decision is taken by the ECB, but relying heavily on NCA preparatory actions, particularly where those preparatory steps are unlawful, for instance because information was obtained

[217] SSM Regulation, art 18(5)
[218] *Foto-Frost* v *Hauptzollamt Lübeck-Ost* (n 137)
[219] *Prokuratuur* (n 138) para 43
[220] SSM Framework Regulation, Part V
[221] Herwig Hofmann, "The right to an 'effective judicial remedy' and the changing conditions of implementing EU law," University of Luxembourg Law Working Paper 2013-2, 18 < https://orbilu.uni.lu/bitstream/10993/5531/1/The%20Right%20to%20an%20'Effective%20Judicial%20Remedy'%20and%20the%20Changing%20Conditions%20of%20Implementing%20EU%20Law.pdf> accessed 26 January 2022
[222] SSM Framework Regulation, art 90

in violation of the rights of the defense.[223] Can the NCA actions be challenged before national Courts, in line with the *Borelli* doctrine? This question has been (partially) answered by the CJEU in the *Berlusconi* case.[224] Even though it concerned a non-punitive final decision, whereby the preparatory national acts were allegedly characterized by irregularities, the main takeaways are highly relevant also for procedures that end with an ECB punitive sanction.

The CJEU said in that respect that Article 263 TFEU bestows upon the CJEU exclusive jurisdiction to review the legality of ECB acts.[225] Any involvement of NCAs during a procedure leading to the adoption of a final ECB decision does not affect the classification of the final decision as an EU act.[226] Furthermore, by virtue of the exclusive jurisdiction of the EU Courts to rule on the legality of final ECB decisions, it falls to the EU Courts "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."[227] It is interesting to note that the Court arrives to this conclusion by bringing to the fore the principle of sincere cooperation between the EU and the Member States. According to the CJEU, the principle of sincere cooperation requires that input/preparatory acts carried out by NCAs cannot be subject to review by the Courts of the Member States,[228] or such a review would undermine the effectiveness of the decision-making process, as there would be the risk of divergent assessment in one and the same procedure.[229]

In my view, in the *Berlusconi* case, the CJEU signals[230] that *any* defects that occurred in the context national preparatory acts must be reviewed by the CJEU, or, inversely, that national Courts would no longer be able to review national preparatory measures.[231] National Courts would thus have to refrain from reviewing *any* national preparatory input. This reading is also backed by the fact that, according to the CJEU, single judicial review demands that once the EU authority has adopted a decision that brings about a distinct change in the applicant's legal position, review shall be carried by EU Courts.[232] To ensure, therefore, full legal protection, the CJEU would need to rule on both the legality of the final ECB decision as well as any defects vitiating the preparatory input of national authorities that "would be such as to affect the validity of that final decision."[233]

Notwithstanding the abovementioned, the Court has not however explained[234] whether final ECB decisions are illegal if they are based on unlawfully obtained national input and, importantly, *how* is the

[223] This situation has been described as "derivative illegality," see Filipe Brito Bastos, "Derivative Illegality in European Composite Administrative Procedures" (2018) 55 Common Market Law Review 101
[224] *Berlusconi and Fininvest* (n 56)
[225] *Berlusconi and Fininvest* (n 56) para 42
[226] *Berlusconi and Fininvest* (n 56) para 44
[227] *Berlusconi and Fininvest* (n 56) para 44
[228] *Berlusconi and Fininvest* (n 56) para 47; see also *supra* Section 4.1.2.2 where I have already argued that the Berlusconi and Fininvest case does not necessarily apply to *coercive* NCA measures, which may require the involvement of a national court.
[229] *Berlusconi and Fininvest* (n 56) paras 49, 50.
[230] See in that respect Wissink, who argues that the Berlusconi judgment could likely be read through the prism of four different scenarios. Laura Wissink, *Effective Legal Protection in Banking Supervision* (Europa Law Publishing 2021) 194-196
[231] Ibid 194-195
[232] *Berlusconi and Fininvest* (n 56) para 49
[233] *Berlusconi and Fininvest* (n 56) para 44
[234] This point is also shared by Brito Bastos, in Filipe Brito Bastos, "Judicial review of composite administrative procedures in the Single Supervisory Mechanism: Berlusconi" (2019) 56 Common Market Law Review 1355, 1375

CJEU to deal with such questions. For instance, if the ECB adopts a final decision vis-à-vis a Dutch credit institution, based on information transmitted to it by DNB, which was obtained by DNB in violation of the Dutch standard of LPP, how can the CJEU review any such defects?[235] Furthermore, the CJEU has not yet explained whether its competence extends also on investigations conducted by an NCA on a Member State and on the basis of which standards – EU or national – it would carry out a single review. In my opinion, when testing the national (non-coercive) preparatory part of the ECB decision, the CJEU will most likely not apply national standards, but will rather test the national procedure against EU standards, i.e., in light of Article 47 CFR. That view of mine is in fact backed by the fact that the CJEU has already stressed in its very first judgment pertaining to the operation of the SSM that "the logic of the relationship between them [the ECB and the NCAs] consists of allowing the exclusive competences delegated to the ECB to be implemented within a decentralized framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation."[236] In that respect, seeing as the CJEU has explicitly said that the ECB has exclusive competence with respect to the supervision of significant credit institutions, it appears to me that the CJEU will test national input against EU common standards. At the same time, I also think that even though, eventually, national (non-coercive) preparatory measures will be tested against EU standards, for that to work, that would also require the harmonization of the information-gathering powers and of the applicable defense rights across all SSM actors. In other words, testing the legality of national actions aimed at the establishing of information against EU standards, would also require that all NCAs obtain information on the basis of uniform rules and legal safeguards.

While important questions such as the ones discussed above have been left unanswered, I believe that the *Berlusconi* ruling is heading toward the right direction; highly integrated enforcement mechanisms should also be accompanied by integrated judicial control. In *Berlusconi* the CJEU seems to have left the door open for moving away from the strict dichotomy of judicial review in terms of levels. While this approach is welcome, it remains to be seen how this case law will evolve and on the basis of which standards single judicial review will take place.[237]

c) Diagonal composite enforcement procedures

As has already been explained, when it comes to the supervision of significant banks, the ECB can ask national authorities to open sanctioning proceedings in order to impose on them pecuniary[238]and non-pecuniary sanctions.[239] Alternatively, an NCA may ask the ECB to request it to open sanctioning proceedings for the imposition of such penalties.[240] It may then be the case that an NCA's sanctioning decision is – partly or wholly – based on evidence gathered by another NCA. For example, let us assume that DNB carries out verification activities at a branch of a Greek credit institution in the Netherlands. The procedure ends with a punitive sanction imposed by BoG, on the basis of information partly obtained by DNB and channeled to BoG through the ECB. Affected parties challenge the BoG decision

[235] Similar questions have also been raised by other authors. See *inter alia* Filipe Brito Bastos, "An Administrative Crack in the EU's Rule of Law: Composite Decision-Making and Nonjusticiable National Law" (2020) 16 *European Constitutional Law Review* 63; Laura Wissink, "CJEU moving towards integrated judicial protection?" (EU Law Enforcement, April 2019) <https://eulawenforcement.com/?p=1567#more-1567.> accessed 12 November 2021
[236] Case T-122/15 *Landeskreditbank Baden-Württemberg* v *ECB* [2017] ECLI:EU:T:2017:337, para 54
[237] See, *per contra*, Brito Bastos, who questions the jurisdiction of the CJEU to apply national law and to review violations of national law, Brito Bastos (n 235)
[238] SSM Regulation, art 18(5)
[239] SSM Framework Regulation, art 134(1)
[240] SSM Framework Regulation, art 134(2)

before the national court, arguing that the critical piece of evidence was obtained in violation of the Dutch standard of LPP.

The critical issue in this example is whether the right of access to a (Greek) court for a violation of a defense right by the Dutch NCA, operating under the auspices of the ECB, is ensured. In the absence of specific provisions in the SSM framework on the law of evidence, national enforcement autonomy applies – within the parameters set by the *Rewe* requirements and by the CFR.[241] Before moving to the national approaches it is important to remind the reader that the CJEU has left the door open for national (albeit criminal) Courts to disregard unlawfully obtained evidence.[242] While the relevance of that case law is unquestioned, it has been developed in the context of decentralized implementation and concerns internal situations and not composite scenarios, such as the ones discussed here.

Moving on the national legal orders, under Greek law, evidence obtained in violation of defense rights is in principle deemed unlawful, by means of a procedural nullity.[243] However, the fact that in internal situations the rules are rather strict, does not necessarily mean that the administrative judge will definitely apply the same rules to foreign materials; reviewing acts carried out under the responsibility of another Member State may be perceived as "an unacceptable intrusion" [244] to that other Member State's sovereignty.

Under Dutch law, obtaining information in violation of defense rights may lead to the exclusion of that information as evidence, but only if the evidence was gathered in a manifestly improper way.[245] Dutch administrative Courts would then consider excluding such evidence only where fair trial is truly at stake, which is – arguably – a rather high threshold to meet.[246] From the perspective of legal protection, the national approaches that are mostly problematic are those where a) national Courts refuse to examine questions concerning the lawfulness of the gathering, as they may not be willing to "intrude" in that other Member State's sovereignty; b) Courts which will only examine violations that were manifestly improper, a rather difficult threshold to meet.

The foregoing analysis shows that where enforcement proceedings are composite, but Courts are willing to test only actions of authorities in their own jurisdiction or test only flagrant violations of defense rights, the right of access to a court and the legal protection dimension of defense rights may often be at stake. But even if a (national) court does decide to look into potential illegalities committed by another NCA, I am not entirely convinced whether and, if so, how a national court is in a position to test the actions that took place abroad, in violation of a law that is not the judge's own law. How will the reviewing judge have access to the necessary information in order to make a precise assessment as to how information was obtained and whether the obtainment violated that other national law? At the moment of writing, there is no mechanism allowing national Courts to engage in such a type of dialogue.

[241] Case C-33/76 *Rewe/Landwirtschaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188; Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107
[242] *Prokuratuur* (n 138) para 44; Case C-310/16 *Dzivev and Others* [2019] ECLI:EU:C:2019:30, para 39
[243] Chapter V, Section 5.3.4
[244] Mazzotti and Eliantonio (n 142) 43
[245] Supreme Court 19 February 2013, ECLI: NL: HR: 2013: BY5322, para 2.4.5
[246] Duijkersloot, de Vries and Widdershoven 2019 (n 213)

4.2.4 Intermediate conclusions

In the foregoing section, which was concerned with the protection of defense rights in composite SSM procedures, I discussed a plethora of problematic issues. If I were to group in three broader categories the issues that ensue with regards to the protection of defense rights in composite SSM procedures, these would be the following: problems of divergent standards of defense rights between legal orders, lack of coordination of the non-punitive and the punitive segments of composite enforcement procedures and issues with respect to the use in one legal order of evidence obtained unlawfully in another. Below, I summarize the main takeaways for each category of problems.

Concerning the problem of divergent standards of defense rights between different legal orders, the main conclusion that can be derived is that EU and national laws set different standards with respect to the protection of defense rights. In the particular context of the SSM, such divergent standards can lead to problems of legal certainty, procedural fairness, and legal protection. To avoid making the analysis overly complex, I focused on the example of LPP in order to show how the fact that standards between legal orders diverge, can give rise to problems of legal certainty and legal protection.

With respect to the legal certainty dimension, the analysis warrants the conclusion that the reasoning used in current case law to justify why issues of legal uncertainty do not exist when the EU Commission applies the EU LPP standard and the national competition authorities their national standards, cannot be convincingly applied to composite enforcement procedures. Because the different segments of SSM enforcement procedures form a composite unity, information obtained on the basis of the EU standard of LPP can be used for punitive sanctioning in the Netherlands or in Greece, which provide for higher protection in this regard. How can a person orchestrate an effective defense strategy when – in one composite procedure – there can be different applicable standards?

The legal protection issues that I have discussed are, in essence, an after-effect of the lack of legal certainty. In other words, precisely because the standard in itself is not clear, the Courts reviewing a final decision lack guidance as to how they should review issues of divergent procedural standards. In bottom-up composite procedures, the CJEU has signaled that it will also review the national segments of a composite procedure, but it is not yet known whether national actions will be tested against EU or national standards. In top-down composite procedures, it is far from clear whether national reviewing Courts can disregard evidence lawfully obtained by an EU organ, on the basis of lower standards of defense rights. Will disregarding such evidence interfere with the primacy, effectiveness, and unity of EU law? Or should national Courts treat materials lawfully obtained by the ECB in the same way as materials gathered by the NCA of their own jurisdiction? The current constitutional framework does not offer clear answers; both approaches are equally defendable, in view of the fact that – unlike the *Melloni* type of situation – the EU legislator has not exhaustively harmonized defense rights in the particular area of EU banking supervision. Similar considerations apply also to diagonal composite procedures. Should national Courts apply the principle of mutual trust and accept evidence obtained on the basis of divergent standards of defense rights? Or can they disregard such materials?

Moving to the problem of the lack of coordination of the non-punitive and the punitive segments of composite enforcement procedures, which is ultimately a problem of procedural fairness, best manifested by the example of the privilege against self-incrimination, the main conclusion that can be derived is the following. In the SSM context, persons can be faced with combinations of non-punitive and punitive procedures, in which the rights they enjoy differ. At the same time, the facts and the information that the different SSM authorities need in these procedures is that same and can often be

channeled – through the ECB, from one set of non-punitive proceedings to another set of punitive ones. Even though, according to the discussed case law, to ensure procedural fairness the different sets of proceedings must be coordinated, we see that such coordination, particularly when the proceedings take place in different legal orders, does not currently exist. Thus, procedural fairness may often be at stake.

Finally, concerning the problem of the use in one legal order of evidence obtained unlawfully in another, the following conclusions can be drawn. Information can be obtained unlawfully, i.e., in violation of defense rights, either by the ECB or by NCAs, and used for punitive purposes either by the ECB or by NCAs. Should that be the case, legal redress by EU or by national Courts for violations of defense rights that took place in another legal order should logically be offered. With respect to top-down vertical procedures, while national Courts cannot invalidate Union act, they can always make a reference for a preliminary ruling or – assuming that the relevant case law can also be transplanted to the context of composite enforcement procedures – disregard the critical evidence.[247] In the case of bottom-up vertical procedures, alleged illegalities committed by NCAs can be reviewed by the CJEU, however, the fact that the CJEU has not explained on the basis of which standards it would test such illegalities, arguably leaves various critical questions unanswered. I find most problematic the situation of diagonal composite enforcement procedures. By contrast to the vertical top-down procedures, which allow the EU and national Courts to – in a way – engage in a judicial dialogue, the fact that national Courts cannot engage in a similar dialogue, combined in with the fact that, according to the ECHR, the use of unlawfully obtained evidence is not, as such, a violation of the ECHR leaves fairly limited possibilities for legal protection.

4.3 The *ne bis in idem* principle in composite SSM enforcement procedures

The *ne bis in idem* principle, which is also known as the prohibition against double jeopardy, limits the possibility of a person being prosecuted twice (or more than twice) for the same act, offense or facts. In a composite setting, which comprises the *ius puniendi* of multiple jurisdictions, the *ne bis in idem* principle will then be ensured where a person prosecuted in Member State A or in the EU is not prosecuted again in Member State B for the same act, offense or facts. Vice versa, if a person is prosecuted/sanctioned in a Member State, the principle will be ensured if that person will not be prosecuted/sanction again for the same act, offense, or facts at the EU level.

In the EU, the principle constitutes a fundamental right and it is enshrined in Article 50 CFR, which reads that reads that "no one shall be liable to be tried or punished again in criminal proceedings for an offense for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."[248] The relationship between *ne bis in idem* and legal certainty is quite straightforward; in the first place, the principle reinforces the notion of *res judicata* and therefore limits the possibility of contradictory decisions.[249] In the second place, *ne bis in idem* protects the individual from potential abuses of a State's *ius puniendi.*[250] Other rationales, such as the facilitation of the right to free movement, have also been brought forward.[251]

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[247] *Prokuratuur* (n 138) para 44
[248] CFR, art 50
[249] Bas van Bockel, "The ne bis in idem principle in EU law – A conceptual and jurisprudential analysis" (Doctoral Thesis, University of Leiden, 2009) 28 < https://scholarlypublications.universiteitleiden.nl/handle/1887/13844> accessed 24 January 2022. See also, Case C- 486/14 *Kossowski* [2016] EU:C:2016:483, para 44
[250] Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005) 383
[251] Renato Nazzini, "Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law" (2014) 2 Journal of Antitrust Enforcement 270, 280

In the SSM Regulations there is no specific *ne bis in idem* provision. Of course, that does not mean that no protection shall be afforded; after all, the CFR provision is addressed to EU institutions and to the NCAs which act under the scope of Union law. In SSM composite procedures, the *ne bis in idem* may be at stake when two punitive administrative sanctions are imposed for the same act or material facts; for instance, one sanction by the ECB and one by an NCA. In that respect to assess whether *ne bis in idem* violations inside the SSM are likely, the first question that needs to be answered is whether the allocation of sanctioning competences among the SSM authorities could potentially result in the imposition of two punitive sanctions for the same offense.

Concerning the allocation of sanctioning competences inside the SSM, in Chapter III we saw that there are no instances in which the ECB and NCAs are concurrently competent to sanction the same breach. As shown in the below scheme, the ECB can only sanction breaches of ECB Regulations/Decisions and breaches of EU Regulations and only those committed by legal person. The rest of the sanctioning takes place at the national level.

Sanctioning in the SSM

ECB	NCAs
Breach of EU Regulations by SIs (Art.18(1) SSMR)	Breach of national legislation by SIs (Art.18(5) SSMR and Art. 134(1) SSM FR)
Breach of ECB Regulations or ECB decisions by SIs (Art. 18(7) SSMR)	Breach of EU Regulations by natural persons in SIs (Article 134 SSM FR)
-	Breach of EU Regulations by LSIs (national law)
-	Breach of national legislation by LSIs (national law)
-	Breach of EU Regulations by natural persons in LSIs (national law)
-	Breach of national legislation by natural persons in LSIs (national law)

However, it has been argued[252] that a combination of an ECB penalty and a withdrawal of an authorization by the ECB may violate *ne bis in idem*. While this may hold true, at the same time there is lack of consensus on whether the withdrawal of a license constitutes a punitive sanction or not.[253] Some authors argue that "the withdrawal of the banking license is a reaction to unlawful behavior too severe to be considered as having only a reparatory aim,"[254] but other comparative studies[255]show that Member States struggle with attributing a punitive or remedial character to the withdrawal of licenses.

[252] Valentina Felisatti, "Sanctioning Powers of the European Central Bank and the Ne Bis In Idem Principle within the Single Supervisory Mechanism" (2018) 8 European Criminal Law Review 378, 399; Bas van Bockel, *Ne bis in idem in EU law* (Cambridge University Press 2016) 229

[253] Generally, the CJEU will look into the purpose of the administrative sanction. If its purpose is to punish the offender, then the sanction is generally punitive. If it aims at repairing the interest harmed by the offender, then it is non-punitive (administrative measure). See, Case-489/10 *Bonda*, para. 40; see also Adrianne de Moor-van Vugt, "Administrative Sanctions in EU Law" (2012) 5 Review of European Administrative Law 5, 12

[254] Raffaele D'Ambrosio, "Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings" (2013) 74 Banca d' Italia Quaderni di Ricerca Giuridica della Consulenza Legale 23-24, 25

[255] Oswald Jansen (ed), *Administrative Sanctions in the European Union* (Intersentia 2013)

In any case, assuming that a license withdrawal constitutes a punitive sanction, if such a withdrawal is an "direct and foreseeable consequence" of the decision to impose another sanction, then *ne bis in idem* will likely not be violated.[256]

All in all, the main conclusion that can be derived is that inside the SSM, *ne bis in idem* violations are highly unlikely.

The discussion on *ne bis in idem* concludes the assessment of fundamental rights protection composite SSM enforcement procedures. The next section assesses the protection of fundamental rights in those cases in which SSM administrative enforcement is linked to national criminal law procedures for the enforcement of prudential EU legislation.

5 The protection of fundamental rights at the intersection between administrative SSM enforcement and national criminal law enforcement

In Section 3 above, using the analytical lens of gathering/transfer/use, I have demonstrated that EU-level supervision of banks by the SSM can have a bearing on criminal law enforcement at the national level. That also holds true for the inverted situation; national criminal law enforcement of prudential legislation can have a bearing on EU administrative enforcement by the SSM. I argued that, owing to the fact that SSM administrative procedures and national criminal procedures carried out for the enforcement of prudential legislation may often relate to the same facts,[257] these different procedures may often become closely interlinked.

Now that the reader is familiar with the different modalities through which the SSM system and national systems of criminal justice interact and has understood that different sets of proceedings may often be closely interlinked, the next logical step is to assess that through the lens of my normative framework, i.e., fundamental rights and the three predominant ways[258] in which the (here studied) fundamental rights cast their safety net over natural and legal persons. In other words, the below section assesses whether fundamental rights issues arise at the point in which EU administrative law enforcement and national criminal law intersect.

5.1 Issues of legal certainty: Top-down transfers of criminally relevant information and the determination of the receiving legal order

Particularly problematic in light of legal certainty is the fact that the EU legislator has bestowed upon the ECB the discretion to transfer to the national level criminally relevant information that came to its knowledge while carrying out its supervisory activities. As explained earlier, the relevant provision stipulates that if the ECB has reason to suspect that a criminal offense was committed, it shall request the "relevant" NCA to refer the matter to the appropriate national authorities for investigation and prosecution in accordance with national law.[259]

However, the EU legislator has not defined which NCA should be considered as *relevant* and on the basis of which criteria the ECB should determine its relevance. At this point, one should be reminded[260]

[256] *Affair Maszni* v *Romania* App no 59892/00 (ECtHR 21 September 2006)
[257] And therefore the nature of the information sought will be the same.
[258] Legal certainty, legal protection, procedural fairness.
[259] SSM Framework Regulation, art 136
[260] Chapter III, Section 7.3.1

that as soon as information is deemed relevant for the purposes of criminal law enforcement, the ordinary rules on jurisdiction are triggered, such as territoriality, active personality, passive personality *et cetera*. Because in a given case more than one national legal orders may have an interest in receiving the ECB information and initiating their own investigation and (potential) prosecution, (positive) conflicts of jurisdiction may then come to the fore.

An examination of other domains of Union law reveals that conflicts of jurisdiction are increasingly being dealt with through soft law instruments, which lay down criteria on the basis of which the jurisdiction that is best placed to prosecute is determined.[261] For example, in cases of overlapping competences, Eurojust has issued guidelines for deciding "Which Jurisdiction Should Prosecute" in cases of cross-border crime. Among other things, those guidelines stipulate that – insofar possible – a prosecution should take place in the jurisdiction in which "the majority or the most important part of the loss was sustained" or on the location of the suspects or in the jurisdiction in which evidence is likely to be available, credible, and admissible.[262] So far, the ECB has not issued any such guidance.

As it follows from the foregoing, the determination of the receiving legal order within the meaning of Article 136 SSM Framework Regulation is currently not regulated in a satisfactory manner. Notwithstanding the fact that in criminal law the issue of forum choices is a rather controversial and well-researched one,[263] at the same time it shall not be forgotten that, in its supervisory role, the ECB is a law enforcement authority that operates on the basis of administrative law and therefore forum choices are not an issue with which should be put over the ECB's shoulders, but one which should be dealt with by national judicial authorities. In that respect, Article 136 SSM Framework Regulation should – in my view – be amended. As to the issue of how a new provision should look, I will come back to this issue in Chapter VII.

5.2 Issues of procedural fairness

As I posited in Chapter II, if one wishes to study whether procedural fairness is ensured at the interface between administrative enforcement at the EU level and criminal enforcement at the national level, the key question that has to be answered is the following: do parallel or prospective criminal investigations have an impact on SSM administrative enforcement? In other words, to assess whether issues of procedural fairness arise, the critical question that has to be answered is whether the law currently anticipates that the non-punitive part of an SSM administrative law procedure may influence the fairness of a (sufficiently interlinked) parallel or future criminal procedure at the national level.

As previously mentioned, in combinations of administrative and criminal proceedings, the same facts and information are often relevant for different purposes, proceedings and even authorities.[264] Those facts and information may then be transferred from one set of proceedings to another, which may in

[261] See for example, Eurojust, "Guidelines for deciding "which jurisdiction should prosecute" (2016) < http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20which%20jurisdiction%20should%20prosecute%20(2016)/2016_Jurisdiction-Guidelines_EN.pdf> accessed 26 January 2022
[262] Ibid, 3
[263] See *inter alia* Michele Panzavolta, "Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?" in Lorena Bachmaier Winter (ed), *The European Public Prosecutor's Office – The Challenges Ahead* (Springer 2018); Katalin Ligeti and Gavin Robinson (eds), *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal La*w (OUP 2018); Michiel Luchtman, "Choice of forum in an area of freedom, security and justice" (2011) 7 Utrecht Law Review 74
[264] See, Michiel Luchtman, *Grensoverschrijdende sfeercumulatie* (Wolf Legal Publishers 2007) 133-134

turn have important consequences for the legal position of the individuals and economic undertakings subjected to multi-agency and multi-disciplinary investigations. That is so because the protection offered by fundamental rights in criminal investigations is typically higher than the one offered in administrative investigations. Because information provided for the supervision of compliance may also serve the purposes of criminal investigations,[265] in the absence of clear rules at the EU level, such as specialty rules, information gathered for administrative purposes – where loser safeguards generally exist – can be routed through the ECB to another legal order, for the purpose of criminal law enforcement. Given that uncontrolled transmissions can undermine defense rights,[266] it is therefore imperative to have in place rules that regulate what impact parallel or consecutive criminal investigations should have on SSM administrative investigations.

In the SSM context, as it follows from the analysis in Section 3, such sufficiently related administrative and criminal proceedings,[267] running in parallel[268] or consecutively,[269] in different legal orders, are a true possibility. For example, it is likely that while the ECB carries out ongoing supervision activities vis-à-vis a Dutch bank, the Dutch public prosecution services (*OM*), which is *inter alia* responsible for investigating prudential offenses laid down in the Economic Offenses Act,[270] may have opened an investigation concerning the same facts and may thus be interested in obtaining the same piece of information that the ECB's organizational structures are looking for. The EU legislator has designed the system in such a way[271] that criminal justice authorities, in the Netherlands or in any other Member State, could gain access to information covered by the privilege against self-incrimination, gathered by an administrative SSM authority (ECB or NCA), over the course of the latter's day-to-day supervision, during which supervised entities are under an obligation to cooperate.

The Dutch judicial authorities are precluded from using improper compulsion to gather the same information for their own criminal investigation, but the ECB or DNB are able to exert compulsion, as they are conducting ongoing supervision (non-punitive). The affected individuals who are then entitled to the privilege against self-incrimination in the Dutch criminal proceedings, will not be able to fully effectuate their defense right. The design of the system therefore entails flaws, which could undermine procedural fairness. In my opinion, as long as it remains unclear whether information gathered for monitoring purposes may also be used as evidence in a closely interlinked (parallel or consecutive) punitive procedure, the non-punitive procedure should also fall within the scope of the privilege against self-incrimination, provided of course that compulsion has been exerted. However, that is currently not the case, i.e., in the non-punitive phase, future interactions with national criminal law enforcement are not anticipated.

In situations like the example I just discussed, the full effectuation of the privilege against self-incrimination from administrative to criminal law enforcement, presents a number of difficulties. While credit institutions are under an obligation to provide information to SSM authorities gathering information for supervisory purposes, incriminating information can later enter the sphere of criminal law enforcement in numerous Member States. The SSM Regulations do not specify whether the

[265] See for example, Financial Times, "ECB slams Slovenia over central bank raid" (July 2016) https://www.ft.com/content/22b10a06-048b-3dea-a8a5-e5ba049b9b1f. accessed 26 January 2022
[266] See, Case 85/87 *Dow Benelux* v *Commission* [1989] ECLI:EU:C:1989:379, para 18
[267] *Chambaz* v *Switzerland* (n 192) para 43
[268] *van Weerelt* v *Netherlands* App no 784/14 (ECtHR 16 June 2015) *Martinnen* v *Finland* (n 192)
[269] *Saunders* v *United Kingdom* (n 187)
[270] Chapter IV, Section 2.3
[271] SSM Framework Regulation, art 136 or through Decision (EU) 2016/1162

information transmitted by the ECB to national judicial authorities (through NCAs) shall be treated as evidence or as starting information, whether such information shall be admissible as evidence for the imposition of criminal sanctions and more generally for what purposes the receiving non-SSM authorities are allowed to use criminally relevant SSM-gathered information.

5.3 Issues of legal protection

How are national Courts to deal with information that has been obtained under compulsion by SSM authorities and is subsequently used in national criminal procedures?

As we have seen in Chapters IV and V, in the Netherlands and in Greece,[272] national judicial authorities may also a role to play in the enforcement of prudential legislation. For that reason, they may often have an interest in obtaining supervisory information collected by SSM authorities. The close links between the SSM and national systems of criminal justice are in fact recognized in the SSM legal framework; as stated previously, two distinct modalities exist, through which SSM-obtained information, which may also serve the purposes of criminal investigations, can end up in the hands of national judicial authorities.[273] Subsequently, national judicial authorities – depending on their national law– can either use that information as intelligence and therefore initiate their own criminal investigation, or, rely on the probative value of the SSM-collected materials and use them in the context of criminal prosecution and perhaps also for the imposition of criminal sanctions. If the national judicial authorities at issue use SSM-collected information merely as starting information, I do not find significant problems from a fundamental rights point of view. However, if national legal orders use SSM-collected materials as evidence in criminal proceedings, at a certain point in time, namely when a criminal trial takes place, national criminal Courts will be called upon to decide whether SSM-generated materials, gathered by foreign administrative authorities, on the basis of divergent procedural standards, or even unlawfully, can be admitted and used in national criminal proceedings. One should be reminded that the SSM Regulations do not deal with those types of questions, notwithstanding the fact that in other policy domains, notably EU competition law enforcement, the EU legislator explicitly forbids the use of evidence gathered by ELEAs for the imposition of custodial criminal sanctions.[274]

A first strand of concerns that will be raised by defendants before national criminal proceedings will relate to the fact that information was gathered by JSTs or OSITs or other NCAs, on the basis of EU or foreign *administrative* law powers and safeguards. The latter are typically less stringent when compared to safeguards applicable in criminal proceedings. For example, while the use of compulsion is available for non-punitive administrative investigations, it is typically not available for criminal ones. To offer effective legal protection, the national criminal court must then be able to test whether the evidence was gathered, transmitted, or used in violation of Article 48 CFR.[275] If we then assume that information lawfully obtained at the EU level or in another Member State for non-punitive purposes, is subsequently transferred by the ECB[276] to national judicial authorities and is used by them in an incriminating way,[277] such a use would – in my opinion – clearly violate the privilege against self-incrimination.

[272] Chapter IV, Section 2.3; Chapter V, Section 2.1.2
[273] SSM Framework Regulation, art 136; Decision ECB 2016/1162
[274] Regulation 1/2003, art 12(3)
[275] Case C-419/14 *WebMindLicenses* [2015] ECLI:EU:C:2015:832; *Prokuratuur* (n 138) para 44
[276] Either on the basis of SSM Framework Regulation, art 136 or Decision ECB/2016/1162
[277] *Saunders* v *United Kingdom* (n 187) para 72

But do the national Courts of the Netherlands and of Greece share the same opinion? The answer is far from straightforward, as case law specifically concerned with materials lawfully gathered under the auspices of ELEAs and later used in national *criminal* proceedings in an unfair way, is absent in both of the jurisdictions studied here. However, due to the EU principle of equivalence, the approaches taken in domestic cases may also be relevant for cases related to ELEAs.

From the analysis in the national chapters, it follows that in the Netherlands, the Supreme Court has explained that where evidence has been gathered by administrative authorities abroad, the Dutch criminal Courts shall not determine whether the foreign investigation complied with national provisions of that country implementing Article 8 ECHR – but should only limit themselves to assessing whether the *use* of the evidence would be contrary to Article 6 ECHR/47 CFR, which is – admittedly – a rather high threshold to meet.[278]

As far as the Greek legal order is concerned, case law regarding evidence obtained lawfully by foreign or EU administrative authorities, with different sets of powers and competences, and its later (unfair) use in national criminal proceedings, does not exist.

The second strand of concerns that will inevitably be raised by defendants before "prudential" criminal proceedings, will revolve around the fact that evidence was gathered abroad – by the ECB or other NCAs – lawfully, but on the basis of divergent procedural standards and should thus be excluded. For example, it is not inconceivable that internal communication between a bank and its lawyer was seized by the ECB, but under national law it is legally privileged. What should the criminal judge, confronted with such materials, do? As has repeatedly been said, unless specific regulation is in place, procedural autonomy is the rule, within the limits set by general principles of EU law, like the principles of effectiveness and equivalence and the CFR. To give effect to those principles, national Courts would in general not be allowed to exclude materials solely on the grounds that they were gathered on the basis of divergent procedural standards.[279] Mutual trust would possibly also come into play, meaning that as long as, according to the law of the gathering legal order, the obtainment and the transfer were lawful and in compliance with the CFR, national Courts will generally be open to using such materials.[280] However, the question that still remains is the following: are national criminal Courts also allowed to disregard EU evidence, if their national fundamental rights standards provide for higher protection? In my view, they should be allowed to disregard EU evidence obtained on the basis of divergent procedural standards, for the following reason. National criminal Courts are not embedded within a clear network type of structure with the ECB. In other words, in contrast with the NCAs which assist the ECB in the implementation of the ECB's exclusive mandate, national judicial authorities – and therefore also Courts – are not institutionally linked to the ECB/SSM. Hence they should be allowed to uphold their own fundamental rights standards, within of course the parameters set by the general principles of EU law.

In the third place, complications may arise where foreign materials were gathered *unlawfully* by the ECB or other NCAs and now end up in national criminal proceedings. For example, during an OSI, the ECB obtained information in violation of LPP. The illegally obtained piece of information raised suspicions that a criminal offense may have been committed by a senior manager. The ECB then

[278] Duijkersloot, de Vries and Widdershoven 2019 (n 213) 212
[279] See, Luchtman, Karagianni and Bovend'Eerdt 2019 (n 199) 23-24; see also Duijkersloot, de Vries and Widdershoven 2019 (n 213) 213, where it is argued that as long as the EU protection of LPP is in conformity with Articles 47/48 CFR and 6 ECHR, the evidence will be accepted by national criminal courts.
[280] Idem

forwarded[281] that information to national judicial authorities – via the relevant NCA – and the person under investigation, who is now facing a criminal trial, complains that the evidence was gathered unlawfully. How will the criminal judge deal with those types of complaints, in order to offer legal protection?

First, it should be noted that in the context of indirect enforcement of EU, the CJEU has given to national Courts the green light to disregard or exclude evidence obtained unlawfully, if their national law so demands, notwithstanding the fact that its use may have fostered the effectiveness of EU law.[282] If we take a look at the studied national legal orders, in Greece, in the absence of case law dealing with such issues, it is not clear how *criminal* Courts would deal with evidence obtained unlawfully by the ECB or its national counterparts. In internal situations, the "fruit of the poisonous tree" doctrine is applicable,[283] therefore, evidence obtained in violation of the right to privacy or the rights of defense, is automatically excluded, by means of a procedural nullity.[284] In academic literature, it has been submitted in this regard that where foreign evidence was obtained in violation of defense rights, it would have to be excluded only if it was obtained in violation of the notion of fair trial, for example, if it was obtained in violation of the right to remain silent.[285] Where foreign evidence was obtained in breach of the right to privacy, the same author submits that it must be declared inadmissible only if the Greek authorities would not have been able to obtain the same piece of information in Greece on the basis of a domestic procedure and powers.[286]

On the other hand, in the Netherlands, case law concerning the admissibility in criminal proceedings of evidence gathered unlawfully by administrative authorities abroad – albeit scarce – does exist.[287] From case law, it can be deduced that the use of unlawfully obtained foreign evidence will be forbidden only if it was obtained in a manifestly improper manner.[288] In essence, Dutch criminal Courts apply the rule of non-inquiry and do not seem to be particularly concerned with questions relating to Article 7 CFR/8 ECHR, especially where investigative acts abroad were conducted on the territory of CoE States: "it is not the task of the Dutch criminal court to assess whether the manner in which the investigation has been conducted complies with the relevant legal rules applicable in the relevant foreign country."[289] Interestingly, when – in the *KB Lux* case – Belgian criminal Courts and tax authorities were confronted with the same question, owing to the fact that Belgian prosecuting authorities were not able to determine the way in which foreign evidence was obtained, they did not admit those materials as evidence.[290] Dutch criminal Courts will likely disregard evidence obtained by the ECB or by other NCAs unlawfully only in exceptional cases in which a breach of a procedural requirement in the obtainment phase would render the proceedings unfair as a whole.[291]

[281] SSM Framework Regulation, art 136
[282] *Prokuratuur* (n 138) para 44; *Dzivev and Others* (n 242) paras 38-39
[283] See, Jeffrey Bein and Michael Kelly, "Fruit of the poisonous tree: recent developments as viewed through its exceptions" (1977) 31 University of Miami Law Review 615
[284] Greek Code of Criminal Procedure, art 177(2). See also, Dimitris Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart Publishing 2019) 31 et seq and 134 et seq
[285] Giorgos Triantafyllou, *Diethnis Dikastiki Syndromi stin Poiniki Apodeixi* (PN Sakkoulas 2009) 319
[286] Ibid 321
[287] Duijkersloot, de Vries and Widdershoven 2019 (n 213) 205-207
[288] Supreme Court 21 March 2008, NL:HR:2008:BA8179, paras 3.4.1–3.4.2
[289] (my translation) Supreme Court 5 October 2010, NL:HR:2010:BL5629, para 4.4.1
[290] Aukje van Hoek and Michiel Luchtman, "Transnational cooperation in criminal matters and the safeguarding of human rights" (2005) 1 Utrecht Law Review 1
[291] Duijkersloot, de Vries and Widdershoven 2019 (n 213) 212

It is striking to see how differently national legal orders deal with such questions. While in Greece the criminal judge will likely assess the extent to which the Greek authorities would have been able to gather the same information on the basis of national law powers and, if not, exclude, Dutch criminal Courts will possibly follow a much more lenient approach and not test alleged violations of rights that took place abroad, unless the fairness of the proceedings as a whole would be jeopardized.[292] In my view, the lack of specific EU provisions, explaining how criminal Courts reviewing information gathered under the auspices of ELEAs unlawfully, may sometimes result in that in several Member States, individuals will be deprived of effective legal protection, as national judges may not test violations of rights that took place abroad, unless a violation was exceptionally flagrant. This may therefore result in a multitude of different national decisions.

5.4 The *ne bis in idem* principle

5.4.1 Unclear content in sufficiently interlinked proceedings taking place in different legal orders

At the intersection between SSM administrative enforcement at the EU level and criminal law enforcement at the national level, *ne bis in idem* issues may come to the fore when the same facts or acts could result in the imposition of a punitive administrative sanction by an SSM authority and a criminal sanction by a national judicial authority.

As stated earlier, even though the CFR provision refers to "criminal proceedings," it is well-established that the *ne bis in idem* prohibition applies also to punitive administrative proceedings[293] and therefore also to ECB punitive sanctions.[294] Furthermore, in the seminal *Menci*,[295] *Garlsson*[296]and *di Puma* cases,[297] which were *inter alia* concerned with the compatibility of *ne bis in idem* with double-track enforcement systems, the CJEU has accepted that – under EU law – a combination of an administrative and a criminal sanction is allowed. In the SSM, a combination of an administrative and of a criminal sanction is likely to occur when an SSM authority imposes a punitive administrative sanction and a national judicial authority imposes – for the same facts/acts – a criminal sanction. Should that be the case, the double proceedings must pursue an objective of general interest,[298] contain rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings,[299] and third, the severity of all of the penalties imposed must be limited to what is strictly necessary in relation to the seriousness of the offense in question.[300] The principle therefore undoubtedly applies to SSM punitive administrative fines. If Member States, after the imposition of an administrative sanction by the ECB or by an NCA, wish to apply additional criminal sanctions for the same offense, they can do so, within the parameters discussed above.[301]

However, it is important to note that in the inverse scenario, namely if criminal proceedings have first been initiated by a Member State, according to the CJEU, if those criminal proceedings are capable of

[292] Supreme Court 21 March 2008, NL:HR:2008:BA8179, paras 3.4.1–3.4.2
[293] Case C-489/10 *Bonda* [2012] ECLI:EU:C:2012:319
[294] D' Ambrosio 2013 (n 254) 26 et seq
[295] Case C-524/15 *Menci* [2018] ECLI:EU:C:2018:197
[296] Case C-537/16 *Garlsson Real Estate* [2018] ECLI:EU:C:2018:193
[297] Case C-596/16 and C-597/16 *Enzo Di Puma* v *Commissione Nazionale per le Società e la Borsa (Consob)* and *Commissione Nazionale per le Società e la Borsa (Consob)* v *Antonio Zecca* [2018] ECLI:EU:C:2018:192
[298] *Menci* (n 297) para 44
[299] *Menci* (n 297) para 63
[300] Ibid
[301] *Garlsson Real Estate* (n 298) para 57

addressing the seriousness of the harm caused to the society, then, a combination of a criminal and punitive administrative penalty may not pass the "strictly necessary" test.[302] In my opinion, it is then really questionable whether the ECB or NCAs can impose a punitive administrative sanction for the same material facts/offense, after Member States have finally concluded criminal proceedings. However, at the moment of writing, in the domain of banking supervision, sufficiently interlinked administrative (SSM) and national criminal proceedings, which take place in different legal orders, lack the element of coordination that the CJEU has articulated in its recent case law.[303] In other words, the imposition of ECB/NCA sanctions after national criminal proceedings have been finally concluded, is – at least in theory – a possibility, something which would in turn result in the violation of Article 50 CFR.

While the applicability of the *ne bis in idem* principle in double-track enforcement systems is indisputable, the issue that still causes much uncertainty is what is meant by the terms "same facts" or "same offense." At the EU level, while in the AFSJ it is generally indisputable that *idem* means a set of concrete circumstances, inextricably linked together, irrespective of the legal classification given to them or the legal interest protected,[304] outside the domain of the AFSJ, the scope of the *ne bis in idem* principle is more limited. In EU competition law, the CJEU applies a stricter three-part test in order to establish whether the *idem* element is met: "identity of the facts, unity of offender and *unity of the legal interest* protected."[305]

The CJEU's reasoning in competition law enforcement has not (yet) been applied in the domain of banking supervision. If the Court's postulations in that policy area were to be applied to the domain of banking supervision, the requirement of the unity of legal interest would possibly result in that a sanction by the ECB/NCA and a "prudential" criminal sanction by national judicial authorities for the same material facts, would not – according to the Court's logic – violate *ne bis in idem*. The ECB/NCA sanction would possibly serve the broader aim of financial stability, while the criminal sanction would serve social aims, retribution, deterrence *et cetera*.[306] Furthermore, the same logic would result in that offenses committed by one person and arising out of the same facts, which infringe rules aimed at different regulatory objectives, such as, for example, prudential rules on the one hand and anti-money laundering rules on the other, could be sanctioned twice,[307] without that violating the *ne bis in idem* principle.

The EU Courts' approach in the domain of competition law enforcement has generally been subjected to criticism[308] and – in my opinion – rightly so. I find the opinion of AG Kokott very well-aimed in that

[302] *Garlsson Real Estate* (n 298) paras 57 et seq
[303] *Menci* (n 297) para 63
[304] Eg, Case C-467/04 *Gasparini and Others* [2006] ECLI:EU:C:2006:610; Case C-367/05 *Kraaijenbrink* [2007] ECLI:EU:C:2007:444
[305] Case C-204/00 P *Aalborg Portland and Others* v *Commission* [2004] ECLI:EU:C:2004:6, para 338; see also Case C-17/10 *Toshiba Corporation* [2012] ECLI:EU:C:2012:72, para 97
[306] Albert Alschuler, "The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next" (2003) 70 The University of Chicago Law Review 1
[307] On the links between prudential supervision and AML control, see Yves Mersch, *"*Anti-money laundering and combating the financing of terrorism – recent initiatives and the role of the ECB"(15 November 2019) < https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp191115~4369baad76.en.html> accessed 18 May 2020. See also, Bas van Bockel, "Ne Bis in Idem Issues Under the Single Supervisory Mechanism" in Bas van Bockel (ed), *Ne Bis in Idem in EU Law* (Cambridge University Press 2016) 230
[308] See *inter alia*, Marc Veenbrink, *Criminal Law Principles and the Enforcement of EU and National Competition Law-A Silent Takeover?* (Kluwer Law International 2020) 170; Alessandro Rosano, "Ne Bis Interpretatio In Idem? The Two Faces of the Ne Bis In Idem Principle in the Case Law of the European Court of

respect. In the first place, to interpret the principle differently depending on the policy domain at issue might disturb the unity of the EU legal order: "the crucial importance of the ne bis in idem principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned.*"*[309] In the second place,[310] the same principle that has been invoked by the CJEU in its *ne bis in idem*/CISA case law as the cornerstone of the AFSJ, namely the right to free movement, is also applicable in the area of EU prudential law, namely the free movement of financial services and capital and the right of establishment and provision of cross-border services. Why then should the principle be interpreted differently depending on the area of competence?

In addition to the issue of the unity of the legal interest, it should additionally be noted that questions may also arise as to who should be considered a "perpetrator." In cases of legal persons having committed a prudential offense, which operate through a branch, the branch is generally part of the parent bank, operationally, legally, and financially.[311] However, in the case of a parent and of a subsidiary, the two could either be regarded as different entities, or as a single entity. In the former case, both the parent and the subsidiary could be sanctioned, while in the latter case only the group as a whole. Again, competition law can be enlightening in that respect. The CJEU has asserted that if undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action, then they should be perceived as a single entity.[312]

Be that as it may, the foregoing discussion reveals that the precise content of the *ne bis in idem* principle in the field of banking supervision remains ill-defined. There is a provision in the CFR which ought to provide for supranational protection and which clearly applies in SSM punitive sanctions. But how precisely it is applied is something to be seen. We may only speculate that the CJEU would apply its competition law standards with regards to the "*idem*" element, but not necessarily. Therefore, for now, the scope in banking supervision remains ill-defined.

Given that ECB investigations can end up in national sanctions (administrative or criminal), the second step in order to assess the extent to which the content of *ne bis in idem* in composite proceedings is sufficiently clear, thereby offering the necessary level of legal certainty to individuals, is to look into its content in national law. Here, we see again a rather fragmented picture. The Netherlands follows a "*una via*" enforcement system. While it is true that administrative and criminal investigations can run in parallel, at a given point the *una via* principle is triggered,[313] which obliges administrative authorities, like DNB, to consult with public prosecution services and decide at a certain stage in the investigation to choose for either punitive administrative or criminal enforcement.[314] However, as has rightly been pointed out, "the Netherlands has quite an advanced policy vision on the choice of enforcement systems,

Justice" (2017) 18 German Law Journal 39; Renato Nazzini, "Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law" (2014) 2 Journal of Antitrust Enforcement 270; Bas van Bockel, "The ne bis in idem principle in the European Union legal order: between scope and substance" (2012) 12 *ERA Forum* 325; Case C-17/10 *Toshiba Corporation and Others* [2012], Opinion of AG Kokott

[309] Ibid, para 117

[310] Ibid para 118

[311] Giacomo Calzorali, Jean-Edouard Colliard, and Gyongyi Lóránth, "Multinational Banks and Supranational Supervision" (2019) 32 The Review of Financial Studies 2997

[312] Case 30/87 *Corinne Bodson* v SA *Pompes funèbres des régions libérées* [1988] ECLI:EU:C:1988:225

[313] GALA, art 5:44

[314] See also, *Convenant ter voorkoming van ongeoorloofde samenloop van bestuurlijke en strafrechtelijke sancties, Staatscourant* 665, 2009 ("Convenant 2009")

but those documents are silent on their transnational implications."[315] Indeed, while within the Netherlands the need for the coordination between administrative and criminal law enforcement is recognized, the vertical and diagonal problems of enforcement cooperation are not. Therefore, it is really not clear how parallel proceedings in other Member States are dealt with in the Netherlands, neither what is to happen in case the ECB imposes a punitive sanction first. Does it block further criminal prosecution in the Netherlands? I will come back to that below, in the discussion of the different scenarios, where I will show that an integrated *ne bis in idem* protection in the enforcement of prudential legislation is currently lacking.

In the Greek legal order, we see a completely different picture. The punitive character of prudential administrative fines is generally not recognized.[316] Therefore, Greek judicial authorities will likely not look into the issue of a potential *ne bis in idem* violation, as they will not consider that a former administrative penalty imposed by BoG is capable of blocking future criminal prosecution.

The important differences in the material scope of the right in EU, Dutch, and Greek law are very much at odds with the interest of legal certainty that *ne bis in idem* seeks to protect. Below, I discuss in order a number of different scenarios which highlight why the lack of a sufficiently defined *ne bis in idem* protection at the Union level and national levels, coupled with the complete lack of coordination between national legal systems, can thwart the protection of the fundamental right at the intersection between SSM administrative law enforcement and national criminal law enforcement.

5.4.2 ECB and national judicial authorities: Systemic risks for *ne bis in idem* violations

Under this scenario, the ECB imposes directly a punitive sanction on the basis of Article 18(1) or 18(7) SSM Regulation, which is simultaneously considered a criminal offense under national law. It should be noted in that respect that this scenario is applicable only in those cases where Member States attribute criminal liability to legal persons. That is so, because the ECB is competent to impose sanctions only vis-à-vis legal persons. So, if – following an ECB sanction on a legal person – national judicial authorities impose a sanction on the basis of the same facts on a natural person, this would not violate *ne bis in idem*.[317]

From the national legal orders studied here, only the Netherlands attributes criminal liability to legal persons. Even though an ECB sanction would likely block further criminal prosecution in the Netherlands, this does not do away with the fact that the Dutch system was not designed for composite EU structures and *modi* of legal interactions.[318] Therefore, it is not clear whether an ECB sanction will indeed block further criminal prosecution in the Netherlands. One possible answer relates to the EU principle of equivalence: if, in purely internal cases, criminal law enforcement is automatically excluded after the imposition of a punitive administrative fine for the same offense, the same incompatibility should also exist if a punitive administrative fine has been imposed by the ECB. However, this answer entails the following pitfall. Oftentimes, criminal law enforcement may be the most preferable for punishing the severe violations law. That is precisely the reason why Dutch law imposes an obligation on administrative and criminal authorities to coordinate action. In the absence of clear (EU or national)

[315] John Vervaele and Michiel Luchtman, "Criminal Law Enforcement of EU Harmonised Financial policies: The need for a shared criminal policy" in Ferry de Jong (ed), *Overarching views of Crime and Deviancy – Rethinking the Legacy of the Utrecht School* (Eleven International Publishers 2015) 362
[316] Chapter V, Section 2.1.1
[317] Case C- 217/15 *Orsi* [2017] ECLI:EU:C:2017:264, para 25
[318] Vervaele and Luchtman 2015 (n 317) 362

provisions obliging Dutch – and generally national – judicial authorities and the ECB to coordinate their action *ex ante*, a side effect may be that very serious violations are dealt with only through an administrative ECB fine. Supervised entities may even have a bigger incentive to be fined at the Union level first, to avoid criminal prosecution in the Netherlands or any other Member State. Again, this brings to the fore the need for coordinating the legal systems that interact in the enforcement of EU prudential legislation and the clear obligations of the EU legislator to coordinate such double proceedings.[319]

Of course, a counterargument could be that since the (EU) legislator has not coordinated EU administrative and national criminal proceedings, the Dutch judicial authorities are not precluded from imposing a criminal sanction, following an ECB sanction. As that would, in essence, result in a violation of Article 50 CFR, I would still be in favor of coordination.

The example discussed above can also be seen through the prism of Member States[320] which have in place a double-track enforcement system and which recognize criminal liability for legal persons. A punitive ECB decision based on evidence that can trigger a credit institution's criminal liability under national law would then mean that a duplication of an EU administrative and a national criminal proceeding is allowed only if the two proceedings a) are sufficiently connected in substance, b) pursue an objective of general interest which is such as to justify a duplication of proceedings, c) contain rules ensuring coordination (emphasis added) which limits to what is strictly necessary the additional disadvantage for the persons concerned, and d) provide for rules that ensure that the severity of all the penalties imposed is limited to what is strictly necessary.[321] Again, the need for coordination of the different legal systems becomes evident.

In the absence of relevant provisions at the EU level, I do not however see how coordination of EU and national interlinked proceedings can currently take place and how violations of Article 50 CFR could be avoided. Neither Article 136 SSM FR nor Decision ECB/2016/19 deal with such issues. While within a single Member State, the coordination of double proceedings and the determination of what is "strictly necessary" may work well, if we add the EU dimension, in the absence of clear rules in the SSM legal framework regulating the nexus of the two enforcement systems, coordination can become illusory. At this point it should furthermore be noted that, given the ill-defined scope of *ne bis in idem* in the policy area studied here, it may well be that if the criterion of the identity of the legal interest were to find application, the authorities could argue that an administrative fine by the ECB and a criminal fine by national judicial authorities for the same facts, serve different legal interests and that, therefore, there is no need to coordinate the duplication of the proceedings and apply the "strictly necessary" test. However, as I argued previously, the fact that the content of the *ne bis in idem* principle differs per area of competence, seems counterintuitive and does not foster the unity of the EU legal order.

[319] *Menci* (n 297) para 63
[320] That is a hypothetical example, as neither the Netherlands nor Greece fit that specific example. The Netherlands recognizes criminal liability of legal persons, but has a single-track enforcement system. On the other hand, Greece has a double-track enforcement systems, but does not attribute criminal liability to legal persons.
[321] *Menci* (n 297) para 63

5.4.3 NCAs and national judicial authorities: Violations possible, depending on the national legal order

Under this scenario, the ECB requests NCAs to open sanctioning proceedings. The requested NCA imposes a punitive sanction on a natural person for a breach that is also considered a criminal offense under national law. For example, a natural person acquired a qualifying holding but the notification to BoG contained false statements, so the NCA imposed a punitive sanction.[322] Greek judicial authorities may also have an interest in prosecuting on the basis of the same facts for the offense of fraud.[323]

In the first place, it is uncertain whether the Greek judicial authorities will acknowledge the punitive character of the BoG administrative sanction, as national law and Courts do not clearly recognize the punitive character of administrative fines.[324] Such an assessment is typically made on a case-by-case basis. Assuming that the punitive character of the BoG sanction is recognized – after all, it has to be recognized, as the national judicial authorities do act within the scope of Union law – a combination of an administrative and a criminal sanction is possible, as long as it passes the test laid down in *Menci* that the proceedings a) are sufficiently connected in substance, b) pursue an objective of general interest which is such as to justify a duplication of proceedings, c) contain rules ensuring coordination (emphasis added) which limits to what is strictly necessary the additional disadvantage for the persons concerned, and d) provide for rules that ensure that the severity of all the penalties imposed is limited to what is strictly necessary.[325]

On the other hand, if the same example is rephrased and instead of the BoG, the authority requested to open sanctioning proceedings is DNB, and the request concerns a breach which is also punishable under Dutch criminal law, the *una via* principle would most probably be triggered. DNB would then have to coordinate its action with the *Functioneel Parket*, in order to decide which course of action should be taken.

As can be seen, depending on the national legal order in question, the risks for *ne bis in idem* violations are different. While in Greece the risks are likely significant, in the Netherlands they are minimal, as a result of the *una via* principle. In other words, where the punitive administrative proceedings are carried by an NCA and not by the ECB and the criminal investigation is carried out by authorities in the same Member State, *ne bis in idem* constitutes an internal matter. Member State A is then free to choose for a double-track enforcement system, while Member State B is free to apply the *una via* rule. As long, then, as administrative and criminal law enforcement within the Member State are coordinated – within the parameters and the criteria set by the CJEU – the responsibility for ensuring *ne bis in idem* protection lies in the Member State at issue. From the perspective of the individual, this is, then, not problematic.

A last scenario that remains to be discussed is the following: a punitive fine in one Member State and criminal prosecution in another Member State. I shall explain that possibility using the following example. Let us assume that a credit institution is established in Greece and operates through a branch in the Netherlands. A Dutch company acquires a qualifying holding, without that being communicated to the BoG, as a result, the BoG has opened sanctioning proceedings.[326] Under the Dutch Economic

[322] Prudential Supervision Act, art 59(1)
[323] Greek Penal Code, art 386/386A
[324] Chapter V, Section 2.1.1
[325] *Menci* (n 297) para 63
[326] Prudential Supervision Act, art 23

Offenses Act, the same conduct constitutes a criminal offense in the Netherlands.[327] Let us then imagine that the BoG has opened sanctioning proceedings, while a public prosecutor in the Netherlands has also initiated criminal prosecution, on the basis of the same facts. At this moment, coordination of the punitive administrative procedure in Greece and the criminal procedure in the Netherlands is not foreseen either in EU law or in Dutch or Greek law

[327] EOA, art 1(2) in combination with FSA, art 3:95(1)

Chapter VII: Synopsis, conclusions, and recommendations

The first part of the final chapter of this PhD dissertation provides a synopsis of the research problem and the thesis's key concepts (Section 1). In part 2, the research question and guiding sub-questions are restated. Next, the main conclusions are reiterated (Sections 3 and 4). The last part (Section 5) brings forward a number of recommendations that follow for improving compliance of the SSM legal framework with fundamental rights.

1. A synopsis of the research problem and key concepts

Law enforcement, defined as "*public actions with the objective of preventing or responding to the violation of a norm*,"[1] is inextricably linked to the sovereign State, which exercises jurisdiction over its territory.[2] In the EU, which claims to be an autonomous legal order,[3] the jurisdiction to enforce – and to a large extent the jurisdiction to adjudicate[4]– is increasingly shared between the EU and its Member States. Indeed, while the most common method of enforcing EU law is that of indirect or decentralized enforcement,[5] whereby the EU prescribes norms and Member States implement and enforce them,[6] over the last years this picture is gradually changing. As the relatively recent proliferation of EU law enforcement authorities confirms,[7] when implementation or compliance with EU law fails at the national level, Europeanization of supervision and enforcement will likely follow.[8]

Europeanization of EU law enforcement tasks is increasingly observed in the EU.[9] Within that context, in various policy domains and areas of competence, direct powers have been bestowed upon EU law enforcement authorities (ELEAs), which are supranational actors, with direct – often punitive – powers

[1] Volken Röben, "The enforcement Authority of International Institutions," in Rüdiger Wolfrum, Armin von Bogdany, Matthias Goldmann, and Philipp Dann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2009) 821
[2] See for example: Martin Böse, Frank Meyer, Anne Schneider, *Conflicts of Jurisdiction in Criminal Matters in the European Union* (Nomos 2014) 22-23; Cedric Ryngaert and John Vervaele, "Core values beyond territories and borders: The internal and external dimension of EU Regulation and Enforcement" in Ton van den Brink, Michiel Luchtman, Miroslava Scholten (eds), *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement* (Intersentia 2015) 299
[3] Case 6/64 Costa E.N.E.L [1964] ECLI:EU:C:1964:66; for a discussion of foundations of this claim of autonomy, see Theodore Schilling, "The autonomy of the community legal order: An analysis of possible foundations" (1996) 37 Harvard International Law Journal 389
[4] For a definition of these terms, see Michiel Luchtman, "Choice of Forum and the Prosecution of Cross-Border Crime in the European Union – What Role for the Legality Principle?" in Michiel Luchtman (ed), *Choice of Forum in Cooperation Against EU Financial Crime* (Eleven International Publishing 2013) 28 et seq
[5] See Adrienne de Moor van Vugt and Rob Widdershoven, "Administrative Enforcement," in Jan Jans, Sascha Prechal, Rob Widdershoven (eds), *Europeanisation of public law* (Europa Law Publishing 2015); Christopher Harding, "Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a 'Joint Action' Model" in Christopher Harding and Bert Swart, *Enforcing European Community Rules. Criminal Proceedings, Administrative Procedures and Harmonization* (Dartmouth Pub 1996)
[6] While they enjoy enforcement autonomy in that regard, they are still bound by the CFR and the principles of equivalence and effectiveness.
[7] Miroslava Scholten, "Mind the trend! Enforcement of EU law has been moving to 'Brussels'" (2017) 24 Journal of European Public Policy 1348
[8] Miroslava Scholten and Daniel Scholten, "From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover?" (2017) 55 Journal of Common Market Studies; Annetje Ottow, "Europeanization of the Supervision of Competitive Markets" (2012) 18 European Public Law 191
[9] Scholten 2017 (n 7); Ottow 2012 (n 8)

to enforce EU law vis-à-vis private parties.[10] However, direct enforcement by EU authorities does not equal to complete centralization, neither to absolute autonomy of the EU level in terms of enforcement powers, definition of procedural safeguards and legal remedies. At a certain point in the enforcement process, usually in the phase in which the collected information needs to be used as evidence for sanctioning purposes, ELEAs legal frameworks need to (re)connect with Member State enforcement systems. This phenomenon raises various interesting questions with respect to how fundamental rights of economic operators and/or natural persons can adequately be protected in the context of "*highly integrated administrative procedural cooperation for the implementation of EU policies*."[11]

Against this background, this dissertation dealt with the protection of fundamental rights in "composite law enforcement procedures," a term that is meant to indicate EU and national law enforcement authorities, organizationally independent, but in a relationship characterized by (decisional) interdependence, operating in a functional EU territory, wherein they obtain, transmit, and use information for punitive purposes, through combinations of procedures and structures, for the attainment of common EU goals.[12]

The Single Supervisory Mechanism is a typical example of composite administration, which takes place through the following composite *modi* of interaction between the EU and national levels: joint supervisory teams, on-site inspections teams, national input for the adoption of an ECB final decision, EU instructions to the national level, EU requests for the opening of (punitive administrative) sanctioning proceedings at the national level and mechanisms of mutual administrative assistance, where national coercive measures are essential the effective discharge of the ECB's mandate. Furthermore, EU-level administrative supervision often interacts with and/or influences national systems of criminal justice,[13] in view of the fact that violations of the law, whose application the SSM oversees, can also be punished through criminal law in some Member States, including the ones studied here.[14]

The genesis and the operation of ELEAs, like the ECB, challenge traditional systems of executive control that were designed for and developed in the context of a single State jurisdiction. This dissertation has looked into the system of fundamental rights protection, as a mechanism that guides and controls executive action. As it was explained in the preceding chapters, for the purposes of this dissertation, fundamental rights realize their controlling function in at least three ways: by offering legal certainty, by ensuring procedural fairness, and by guaranteeing legal protection.[15] The right to privacy, the rights of the defense, the *ne bis in idem* principle, and their different controlling functions (legal certainty, procedural fairness, and legal protection) were subsequently introduced as comprising the normative framework of this dissertation.

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[10] Not every ELEA is entrusted with monitoring, investigating, and sanctioning powers. For example, while the ECB enjoys enforcement powers in all the stages of law enforcement, other ELEAs, like EASA do not have direct sanctioning powers at their disposal.

[11] Herwig Hofmann, Gerard Rowe, and Alexander Türk, *Administrative Law and Policy of the European Union*, (OUP 2011) 690

[12] Chapter II, Section 3.2

[13] SSM Framework Regulation, art 136; Decision (EU) 2016/1162 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19) OJ L 192/73

[14] CRD IV, art 65(1)

[15] Michiel Luchtman, "Transnational Law Enforcement Cooperation – Fundamental Rights in European Cooperation in Criminal Matters" (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 14

Legal certainty is a rather wide concept without universally accepted definition.[16] In broad strokes, legal certainty requires that the law is clear and predictable and that decision-making is consistent in order to guarantee that individuals are able to affirm their legal situation in a court procedure in accordance with an existing set of procedural rules.[17] Legal certainty often embedded in specific fundamental rights and it becomes particularly critical whenever limitations on fundamental rights take place. As regards the here studied fundamental rights, albeit in different ways, legal certainty underpins the right to privacy and the limitations attached to the right to privacy, the rights of the defense, like the legal professional privilege and the privilege against self-incrimination, and the fundamental right of *ne bis in idem.*

Procedural fairness entails that the procedures toward the discovery of the truth are carried out "in a fair and inclusive way."[18] Procedural fairness is generally satisfied when persons subject to punitive proceedings are enabled to effectuate a minimum set of procedural rights. By the same token, as has rightly been observed procedural fairness fails to be ensured when "*there is no space or means made available for its targets to be heard, to question, to inform, or to affect the exercise of power over them and no requirement that their voices and interests be taken into account in the exercise of power*."[19]

The concept of legal protection generally goes part and parcel with the right to an effective remedy (Article 47(1) CFR), but it is also strongly embedded in Articles 47(2)/48(2) and 7 CFR and Articles 6(1) ECHR/8 ECHR. In the context of the right to privacy, legal protection takes the form of *ex ante* or *ex post* legal control. The aim of *ex ante* or *ex post* legal control is to protect (legal and natural) persons against disproportionate intervention by public authorities in the sphere of their private space and activities.[20] In the context of defense rights, legal protection is deemed to be met when – *ex post* – a court can rule on the fairness of a procedure as a whole. By means of an example, assuming that the legal professional privilege was violated in the information-gathering phase of a composite procedure, the legal protection dimension of defense rights will be met when the reviewing Court – irrespective of whether it is the CJEU or a national Court – can rule on the lawfulness of the evidence and, should it consider that evidence was obtained or used by the law enforcement authority in violation of the right to a fair trial, exclude or disregard the critical piece of evidence in order to offer effective legal protection. For legal protection to be ensured, affected persons must have access to a Court that can review all the steps of a composite enforcement procedure, even of those which – due to their (preparatory) nature – could not have been judicially reviewed at an earlier stage. For example, where NCAs carry out preparatory tasks, which as was explained,[21] cannot be judicially reviewed *per se*, if the ECB takes a final decision based on such national input, effective legal protection will be ensured if the reviewing EU court is competent to exercise full review, i.e., also on the national preparatory part of a composite procedure.[22]

[16] See, Takis Tridimas, *The General Principles of EU Law*, (2nd edn, OUP 2007) 243; Juha Raito, *The Principle of Legal Certainty in EC Law* (Kluwer Academic Publishers 2003) 125
[17] *Coeme and Others* v *Belgium*, App nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 (ECtHR 22 June 2000) para 103; see also Elina Paunio, "Beyond Predictability-Reflections on legal Certainty and the Discourse Theory of Law in the EU Legal Order" (2009) 10 *German Law Journal* 1469, 1474
[18] Michiel Luchtman, "Transnational Investigations and Compatible Procedural Safeguards" in Katalin Ligeti and Vanessa Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart Publishing 2017) 192
[19] Martin Krygier, "The Rule of Law: Pasts, Presents and Two Possible Futures" (2016) 12 Annual Review of Law and Science 199, 203
[20] Klass and Others v Germany App no 5029/71 (ECtHR 6 September 1978) para 55
[21] Chapter III, 2.2.2
[22] Enrico Gagliardi and Laura Wissink, "Ensuring effective judicial protection in case of ECB decisions based on national law" (2020) 13 Review of European Administrative Law 41

Finally, an additional fundamental right that is of particular important in the context of punitive law enforcement is the *ne bis in idem* principle. First, the principle limits the possibility of a person being prosecuted twice (or more than twice) for the same act, offense or facts. It accomplishes its protecting function primarily by offering legal certainty: it reinforces the notion of *res judicata* and therefore limits the possibility of contradictory decisions which in turn promotes legal certainty.[23] In the second place, *ne bis in idem* protects the individual from potential abuses of a State's *ius puniendi.*[24]

2. Research question and guiding sub-questions

Considering the abovementioned, this dissertation sought to answer the following research question:

Do SSM procedures that may lead to national or EU punitive sanctions comply with the right to privacy, the rights of the defense and the *ne bis in idem* principle and, if not, how should the existing legal framework be adjusted to ensure such compliance?

Implicit in this question were three goals: an evaluative, a normative, and a legal design goal. The evaluative goal entailed an appraisal of how fundamental rights are *currently* integrated in composite SSM enforcement proceedings, in order to ultimately assess whether fundamental rights are sufficiently safeguarded in the SSM legal framework. The second and the third goals entail that, if from the perspective of legal certainty, procedural fairness, and legal protection, fundamental rights are *not* sufficiently protected in the current SSM legal framework and the composite procedures thereof, which recommendations follow for the design of the SSM legal framework in the future.

To answer the central research question, in Chapter I, I have also formulated a number of sub-questions that steered and guided the subsequent chapters (II, III, IV, and V) and which were articulated as follows:

1) What does composite punitive law enforcement entail, and how does it manifest itself in the Single Supervisory Mechanism (SSM)?
2) What is the content of the right to privacy, of defence rights, and of the *ne bis in idem* principle in punitive enforcement procedures?
3) How do the legal orders of the EU, the Netherlands, and Greece guarantee these fundamental rights in the framework of composite SSM enforcement proceedings?
4) If deficiencies are found to exist, how should the SSM framework, including its relations to criminal justice systems, be adjusted to ensure compliance with fundamental rights?

The answer to the evaluative part of the central research question shall be that, in certain instances, the current legal framework lacks guarantees to prevent unwarranted interferences with fundamental rights from occurring.

The discussion henceforth is structured as follows: in the below sections (3) and (4), I reiterate why the analysis in the preceding chapters leads to providing this answer to the main research question. In the

[23] Bas van Bockel, "The ne bis in idem principle in EU law – A conceptual and jurisprudential analysis" (Doctoral Thesis, University of Leiden, 2009) 28 < https://scholarlypublications.universiteitleiden.nl/handle/1887/13844> accessed 24 January 2022; See also, Case C-486/14 *Kossowski* [2016] EU:C:2016:483, para 44
[24] Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005) 383

subsequent section (5), the attention shifts to the normative part of the central research question: which recommendations follow for the EU legislator and, where applicable, for the national legislators? In other words, how can/should the system be adjusted in order to provide for composite fundamental rights protection?

3. The protection of fundamental rights in composite SSM procedures: Conclusions

3.1 Right to privacy

3.1.1 Privacy-related legal certainty

In Chapter II (Section 3.3.2), I raised the question whether the "legal certainty" requirement that the right to privacy encompasses is compromised in composite SSM enforcement procedures. More specifically, the potential problem of legal certainty was framed as follows: if the same piece of information can be obtained by various SSM authorities and if the content of the investigative powers of these authorities diverges, how can persons – in a composite enforcement ecosystem – get a reasonable expectation as to what falls under the notion of privacy and what does not?

First, it cannot be explicitly concluded that the legal certainty dimension of the right to privacy is at stake in composite SSM enforcement procedures. For such a conclusion to be safely reached, the precise content of the investigative powers of the NCAs of all 19 Member States should have been researched. From the analysis of the two national legal orders, as well as from reviewing relevant academic literature,[25] which has comparatively analyzed the information-gathering powers of various NCAs, notable differences in the content of investigative powers of NCAs and the ECB were not found.[26] In my view, this can be attributed to the fact that, following the 2008 financial crisis and subsequent inquiries into its causes, which revealed significant inconsistencies in the (supervisory) powers[27] across Member States,[28] the EU legislature took decisive steps to address such shortcomings. Indeed, the CRD IV has harmonized to a significant extent the minimum supervisory, investigative and sanctioning powers that must be available to the different NCAs.[29] As a consequence, all NCAs as well as the ECB are competent to request information, carry out on-site inspections and receive oral statements.[30] Notwithstanding the fact that the ECB, DNB and BoG have the same information-gathering powers, still, one cannot completely rule out the fact that certain NCAs may have more powers than the "standard" minimum powers provided for by the CRD IV framework.

Second, it was argued that the way in which the legal framework is currently designed may give rise to problems of privacy-related legal certainty, especially where legal orders set different standards with respect to how they test compliance with the inviolability of the home (Article 7 CFR/ 8 ECHR). The two national legal orders studied here test such compliance only *ex post* and therefore the specific

[25] Silvia Allegrezza (ed), *The enforcement dimension of the Single Supervisory Mechanism* (Wolters Kluwer 2020); Michiel Luchtman and John Vervaele (eds), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)* (Utrecht University 2017) 95 < http://dspace.library.uu.nl/handle/1874/352061> accessed 13 December 2021
[26] Allegrezza 2020 (n 25)
[27] And by extension, presumably, also in enforcement powers more generally.
[28] The de Larosière Group, "Report of The High level group on financial supervision in the EU" (February 2009) 41 < http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf> accessed 13 July 2021 ("De Larosière report")
[29] CRD IV, recitals 35 and 50
[30] Alegrezza 2020 (n 25); Luchtman and Vervaele 2017 (n 25)

comparison does not lend itself to highlight the potential problem of legal certainty. Nevertheless, if a credit institution operates through branches in various Member States (A, B, and C) and – for example – legal order A tests compliance of an OSIT with the right to privacy *ex ante*, while legal order B tests it *ex post*, in the absence of clear rules explaining how the ECB chooses in which jurisdiction it will deploy on-site inspections, problems of privacy-related legal certainty will come to the fore.

To conclude, privacy-related legal certainty is not generally at stake in the context of SSM on-site inspections and the more specific powers exercised therein.[31] Nevertheless, there are certain circumstances – like the ones mentioned in the previous two paragraphs – which may not be evident in the particular example of the ECB-DNB-BoG, but if other NCAs and legal orders were to be entered into the equation, concerns from the viewpoint of legal certainty and the "reasonable expectation of privacy" could then come to the surface. In that respect, for legal certainty to be absolutely watertight, it is essential that a) the content of the powers that can be used for SSM supervision, both by EU and by national staff members, are aligned (see Recommendation 1 below)), and b) that the way in which compliance of OSITs with the right to privacy is ensured is also aligned (see Recommendation 3 below)

3.1.2 Privacy-related legal protection

First, the analysis in the preceding chapters leads me to the overarching conclusion that privacy-related legal protection is generally not at stake in vertical top-down composite SSM procedures. More specifically, it can be concluded that with respect to EU on-site inspections that end with an NCA fine, legal protection is shielded; should concerns with respect to the ECB's compliance with the right to privacy come to the fore, the reviewing national court may make use of the preliminary ruling reference procedure[32] and thereby seek the CJEU's guidance.

Second, with respect to privacy-related legal protection in the case of procedures the end with an ECB fine but are based on national preparatory input during on-site inspections (vertical bottom- up procedures), notwithstanding the fact the CJEU has clearly stated that it is competent to judicially review all parts of such a composite enforcement procedure, [33] I have concluded that important questions still remain open.[34]

In my opinion, when the national part of a bottom-up composite enforcement procedure consists of intrusive, national coercive measures, it is questionable whether the CJEU is well-positioned to conduct a full *ex post* assessment of the national part of a composite enforcement procedure. The national part could play either the role of a question of law, or the role of a question of fact, or even the role of both. Consequently, the reviewing (EU) judge would have to assess the facts in light of arbitrariness and excessiveness and that might also involve the question of what, in accordance with the national law in question, constitutes arbitrariness and excessiveness (question of law). In addition, the reviewing judge may also need to examine the precise circumstances and facts (question of fact) of an on-site inspection that likely took place years ago, which is not a straightforward task. Therefore, I expressed the view that when the deployment of national coercive powers would lead to the imposition of an ECB punitive sanction, in the absence of an impartial assessment of the facts and an assessment of arbitrariness and

[31] Such as the power to issue production orders and to take copies of books and records.
[32] See Chapter II, Section 4.3
[33] Case C- 219/17 *Berlusconi and Fininvest* [2019] ECLI:EU:C:2018:1023, para 49
[34] See Chapter VI, Section 4.1.2.2

excessiveness by a national court, "single judicial review" may not be such a realistic exercise. In that particular setting, the involvement of national Courts should thus be ensured.[35]

Third, with respect to diagonal composite enforcement procedures, there are certain gray zones concerning how privacy-related legal protection works. Even though there is – in principle – no rule that precludes national Courts from reviewing compliance of foreign NCAs with the right to privacy, in many cases, national Courts may abstain from testing earlier segments of a composite procedure, as that could be perceived as being an unacceptable interference with that other Member State's sovereignty.[36] Against this background, an overarching conclusion is that the absence of a horizontal mechanism whereby national Courts can cooperate and pose questions to one another, may sometimes lead to an undesirable effect, whereby the full judicial oversight of all segments of a composite procedure may fall between the cracks. In that respect, from a normative perspective, the introduction of cooperation mechanisms between national courts seems essential (see Recommendation 5 below)

3.2 Rights of the defense

3.2.1 Defense rights-related legal (un)certainty

The content of the legal professional privilege (LPP) and of the privilege against self-incrimination in composite SSM enforcement procedures, is largely unclear. These rights are not codified in the SSM legal framework. However, because they both constitute general principles of EU law and fall under the scope of the CFR, one can safely deduce that their content, as developed in pertinent EU case law,[37] applies also to the ECB.

With respect to the LLP, where an enforcement procedure is carried out only at the EU level, i.e., not a composite procedure, I do not see important issues of legal uncertainty as to the content of LPP, because EU law enables supervised entities to ascertain the content of their defense right, by taking cognizance of the relevant case law of the CJEU.[38]

However, the picture becomes markedly different when it comes to the content and meaning of LPP in *composite* SSM enforcement procedures. When a procedure commences at the EU level and ends in a national legal order, or when information was obtained on the basis of the LPP standard of legal order A and – through the ECB – ends up in legal order B, which complies with LPP by following different procedural rules, the composite content of the LPP becomes ambiguous. Even though the sanctioning legal order functions as the ECB's "agent"[39] and acts for the fulfillment of the ECB's exclusive competences, it is currently unclear if the receiving legal order is precluded from applying its national LPP standard, which may be offering more protection than the standard of the gathering legal order. As such, the content of LPP in composite SSM procedures is ill-defined and thus in need of clarification.

[35] See Section 4.2 below
[36] Paolo Mazzotti and Mariolina Eliantonio, "Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnelan and the Constitutional Law of the Union" (2020) 5 European Papers 41, 4
[37] Case 374/87 *Orkem* v *Commission of the European Communities* [1989] ECLI:EU:C:1989:387; Case C 155/79 *AM & S* v *Commission* [1982] ECLI:EU:C:1982:157. See also, Jacobine van den Brink, Willemien den Ouden, Sascha Prechal, Rob Widdershoven, Jan Jans, "General Principles of Law," in Jan Jans, Sascha Prechal, Rob Widdershoven, *Europeanisation of public law* (Europa Law Publishing 2015)
[38] Chapter III, Section 6.1.2
[39] Elena Carletti, Giovanni Dell'Ariccia and Robert Marquez, "Supervisory incentives in a banking union" (2021) 67 Management Science 455

Problems of defense right related legal certainty exist also with respect to the content of the privilege against self-incrimination in composite enforcement procedures, and particularly its application at the interface between non-punitive and punitive administrative enforcement, taking place in different legal orders. While CFR rights that correspond to rights guaranteed by the ECHR shall have the same meaning and scope,[40] at present, questions on the protection of the privilege against self-incrimination in the framework of composite EU enforcement procedures have not yet been brought before the CJEU. As a consequence, it remains unclear whether – at least as far as legal persons are concerned – the CJEU will "opt" for the *Saunders* type of approach (exclusion of evidence that was gathered under compulsion during a non-puntiive stage), or, embrace the "Swiss way," namely, remove compulsion from the non-punitive stage and thus allow for the introduction of any information as evidence,[41] or – alternatively – leave it up to the EU legislature to regulate as it deems fit, depending on the policy domain at issue.

The foregoing discussion warrants the conclusion that legal certainty as to the content of the LPP and of the privilege against self-incrimination in composite SSM enforcement procedures is currently in a state of flux. Obviously, the legal framework requires modifications in that respect.

3.2.2 Procedural fairness may often be compromised

As far as procedural fairness in the SSM system is concerned, the analysis in the preceding chapters, necessitates three distinct conclusions.

First, frictions with the procedural fairness element of defense rights arise where an investigation (be it an on-site inspection or an investigation carried out by the IIU) is formally run under the aegis of the ECB, but during that investigation, the ECB is able to obtain information indirectly, through the NCAs.[42] These choices,[43] will ultimately affect the legal position of a supervised entity either at the EU level or in the home State jurisdiction, where (punitive) sanctioning competences are eventually located. But what happens if it is entirely clear that – for sanctioning purposes – a case will be handled by the supervisory authority of jurisdiction x, but evidence was obtained in another legal order, on the basis of different procedural standards, compared to the standards of the sanctioning legal order, or even unlawfully? Currently, the legal framework does not provide answers to these questions, which necessitates the conclusion that supervised entities are at the moment not always able to effectuate a (composite) defense strategy. The fact that all actors in a composite procedure do not always follow the same pre-established rules, is yet another point that requires modification, in order for procedural fairness– in a composite law enforcement setting – to be adequately protected.

Second, in "EU procedures," there may be problems of procedural unfairness, particularly with respect to the privilege against self-incrimination. The term "EU procedures" is used here to refer to ECB procedures that do not present composite elements. These procedures commence at the EU level, the

[40] CFR, art 52(3); Sionaidh Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis" (2006) 43 Common Market Law Review 629, 650

[41] Michiel Luchtman, Argyro Karagianni and Koen Bovend'Eerdt, "EU administrative investigations and the use of their results as evidence in national punitive proceedings" in Fabio Giuffrida and Katalin Ligeti (eds) *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (ADCRIM Report, University of Luxembourg 2019) 9 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021

[42] Eg, SSM Regulation, art 9; SSM Framework Regulation, art 21(1)

[43] The word choice, instead of the word "decision," is deliberately used here to imply that they do not bring about a distinct change in the legal position of supervision persons and, as such, they cannot be appealed before the CJEU.

investigation takes place on the basis of EU investigative powers, and the procedure ends with an ECB punitive sanction. The privilege against self-incrimination, as such, has not been codified in the SSM Regulations. The fact that the privilege against self-incrimination constitutes a general principle of EU law does not dispose the EU legislator of the obligation to include it also in the SSM Regulations.[44] But, there is more than "simply" introducing a privilege against self-incrimination provision in the SSM legal framework. It should be reiterated that even though the CFR rights correspond to ECHR rights[45] and notwithstanding the fact that the ECtHR has a relatively clear approach as regards the relationship between the non-punitive and the punitive stages of sufficiently interlinked proceedings, up until today, this case law has been discussed by the CJEU only in the context of indirect enforcement and only in relation to natural persons.[46] In that respect, it is uncertain how the privilege against self-incrimination ought to be protected in EU enforcement procedures vis-à-vis credit institutions, i.e., legal persons. In other words, from the case law of the ECtHR it can be derived that in one legal order more systems of privilege against self-incrimination protection may be fundamental rights consistent. In the SSM setting, the EU legislator should soon decide which system will be used. For that reason, in my view, to ensure procedural fairness, it is necessary that the EU legislator amends the legal framework on that point and clarifies how combinations of punitive and non-punitive proceedings carried out by the ECB must be coordinated, in order to secure the fairness of the proceedings as a whole.

Third and finally, procedural fairness can be at stake at the interface between the EU non-punitive segment of a composite procedure and the national, punitive segment.[47] More specifically, where information is obtained on the basis of EU powers[48]and that information is transferred to a national legal order, which uses it as evidence in national punitive proceedings, defense rights, such as the privilege against self-incrimination will not always be fully effectuated. On a more general level, from a fundamental rights perspective, it is problematic when different authorities use the same information, but the "instruments," i.e., powers, procedures, and safeguards, vary. In the specific SSM example, in the obtainment phase, credit institutions are under a duty to cooperate. The same information can – in a follow-up punitive proceeding at the national level – be introduced and used as evidence. Within a single State jurisdiction,[49] this violates the very essence of the privilege against self-incrimination. I do not see a convincing argument as to why the same situation – but now in a composite setting – would not violate the very essence of the privilege against self-incrimination. In that respect, the law should clarify that incriminating information obtained under legal compulsion in the non-punitive leg of a composite enforcement procedure, should be excluded from being used as evidence for punitive purposes (see Recommendation 2 below).

[44] See also, Laura Wissink, Ton Duijkersloot and Rob Widdershoven, "Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection" (2014) 10 Utrecht Law Review 92
[45] CFR, art 52(3)
[46] Case C-481/19 *Consob* [2021] ECLI:EU:C:2021:84
[47] In those cases where the ECB concludes an investigation, but it is not competent to sanction in itself, it therefore requests an NCA to open sanctioning proceedings (SSM Regulation, art 18(5))
[48] The term "ECB powers" is understood here in a rather broad sense, meaning also its powers to request information from other NCAs. See Chapter III, Section 6.4
[49] *Chambaz* v *Switzerland* App no 11663/04 (ECtHR 5 April 2012)

3.2.3 Defense rights-related legal protection

3.2.3.1 Evidence gathered on the basis of divergent procedural standards and legal protection

The analysis in the preceding chapters leads me to the conclusion that, currently, it is uncertain how Courts reviewing the final decision of a composite procedure are to assess the use as evidence (by the sanctioning SSM authority) of materials obtained abroad lawfully, but on the basis of lower standards, i.e., lower than the procedural standards applied in purely domestic cases, which are however consistent with the minimum standards set by Union law. For instance, is the application of a national standard of the LPP, offering more protection than the EU standard,[50] allowed in the SSM, in view of the *Melloni* requirements?[51] Or is it not? Does more extensive national protection compromise the primacy, unity and effectiveness of EU prudential supervision? The EU legislator has not provided yet answers to such composite questions,[52] neither have the national legal orders studied in this dissertation.

Notwithstanding the aforementioned, this is a particularly important matter for EU law that should – and I believe – will at some point be referred to the CJEU, which will then get the chance to clarify the matter. Irrespective of how the CJEU will answer such questions, in my view, a logical argument can be construed as follows. The ECB has been granted *exclusive* competences in a particular policy area. Notwithstanding the fact that its exclusive mandate is largely implemented through composite procedures, since the ECB has an exclusive mandate, it remains the "principal" and the NCAs its "agents." Composite implementation implies joint responsibility of the EU and national levels to enforce, but still under the command and the overview of the ECB. Owing to the fact that the EU and national levels cannot be institutionally separated, composite procedures require aligned procedural standards, to be applied by all participating authorities, i.e., both by the ECB and by the NCAs. The next logical question is which standards. Given that the EU competence is exclusive and that at the same time the primacy, unity and the effectiveness of EU law should be ensured (as should legal certainty and procedural fairness for supervised entities), in my view, the common standards – both for the ECB and for the NCAs – should be EU standards, supplemented by an obligation to admit as evidence SSM-generated information, i.e., information obtained either by the ECB or by an NCA. I will come back to that point more specifically in my recommendations below (Section 4.2)

3.2.3.3 Unlawfully obtained evidence and legal protection

The analysis in the foregoing chapters leads me to the general conclusion that, where alleged irregularities took place in the "gathering" legal order, the judicial review of such irregularities in the legal order that is ultimately called upon to offer legal protection, can often be a complex task, owing to the fact that reviewing Courts may not be in the position to test acts of authorities outside their jurisdiction. This overarching conclusion can be broken down in two more specific points. The first sub-conclusion concerns SSM composite procedures terminated by means of an ECB final decision, based on information obtained by NCAs (vertical bottom-up procedures). The second sub-conclusion pertains to SSM composite procedures that end with a national final decision, which is (partly or wholly) based on foreign input, obtained either by the ECB or by other NCAs (vertical top-down and diagonal composite procedures).

[50] Both jurisdictions studied here offer wider protection compared to the EU LPP standard.
[51] Chapter II, Section 4.4
[52] The view of the CJEU in the *Akzo Akcros* case discussed earlier in the book (Chapter VI, Section 4.2.1.2), namely that the applicable standard is the EU standard, cannot in my view be applied *mutatis mutandis* here. In competition law the institutional competences are quite different, whereas the SSM comprises a highly integrated system of law enforcement.

When a composite SSM procedure ends with a final ECB decision, but input has been provided by the national level, the CJEU currently embraces the approach of a single judicial review.[53] The EU Court has clarified that it is the only competent Court to review also the national part of the composite procedure.[54] However, what has not been explained yet, is on the basis of which standards the CJEU will engage in such an integrated review. For instance, under Dutch and Greek law in-house lawyers are covered by LPP,[55] while under EU law they are not. If DNB obtained unlawfully information concerning internal communication between a credit institution and an in-house lawyer, will the EU Courts test the lawfulness of the Dutch part of the composite procedure against the Dutch or against the EU standard? If they test it against the EU standard, it is quite unlikely that the obtainment will be deemed unlawful.[56] In my view, there are good reasons for arguing that the obtainment should be tested against the EU LPP principle, especially in light of the fact that the ECB has been given exclusive competence and the NCAs assist the ECB in the implementation of its exclusive mandate.[57] However, as that view of mine has not yet been embraced by CJEU, unless the Court is given an opportunity to answer such questions, the legal situation remains unclear and so does the legal protection dimension of defense rights.

Concerning national Courts reviewing unlawfully obtained EU materials or materials obtained unlawfully in another national legal order, it can be concluded that attributing responsibility for violations of rights is a rather difficult task, for various reasons.

In the first place, it may not always be possible to separate the individual actions that took place within a composite structure. In other words, the different parts of a procedure are so inextricably linked that it may not always be possible to disentangle specific steps and attribute them to a specific legal order. For instance, in diagonal procedures, the sanctioning legal order may not even be aware that the input was provided by a national legal order and not – for instance – by the EU legal order.

In the second place, while national Courts can refer to the EU Courts questions on the validity of the acts of EU organs and authorities,[58] where validity questions concern actions of foreign authorities (other SSM NCAs), there is no similar preliminary reference procedure among national Courts of the EU Member States. In light of the principle of mutual trust, national Courts may furthermore not even consider testing actions of foreign administrative organs. As a result, there may be gaps in the offering of effective legal protection. Furthermore, the fairness of the procedure as a whole may not be sufficiently assessed by a court, as the extent to which fairness is checked is completely dependent on the national approach. From the analysis of the national legal systems here studied, it can be concluded that the national approaches to the same issue are diametrically opposed. In the Netherlands, only evidence obtained in a "manifestly improper" way[59] may be excluded. In the Greek legal order, currently, it is not entirely clear if the administrative judge would apply the rather strict internal rules, whereby evidence obtained in violation of the right to privacy or defense rights is deemed unlawful by

[53] Case C-219/17 *Berlusconi and Fininvest* [2018] ECLI:EU:C:2018:1023
[54] Ibid
[55] Similar considerations can also be applied to other procedural safeguards. For instance, under German law, will-independent information is also covered by the privilege against self- incrimination. If the German supervisory authority gathered will-independent information unlawfully, will the EU court test the lawfulness of the German part of the composite procedure against the German or against the EU standard?
[56] Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECLI:EU:C:2010:512
[57] Case C-450/17 P *Landeskreditbank Baden-Württemberg* v *ECB* [2019] ECLI:EU:C:2019:372, para 49
[58] TFEU, art 263
[59] Council of the State 19 February 2013, ECLI: NL: HR: 2013: BY5322, para 2.4.5

means of a procedural nullity,[60] or apply the rule of non-inquiry for foreign evidence and the principle of effectiveness of EU law for EU evidence and thereby not delve into questions of unlawful gathering.

At a meta level, the foregoing conclusions suggest that – in composite SSM enforcement procedures – legal protection and legal redress for violations of the rights of defense, which took place in a different jurisdiction than the reviewing jurisdiction, may not always be remedied through excluding or disregarding the critical piece of evidence. If the reviewing court is willing to test the lawfulness of the obtainment (presumably on the basis of the standards of the gathering legal order), some degree of protection may be offered, in the sense that if a national court considers a piece of evidence unlawful, the national court could always choose to disregard the critical evidence,[61] according to its national rules on evidence. If, however, a national court does not in the first place delve at all into such questions, violations of rights will – in essence – be swept under the carpet. It goes without saying that this is not a problem for which individual Courts and legal orders are to "blame"; I rather see it as a systemic issue which stems from the way in which the SSM has been designed; in the first place, there is lack of guidance for national Courts, and second, there is a lack of common standards against which fundamental rights violations are to be tested.

3.3 Ne bis in idem: Ambiguous content, but systemic risks for violations are unlikely

In the composite SSM ecosystem, the content of the fundamental right of *ne bis in idem* principle is ill-defined.[62] While in other areas of EU competence, specifically the AFSJ, the transnational application of the *ne bis in idem* is well-established,[63] in the context of the SSM, the (composite) content of the fundamental right is unsettled. An analysis of a similar policy domain, namely EU competition law enforcement,[64] revealed that the content of *ne bis in idem* is more limited compared to its content in the AFSJ; in competition law, the CJEU currently applies a stricter, three- part test as to the *idem* element (identity of offender, facts and legal interest). At the moment of writing, it remains unknown whether the EU competition law case law will be applied by EU Courts in the SSM context; in contrast with other rights, like LPP and the privilege against self-incrimination, which comprise general principles of Union law.

Another important conclusion with respect to the *ne bis in idem* principle and the requirement of legal certainty that it encompasses is that the SSM, as such, is generally foolproof as regards violations of the *ne bis in idem* principle. The way in which sanctioning powers have been allocated within the SSM warrants this conclusion.[65] More specifically, the ECB can only sanction violations of EU Regulations[66] and ECB decisions,[67] while the *home* NCA is competent to sanction a) violations laid down in national law implementing EU law[68] and b) violations committed by natural persons.[69] To conclude, the probability the *ne bis in idem* violations will occur within the SSM is quite unlikely.

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[60] Chapter V, Section 4.2.3
[61] Case C-746/18 *Prokuratuur* [2021] ECLI:EU:C:2021:152, para 44
[62] Chapter VI, Section 4.3
[63] John Vervaele, "*Ne Bis In Idem*: Towards a Transnational Constitutional Principle in the EU" (2013) 9 Utrecht Law Review 211
[64] They are similar in that they are both concerned with the supervision and enforcement of economic law vis-à-vis legal persons, primarily through administrative law and – depending on the Member State in question – also through criminal law
[65] Chapter VI, Section 4.3
[66] SSM Regulation, art 18(1)
[67] SSM Regulation, art 18(7)
[68] SSM Regulation, art 18(5); SSM Framework Regulation, art 134
[69] SSM Framework Regulation, art 134

4 The protection of fundamental rights at the intersection between SSM administrative law enforcement and national criminal law enforcement: conclusions

4.1 Issues of legal certainty at the intersection between SSM administrative law enforcement and national criminal law enforcement

When the ECB comes across evidence suggesting the commission of criminal offenses, it "*shall request the relevant NCA to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law."*[70] The provision has significant repercussions for national systems of criminal law enforcement and for the principle of legal certainty.

In the first place, the ECB is not a judicial authority, and yet it indirectly engages in a "*quasi-forum* choice."[71] This is particularly problematic from the perspective of legal certainty,[72] because – in the absence of guidance as to which NCA is considered to be "relevant" – in cases involving transnational crime, legal certainty as to the receiving jurisdiction will often be at stake. In the second place, such a lack of legal certainty may render particularly complex the task of knowing one's rights and obligations – and thereby the task of designing an effective defense strategy.

To conclude, the principle of legal certainty may often be at stake in cases of transnational financial crime, given that multiple national public prosecutors may have an interest in receiving the same information or evidence, yet credit institutions and natural persons employed by them, currently lack legal certainty as to how the "relevant" receiving jurisdiction is to be determined.

Another modality[73] on the basis of which the ECB interacts with national criminal enforcement authorities is Decision 2016/1162, which – in essence – comprises the inverted version of the provision discussed in the previous section; instead of top-down transmission from the ECB to national legal orders, the EU Decision explicitly enables national criminal law enforcement agencies to request from the EU authority (bottom-up), through their local NCAs,[74] confidential information, which may then be used in the context of national criminal investigations. The challenges and the jurisdictional complications that can arise in such bottom-up requests, have been discussed in detail in the previous chapters. For instance, if a prosecutor in a host Member State requires information held by the ECB, to whom shall the request be addressed? To the host NCA which shall further address the request to the ECB? Or to the prosecution authorities of the home Member State, via a mutual legal assistance request,[75] which shall further ask from the home NCA to request information from the ECB?[76] Or should the request be addressed to the public prosecutor in Frankfurt, who shall further transmit it to the German NCA? How do the persons subjected to such investigations have legal certainty concerning which jurisdiction will deal with their case and, as a result, which defense rights they will have at their disposal?

[70] SSM Framework Regulation, art 136
[71] Chapter III, Section 7.3.1
[72] In fact, it may be problematic also from the perspective of substantive legality (*nullum crimen nulla poena sine lege* principle)
[73] Chapter III, Section 7.3.1
[74] Decision 2016/1162, arts 2 and 3
[75] Given that a prosecutor in Member State A cannot formally address a request to a banking supervisor in Member State B, as no such mechanisms are currently foreseen.
[76] Allegrezza 2020 (n 25) 42-43

The foregoing still unanswered questions and the analysis in the preceding chapters, necessitate the conclusion that while – albeit quite reluctantly – the ECB has recognized some of the links that exist between the EU system of banking supervision, and it has therefore attempted to establish a nexus between the SSM and national judicial authorities, this has not been achieved in a satisfactory way, as many fundamental issues remain untouched. Currently, the SSM is a stand-alone enforcement system, without the existence formal coordination and cooperation mechanisms between SSM administrative enforcement and criminal enforcement at the national level for violation of SSM enforced provisions.

4.2 Issues of procedural fairness at the intersection between SSM administrative law enforcement and national criminal law enforcement

To formulate a conclusion about issues of procedural fairness at the interface between administrative law enforcement by the SSM and criminal law enforcement by national judicial authorities, one would have to give an answer to the following question: what is the impact on SSM investigations of criminal proceedings running in parallel or consecutively in different legal orders and which concern the same material facts?

The analysis in the previous chapters leads me to the conclusion that parallel or consecutive criminal proceedings do not currently have any influence on an SSM administrative investigations. In other words, combinations of SSM non-punitive and national criminal proceedings, in which authorities have an interest to obtain the same information, can currently run in tandem or one after another, without any coordination between the two being present. The current narrative is one in which each authority and legal order is responsible for its own proceedings and thereby must in itself ensure fundamental rights protection. More specifically, it can be concluded that the gathering legal order, will likely not apply criminal law safeguards, which is logical, given that activities carried out for purposes of ongoing supervision do not *a priori* necessitate the observance of strict safeguards; at the same time, the "using" authority, namely the national criminal enforcement authority will – in accordance with the principle of national procedural autonomy – decide on the basis of its national law[77] how to treat SSM generated evidence. Even though, according to the ECHR standards, non-punitive proceedings (can) "forecast their shadows" over parallel or follow-up criminal proceedings, in the SSM system this is not the case and – of course – this can ultimately be to the detriment of procedural fairness.

How does this situation differ from the similar problem of procedural fairness that I previously discussed and which concerned the SSM system, i.e., the ECB and NCAs? In my view, the situation discussed here differs significantly because the SSM consists of institutionally linked authorities which jointly generate information and reach formal decisions. On the other hand, when it comes to administrative law enforcement by SSM authorities and criminal law enforcement by national judicial authorities, the coordination of different proceedings and authorities for the purpose of ensuring procedural fairness at the interface between administrative and criminal law, is a much more complex task. Nonetheless, the fact that attaining coordination of EU administrative and national criminal law proceedings is a complex task, does not mean that it should not be high on the agenda, especially in light of the fact that the aforementioned authorities often implement the same EU rules.

Against the foregoing, clear guidance as to whether information transmitted on the basis of Article 136 SSM Framework Regulation and/or Decision ECB/2016/1162 is to be treated as starting information or

[77] One should be reminded, of course, that in *stricto sensu* criminal proceedings in which natural persons are involved, Member States are obliged to observe as a minimum standard Directive EU/2016/343

as evidence, as well as coordination between the two levels and areas of law are truly necessary, in order for procedural fairness to be guaranteed.

4.3 Issues of legal protection at the intersection between SSM administrative law enforcement and national criminal law enforcement

Legal protection at the intersection between EU administrative enforcement and national criminal law enforcement can be at stake where Member States, such as the ones studied here, enforce prudential legislation, the application of which the ECB supervises and enforces, also by means of ordinary or special criminal law provisions.[78] When the materials, on the basis of which national criminal enforcement authorities sanction such offenses have been obtained and transferred by SSM administrative authorities, there are two circumstances under which legal protection of supervised entities, or natural persons working for them, can be at stake. First, where the evidence used for the imposition of criminal sanctions by national criminal Courts has been obtained abroad unlawfully. Second, where the obtainment as such was lawful, but the way in which the evidence is used by national criminal enforcement authorities may be *unfair*.[79] How can the affected persons enjoy legal protection?

The analysis in the previous chapters leads me to the overarching conclusion that in, the particular setting that I described in the previous paragraph, legal protection is currently fragmented. At the moment of writing, it is unclear how persons subject to national *stricto sensu* criminal proceedings can always enjoy legal protection for violations of their rights that may have taken place in another legal order. Below, I discuss the main conclusions per issue.

4.3.1 Legal protection and unlawfully obtained evidence

The problems with respect to legal protection do not – at first sight – differ that much from those that were discussed (*supra* Section 2.2.3) as being evident "within the SSM." However, what really distinguishes the "inner" and the "outer" circle, is the fact that national criminal agencies and Courts are not institutionally related to the ECB, in the same way as are the 19 NCAs. Notwithstanding the fact that they may be enforcing the same legal provisions, national judicial authorities are currently not embedded in a clearly defined network.[80] Therefore, unlike the NCAs, they do not act under the command of the ECB, or, as the ECB's agents. Whereas NCAs and national Courts reviewing their decisions may thus be required to act as the ECB's "agents," the same logic does not automatically apply in the case of criminal authorities and Courts, which generally apply stricter standards.

There is currently no guidance as to how (against which standards) national criminal Courts should treat evidence obtained within the SSM, which under national law is – for instance – legally privileged. The question is thus governed entirely by national law-within the limits set by the general principles of Union law. There are different approaches in that respect, as has also been demonstrated in Chapters

[78] Allegrezza 2020 (n 25)
[79] See John Vervaele, "Lawful and fair use of evidence from a European Human Rights Perspective," in Fabio Giuffrida and Katalin Ligeti (eds), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings*, (ADCRIM Report, University of Luxembourg 2019) 56-94 < https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 13 December 2021
[80] Argyro Karagianni, Miroslava Scholten and Michele Simonato, "EU Vertical Report" in Michele Simonato, Michiel Luchtman, and John Vervaele (eds), "Exchange of information with EU and national enforcement authorities: Improving the OLAF legislative framework through a comparison with other EU authorities" (Report, Utrecht University, March 2018) 8 https://orbilu.uni.lu/bitstream/10993/35503/1/Utrecht_University_Hercule_III_Exchange_of_information_with_EU_and_national_enforcement_authorities.pdf accessed 13 December 2021

IV and V. The main conclusion which stems from the analysis in the previous chapters, is that – due to the lack of guidance at the Union level – individuals depend entirely on the approach of 19 national legal systems. As a result, they can be deprived of their right of access to a court, seeing as national judges are not always willing to seriously take into consideration complains about violations of defense rights that took place abroad, unless a violation was exceptionally flagrant.

4.3.2 Lawful obtainment but unfair use: issues of legal protection

One could say that the point I wish to establish here is not really a problem: why would information lawfully obtained by the SSM, for instance in the phase of ongoing supervision, and thereafter lawfully transferred to the national level, not be used for the imposition of *stricto sensu* criminal sanctions? In my view, particularly in the absence of an explicit provision on the privilege against self-incrimination at the EU level – it is not as self-evident that SSM generated information, obtained lawfully by SSM authorities, will be used by national judicial authorities in a way that does not undermine fairness of the proceedings as a whole. The two national legal orders studied here do not currently anticipate interactions between their criminal law enforcement systems and the ECB/SSM. Neither has the EU legislator designed the SSM in a way which clearly expects interactions between EU administrative and national criminal enforcement. After studying the Dutch and the Greek national legal orders, case law specifically concerned with materials lawfully obtained under the auspices of ELEAs in the phase of ongoing supervision and later used in national *criminal* proceedings has not been found. The conclusion that follows from the analysis in the previous chapters is, again, that legal protection in that particular context remains uncharted territory.

4.4 The *ne bis in idem* principle at the intersection between SSM administrative law enforcement and national criminal law enforcement

The proceedings of SSM authorities and those of national judicial authorities that run in parallel or consecutively and concern the same facts, may often be characterized as sufficiently interlinked or interwoven.[81] At the same time, their interconnectedness has not been (yet) acknowledged by the EU legislator. As a result, it is not clear whether – in *una via* enforcement systems, like the system of the Netherlands[82] – an ECB punitive sanction would immediately block further prosecution at the national level. In a similar vein, in double-track enforcement systems, which do provide for criminal liability of legal persons, a duplication of ECB punitive administrative proceedings and national criminal proceedings would only be possible within the parameters previously discussed,[83] namely as long as the double proceedings are sufficiently connected in substance and have been really coordinated. At the moment, coordination mechanisms between the EU administrative and national criminal law enforcement do not exist, which necessitates the conclusion that *ne bis in idem* violations under the circumstances discussed above will arise in practice.

Whereas on the vertical level (ECB and national judicial authorities) it can be concluded that *ne bis in idem* violations are quite likely, in internal situations where a NCA imposes a punitive sanction upon the ECB's request, for an offense that is also punishable under national criminal law, the extent to which *ne bis in idem* will be violated really depends on the national legal order in question. At least in theory, the NCA and the national judicial authorities would have to coordinate their action; this, however, triggers an important question: do national judicial authorities actually have the power to "interfere"

[81] Luchtman, Karagianni and Bovend'Eerdt 2019 (n 41)
[82] Chapter IV, Section 5.4.4
[83] Chapter III, Section 8.3.1

and coordinate with the respective NCA a procedure that stems from an ECB exclusive competence? I believe that the answer to that question is not that simple, and the EU legislator – no matter how sensitive an issue may be – has a clear obligation to regulate those types of tensions that will certainly arise in practice.

A last conclusion concerns the possibilities of *ne bis in idem* violations horizontally, especially where the NCA of Member State A has opened punitive administrative proceedings and – at the same time – the judicial authorities of Member State B have initiated criminal prosecution, based on the same set of facts/historical event. In the absence of horizontal cooperation mechanisms between national administrative authorities (NCAs) and national judicial authorities, *ne bis in idem* violations could likely occur.

5 Recommendations

5.1 Introduction

On the basis of the conclusions presented above, it becomes evident that in the composite SSM system of law enforcement, at times, unwarranted interferences with the fundamental rights of supervised persons do occur. Naturally, for that to be prevented, certain adjustments to the legal framework should materialize. The modifications that I bring forward, should be aimed at four main objectives:

- Objective no 1: strengthening legal certainty
- Objective no 2: attaining a high level of (composite) procedural fairness
- Objective no 3: ensuring composite legal protection
- Objective no 4: preventing double jeopardy

How exactly should the abovementioned points be achieved in order to provide for a high level of fundamental rights protection in composite SSM proceedings and still enable the ECB, NCAs and national criminal enforcement agencies to effectively discharge their respective tasks? I shall now deal with that question. In doing so, in the first place (Section 5.2), I come up with a number of recommendations, which are mainly addressed to the EU legislature, to the SSM authorities and to (EU and national) Courts. In the second place (Section 5.3), I bring forward a number of recommendations for ensuring the protection of fundamental rights at the intersection between SSM administrative law enforcement and national criminal law enforcement.

Before I proceed with the articulation of the recommendations, it is important to emphasize at the outset that I am aware of the fact that amendments to EU legislation are cumbersome and time-consuming and may thus not appear to be realistic. I am of the opinion that a number of the recommendations presented below could also materialize if the ECB and the NCAs avail themselves of the existing tools, namely the case law of the CJEU[84] and the ECB's powers to adopt regulations.[85] In other words, we already know from case law that the ECB is exclusively competent to implement the tasks conferred on it under the SSM Regulation and that NCAs have a subordinate, assisting role in that respect. In this light, the

[84] *Landeskreditbank Baden-Württemberg* v *ECB* (n 57)
[85] Statute of the European System of Central Banks and of the European Central Bank, OJ C 202/230, art 34; see also Article 6(7) of the SSM Regulation which states that the ECB must, in consultation with the NCAs and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to organise the practical arrangements for cooperation between the ECB and the NCAs within the SSM

ECB could use its power to adopt regulations and amend the SSM Framework Regulation along the lines I discuss below.

5.2 A roadmap toward protecting fundamental rights in the composite SSM landscape

Recommendation 1: *Information-gathering powers for the supervision credit institutions falling under the competence of the SSM, should be defined by EU law, except for coercive measures employed by national authorities in cases of bank opposition.*

Notwithstanding the fact that the investigative powers of prudential supervisory authorities are minimally harmonized by means of the Directive CRD IV, it is not entirely clear whether content of the powers of the ECB and of the 19 NCAs is completely aligned. In composite procedures, when the content of information-gathering powers is not aligned, but at the same time, for the same investigation, the EU supervisor can utilize different channels and legal orders to obtain information, problems of legal certainty will come to the fore. Furthermore, disjoined powers but integrated procedures can also undermine the reasonable expectation of privacy that persons should generally be given.

In my view, to address these problems, the content of the powers of NCA staff members, who participate in JSTs[86]and OSITs[87] and who gather information for the purposes of assisting the ECB with the implementation of its exclusive mandate, should be aligned. More specifically, the SSM Framework Regulation should clarify that national staff members integrated in EU structures and acting for the execution of the ECB's exclusive mandate are allowed to make use only of the investigative powers that are already enshrined in the SSM Regulation[88] within the limits imposed by EU law.[89] By means of an example, assuming that the ECB requests BoG to carry out certain verification and on-site activities and later report back to the ECB, the BoG decision by which it requests information from a significant credit institution located on Greek territory should state that the legal basis on which the information is requested is Article 10 of the SSM Regulation and not Article 57(3)of the Greek Act on Prudential Supervision. By the same token, Article 9(1), which states that "(…) 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," should be deleted.

If the information-gathering powers for the supervision of significant institutions are completely aligned, legal certainty as to the content of those powers in composite investigations, will be secured (objective no 1). In other words, it will not matter anymore in which jurisdiction information was gathered, as it will have been gathered on the basis of the same powers. As a corollary, all reviewing Courts, be they EU or national, will test the legality of other authorities' actions on the basis of the same standards. A strong argument in favor my approach stems from the fact that the ECB has been entrusted with exclusive competences.[90] In that sense, when assisting the ECB for the supervision of euro area institutions, NCAs do not exercise an autonomous competence, but an ECB competence; as a result, they should be employing the powers of their principal, given that for the specific tasks enshrined in

[86] SSM Framework Regulation, art 3
[87] SSM Framework Regulation, art 144
[88] These include the power to request information, to require the submission of documents, to examine books and records and take copies and extracts thereof, to obtain written and oral explanations and to interview persons who consent to being interviewed.
[89] See Chapter III, Section 6
[90] Case T 122/15-*Landeskreditbank Baden-Württemberg v ECB* [2017] ECLI:EU:T:2017:337, para 54

the SSM Regulation, national supervisors derive their competence from EU law.[91] Such an architecture, together with the fact that sanctioning is shared between the EU and national levels, calls for aligned investigative powers.

There should, however, be one important exception to that rule: the application of coercive powers to enforce an SSM on-site inspection, in the event a credit institution opposes the inspection. The competence for the application of coercive powers and measures should be reserved for national enforcement organs (see also Recommendations 3 and 4 below), so as not to disturb a Member State's procedural autonomy.

Recommendation 2: *The rights of the defense afforded to credit institutions and their staff members in all the different phases of a composite enforcement procedure stages should be defined by EU law.*

In the absence of a common EU legal framework, the current narrative is one in which credit institutions and natural persons need to find their way in a labyrinthine landscape: they must provide information for non-punitive purposes (ongoing supervision), because they are obliged to cooperate, yet the same information can later be used for punitive sanctioning, either at the EU or at the national level; according to EU law, the ECB can collect information containing internal communications between a bank and its in-house lawyers, but if the sanctioning legal order is – for example – the Netherlands and the Dutch authority (and ultimately Dutch administrative Courts) will be confronted with the question of how to treat that piece of evidence, which was obtained on the basis of lower procedural standards than the standards of the legal order which is now called to ensure procedural fairness and to ultimately also offer legal protection.

To overcome these types of problems and uncertainties, there are in my view two solutions. One way of solving the problem would be to insert in the SSM Regulation a provision similar to the one contained in Regulation 1/2003: a presumption that the rights of the defense of legal persons are protected in an equivalent manner across SSM Member States.[92] The second solution would be one in which, instead of "simply" inserting a presumption of equivalent protection, the EU legislator actually lays down common standards in EU legislation.

I would advocate in favor of the second approach; the former approach would only conceal the composite problems. In other words, such an approach would not offer a solution for the defense rights of natural persons and it would not provide national Courts with complete certainty as to how they should review national final decisions. It is therefore recommended that the precise content of defense rights, such as the legal professional privilege and the privilege against self-incrimination, are explicitly codified in the SSM Regulation.

Moreover, it is recommended that these EU rights of the defense are observed not only by ECB staff members, but also by NCAs and their staff members, whenever the latter assist the ECB with the implementation of its tasks under the SSM Regulation. The rationale behind this recommendation is similar to the rationale behind Recommendation 1. The ECB has been granted with an exclusive competence to carry out specific supervisory tasks vis-à-vis all euro area banks. The logic of the

[91] See also, Argyro Karagianni and Mirosava Scholten, "Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework" (2018) 34 Utrecht Journal of International and European Law 185

[92] Regulation 1/2003, recital 16

relationship between the ECB and the NCAs "consists of allowing the exclusive competences delegated to the ECB to be implemented within a decentralized framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks (…)."[93] In that respect, where NCA staff is involved in the prudential supervision of euro-area banks, they act as "delegated EU civil servants," who derive their competences from EU law. Therefore, if one follows the CJEU's line of reasoning, it is only logical that the "agent" applies (also) the safeguards of its "principal."

A logical corollary of this is that, also when an EU procedure ends with a national punitive sanction, and this national decision is subsequently contested before a national administrative court, to ensure the effectiveness of EU law, the national court would need to test compliance of – for instance – the privilege against self-incrimination only against the EU standard (objectives 1 and 3).

The question that still needs to be answered though is the following: which standards? For the legal professional privilege, the answer is not so difficult: the existing EU standard, as already developed in the EU competition case law.[94] This standard should be applied by the ECB, by its composite organizational structures, and by the NCAs whenever the carry out tasks that have been entrusted to the ECB by the SSM Regulation. The same standard with respect to legal professional privilege should also be applied by national administrative Courts when they review national sanctioning decisions based either on ECB input or on other NCA input.

For the privilege against self-incrimination, the answer is less straightforward. The *Orkem* standard does not provide an answer to questions related to composite enforcement procedures; therefore, the EU legislator should provide guidance as to how the privilege against self-incrimination should be applied in combinations of non-punitive and punitive SSM proceedings. In my opinion, the key issue here is the nature of banking supervision: it is highly prudential and less restorative. Most of the times, intervention is required *ex ante* and, to a lesser extent, *ex post.* Effective banking supervision requires that a supervisor maintains a strong information-gathering position. It is therefore necessary that the element of compulsion in the non-punitive parts of SSM procedures is maintained, the limit being that – similar to the *Orkem* standard – SSM authorities should not be allowed to ask directly incriminating questions. However, to avoid a violation of the privilege against-incrimination at a later punitive stage (objective no 2), the EU legislator should follow the criteria of the ECtHR and prescribe in the EU legal framework a prohibition on using will-dependent information, obtained by under legal compulsion by the ECB or by NCAs, from being used as evidence for the imposition of a punitive sanction by an SSM authority. That way, a balance between effective supervision one the one hand and legal certainty as to the content of rights, as well as fairness of the proceedings as a whole, will be struck.

To sum up, to ensure complete procedural fairness, I propose a two-pronged approach: in the first place, the *Orkem* standard should be preserved before a legal or a natural person becomes a suspect. Second, when will-dependent materials that were obtained under compulsion are to be used as evidence for the imposition of a punitive sanction, the *Saunders* standard should be triggered, and the incriminating information should be excluded from being used as evidence for punitive purposes.

[93] *Landeskreditbank Baden-Württemberg v ECB* (n 90) para 54
[94] Chapter III, Section 6

Recommendation 3: *To ensure a reasonable expectation of privacy, not dependent on possibly divergent national laws, obligatory ex ante authorization by a national judge, before the performance of an on-site inspection, should be foreseen.*

Given that systemic flaws in the testing of the necessity and the proportionality of on-site inspection decisions may often occur, to strengthen legal certainty (objective no 1), I would favor a system wherein *ex ante* judicial authorization becomes obligatory under the SSM Regulation for three reasons.[95] First, whenever an on-site inspection contains or will contain coercive measures which are always a national competence, national Courts are the ones that are better equipped to test the arbitrariness and the excessiveness of the inspection.[96] Second, it would ensure uniform standards in relation to the level of judicial scrutiny of the SSM investigations, which is certainly necessary from the perspective of legal certainty. Third, it would foster effective law enforcement; a review of the excessiveness of coercive powers *ex post* entails the danger that, if the CJEU courts annul a sanction *ex post*, the procedure would have to probably be repeated, which is of course quite cumbersome. On the other hand, if an EU on-site inspection ends with a national decision adopted by the NCA of another national legal order than the one in which the OSI took place, the reviewing national administrative court will arguably not carry out *ex post* an arbitrariness and an excessiveness test on the basis of the laws of the legal order in which the inspection took place. This is yet another reason as to why I advocate that *ex ante* authorization in the SSM should be mandatory.

Recommendation 4: *The judicial cooperation between the CJEU and national courts should be enhanced.*

This recommendation is, to a certain extent, complementary to Recommendation 3. Assuming that national Courts do remain involved in the judicial review of the national coercive parts of a composite SSM enforcement procedure that ends with an EU punitive sanction, the reviewing court, i.e., the CJEU, must logically also be capable of asking the opinion of a national Courts for matters pertaining to the testing of national coercive powers.

More specifically, as explained in Chapter VI (Section 4.2.1), notwithstanding the fact that in the *Berlusconi* case the CJEU has argued that it is competent to carry out a "single judicial review," in my opinion, it is questionable whether – in instances involving the application of national coercive powers during on-site inspection – the CJEU is well-positioned to conduct such a full *ex post* assessment. The deployment of national coercive measures during an EU on-site inspection contains elements that can be perceived as both questions of fact and of law.

More specifically, in the first place, in the absence of an obligatory *ex ante* judicial authorization by a national court, the reviewing EU judge would have to carry out an arbitrariness and excessiveness test and that might also involve the question of what, in accordance with the national law in question, constitutes arbitrariness and excessiveness. Precisely this problem can be addressed by means of Recommendation 2 (obligatory *ex ante* judicial authorization by a national judge).

[95] In that sense, I agree entirely with the view of Widdershoven and Craig; see Rob Widdershoven and Paul Craig, "Pertinent issues of judicial accountability in EU shared enforcement," in Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU* authorities (Edward Elgar 2017) 343
[96] Ibid

In the second place, it may also be the case that the reviewing EU judge may need to examine the precise circumstances and facts of an on-site inspection that likely took place years ago, which is not a straightforward task. This is the point in which the introduction of a reversed preliminary reference procedure seems essential. The CJEU could thus pose a question to the competent national court. As has rightly been argued,[97] it seems preferable that the answer of the national court is merely an opinion, i.e., not a binding ruling, as the non-binding character of the national opinion would indeed be in line with the CJEU's exclusive competence under Article 263 TFEU to review acts of EU institutions.

Notwithstanding the above, I do recognize the existence of an important caveat, namely that the introduction of a reversed preliminary reference would require a modification of the Treaty, a procedure which is time-consuming and, perhaps, even unrealistic. For that reason, I would alternatively propose the creation of an architecture inspired from the system of EU competition law enforcement but tailored to the specific problems inherent in the SSM.

Regulation 1/2003 explicitly foresees the involvement of national courts in the enforcement of EU norms. Article 6 of Regulation 1/2003 reads that "national courts shall have the power to apply Articles 81 [now 101] and 82 [now 102] of the Treaty".[98] In addition, the Commission Notice on the cooperation between the EU Commission and the national courts[99] lays down the practical modalities that govern such cooperation. For instance, the EU Commission can act as *amicus curiae*, by *inter alia* transmitting information to national courts, submitting observations and opinions.[100] In a similar vein, in the situations discussed throughout this dissertation, national courts could act as *amici curiae* in EU judicial proceedings. I am aware of the fact that, the example of EU competition law that I bring up here, concerns the cooperation between the EU Commission and the national courts and not the cooperation between the CJEU and national courts, at which my recommendation aims. Furthermore, I am aware of the fact that, in the enforcement of EU competition law, the EU Commission may act as *amicus curiae* in national proceedings, while my recommendation aims at a slightly different scenario, namely, national courts acting as *amici curiae* in EU judicial proceedings. In that respect, my reference to the system of EU competition law enforcement serves only as an illustration[101] of a "creative" way in which the principle of sincere cooperation could be used in the future.

In light of the foregoing, the principle of sincere cooperation, which is enshrined in Article 4(3) TFEU could form the legal basis for the amendment of the Rules of Procedure of the Court of Justice[102] and the inclusion of a new provision. That new provision should specifically foresee the possibility of national courts acting as *amici curiae* by submitting observations and opinions to the CJEU.

Recommendation 5: *The judicial cooperation between national courts should be enhanced.*

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[97] Laura Wissink, *Effective Legal Protection in Banking Supervision* (Europa Law Publishing 2021) 309
[98] Regulation 1/2003, art 6
[99] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC OJ C 101 ("Commission Notice on the co-operation between the Commission and the national courts")
[100] Ibid, section A
[101] In fact, there are more examples that could help illustrate my point, however, a discussion of all possible examples exceeds the scope of the dissertation. See for example, Article 29 of Council Regulation (EU) 2015/1589 concerning the application of State aid rules which, similar to Regulation 1/2003, governs the cooperation between the European Commission and national courts. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9
[102] Rules of Procedure of the Court of Justice OJ L 265/1

While this recommendation builds upon recommendation 4, at the same time, it serves a markedly different function: it seeks to solve (potential) gaps in complete legal protection in diagonal composite procedures (objective no 3).

More specifically, as it has been discussed in many instances throughout the dissertation, in diagonal composite enforcement procedures, there may be a gap in full judicial protection, owing to the fact that a reviewing national court may not be well-positioned to test violations of fundamental righths that may have taken place in another national legal order (see *supra* Section 2.1.2). Even though there is – in principle – no rule that precludes national Courts from reviewing compliance of foreign NCAs with fundamental rights,[103] in many cases, national Courts may abstain from testing earlier segments of a composite procedure, as that could be perceived as being an unacceptable interference with that other Member State's sovereignty,[104] or it may even undermine the principle of mutual trust and the horizontal division of judicial powers.[105] For that reason, there should be a mechanisms enabling national courts to pose questions to each other concerning the lawfulness of acts that took place in another national legal order.

The introduction of a horizontal cooperation mechanism between national courts, seems essential. An example of an existing instrument that seeks to promote cooperation between national courts, and which could serve as a source of inspiration, is Council Framework Decision 2009/299/JHA ("Framework Decision on the European Arrest Warrant").[106] This legal instrument, which is specifically concerned with surrender procedures between Member States in the AFSJ, abolished the former extradition procedure between between Member States.[107] The former cumbersome procedure was replaced with a new mechanism, whereby the competent judicial authority of one Member State (the issuing authority) addresses a request to the competent judicial authority of another Member State (executing judicial authority). [108]

The very logic underpinning the Framework Decision on the European Arrest Warrant could be transplanted to the SSM setting, and more generally to the field of EU composite administration, in the following way. The EU legislator could adopt, in secondary Union law, an instrument establishing a framework for cooperation between national courts. Again, Article 4(3) TFEU could form the legal basis for the adoption of such an instrument of EU secondary law. Such a legal instrument could prove

[103] In fact, as discussed by Mazzotti and Eliantonio, in the case *Donnellan* one may even observe "advancement in the Court's openness to admitting the carrying out of transnational judicial review in the context of horizontal composite procedures". See Paolo Mazzotti and Mariolina Eliantonio, "Transnational Judicial Review in Horizontal Composite Procedures: Berlioz, Donnelan and the Constitutional Law of the Union" (2020) 5 European Papers 41, 61

[104] Ibid, 43

[105] Catherine Warin, "A Dialectic of Effective Judicial Protection and Mutual Trust in the European Administrative Space: Towards the Transnational Judicial Review of Manifest Error?" (2020) 13 Review of European Administrative Law 7, 21

[106] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L 81/24

[107] Libor Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer 2017)

[108] It is worth noting that the application of the Framework Decision on the European Arrest Warrant has paved the way for a strand of case law whereby the CJEU requires national judicial authorities to engage in further dialogue and cooperation in order to ensure that the protection of fundamental rights (in the issuing Member State) will be ensured. See *inter alia* Joined Cases C-354/20 *PPU* and C-412/20 PPU [2020] ECLI:EU:C:2020:1033; Case C-220/18 PPU *Generalstaatsanwaltschaft* [2018] ECLI:EU:C:2018:589; Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198

be extremely useful also outside the contours of the SSM; it could be utilized by national courts more generally, whenever the latter review final decisions adopted on the basis of horizontal and/or diagonal composite administrative procedures, and the lawfulness of foreign acts is unclear.

Recommendation 6: *An explicit legal provision, similar to the one contained in Regulation 1/2003,*[109] *should be included in the future amendment of the SSM Regulation or the SSM Framework Regulation. The legal provision could be framed as follows: "The ECB and the NCAs shall have the power to provide one another with and use in evidence of any matter of fact or of law. Such information shall only be used in evidence for the purposes of the ECB's exclusive tasks under this [SSM] Regulation."*

Given that in Recommendations 1 and 2 I have already underscored the importance of defining powers and procedural safeguards at the EU level, it naturally follows that a legal provision regulating the undistorted circulation of evidence between SSM authorities, should be introduced. Indeed, if information is obtained anywhere in the SSM using the same powers and safeguards, its admissibility in national administrative proceedings that fall within the scope of the ECB's mandate is the next logical step.

While the foregoing recommendation offers a solution to the problems of legal certainty and procedural fairness, it leaves unanswered the question of how unlawfully obtained SSM evidence, i.e., evidence obtained in violation of the standards mentioned in Recommendations 1 and 2, ought to be treated by national Courts. I believe that, as recently also signaled by the CJEU,[110] the effectiveness of EU law should give way to the protection of fundamental rights. It is therefore argued here that the reviewing judges – be they EU or national judges – should carry out "at least a summary examination in light of all the circumstances of the particular case that are known to them."[111] In other words, a reviewing court must not knowingly rely on evidence that was obtained or forwarded in violation of the fundamental rights standards mentioned in Recommendations 1 and 2. In that respect, if a reviewing court has reasons to believe that evidence was obtained unlawfully, and that this has affected the fairness of proceedings as a whole, it should exclude that evidence.[112]

Recommendation 7: *A ne bis in idem provision should be added to the SSM Framework Regulation*

First, it should be reminded that, owing to the allocation of sanctioning competences between the ECB and the NCAS, I have concluded that *ne bis in idem* violations in the SSM seem unlikely (see *supra* Section 2.3). Nevertheless, to absolutely safeguard legal certainty, notwithstanding the fact that the *ne bis in idem* prohibition is enshrined in Article 50 CFR thereby being binding upon all SSM authorities, an explicit addition of a relevant provision in the EU-level legal framework seems necessary.

Given that the exact application of the *ne bis in idem* in the domain of banking supervision, i.e., whether its content concurs with the more limited content of the right in competition law enforcement or the more generous content in the AFSJ, is currently unclear, the precise content of the *ne bis in idem*

[109] Regulation 1/2003, art 12
[110] *Prokuratuur* (n 61); Case C-310/16 *Dzivev and Others* [2019] ECLI:EU:C:2019:30; see also Thomas Wahl, "CJEU: Exclusion Rules on Unlawfully Obtained Evidence Precede Anti-Fraud Obligations" (12 January 2019) < https://eucrim.eu/news/cjeu-no-rehearing-alleged-infringements-eu-fundamental-rights/> accessed 24 January 2022
[111] Case C-469/15 P *FSL and Others* v *Commission* [2017] ECLI:EU:C:2017:308, Opinion of AG Kokott, para 37
[112] *Prokuratuur* (n 61) paras 43-44

principle should be clarified. In my view, in order to strengthen legal certainty (objective 1) and prevent situations of double jeopardy (objective 4), the content of the fundamental right should not differ per area of EU competence or policy domain. In that respect, I would more generally advocate in favor of convergence in the case law of the CJEU.

Concerning the question of how such a uniform and coherent *ne bis in idem* should look like, I embrace the test set out by Advocate General Bobek in the *Bpost*[113] and Nordzucker cases:[114] the assessment of "*idem*" should entail an identity of the offender, of the relevant facts, and of the protected legal interest in all areas of EU law.[115] Depending on the scenario at issue, identity of offender, relevant facts, protected legal interest would mean different things. As in this recommendation, I am specifically discussing the *ne bis in idem* principle in the composite SSM landscape, I shall now focus on what this "triple identity" test would mean in the SSM.

In the context of the SSM, the "triple identity" test would mean that the imposition of two punitive sanctions, one by the ECB and one by an NCA, for the same "prudential offence", would violate the *ne bis in idem* principle. Indeed, the enforcement of prudential requirements by the ECB and by the NCAs would most probably serve the same legal interest, as the relevant applicable laws do not distinguish between different spheres of competence. This is markedly different from the system of competition law enforcement, which is premised on a distinction between agreements affecting trade between Member State, dealt with under EU rules, and internal situations, dealt with under national rules.

Concerning the question of what the "triple identity" test would mean at the interface between SSM administrative law enforcement and national criminal law enforcement, I address that issue in recommendation 11 below.

Recommendation 8: Law 2690/1999 (*Κώδικας Διοικητικής Διαδικασίας*) should be amended and detailed provisions concerning the administrative fine and the legal safeguards applicable to investigations that may lead to the imposition of punitive sanctions should be legislated.

In the previous chapters, we have seen that "punitive administrative law" is still in a phase of development in the Greek legal order. However, this is at odds with obligations stemming both from the ECHR and the CFR. The Greek legislator should thus introduce clear rules concerning the applicability of criminal law safeguards to the field of punitive administrative sanctions and the proceedings leading to them. In that respect, the Greek legislator could draw inspiration from the text of the Dutch General Administrative Law Act and include the following provisions: a legal provision concerning the privilege against self-incrimination, stating that a person has the right to remain silent when interrogated with a view to a punitive sanction being imposed on him or her. Furthermore, the provision could also specify that will-dependent information obtained under legal compulsion for the purposes of ongoing supervision should not be used as evidence in parallel or consecutive punitive proceedings.

Second, a *ne bis in idem* provision should also be inserted in the Greek code of administrative procedure (Law 2690/1999) and in the Greek Code of Criminal Procedure. Both provisions should aim at

[113] Case C-117/20 *bpost SA* v *Autorité belge de la concurrence* [2021] ECLI:EU:C:2021:680 ("Bpost"), Opinion of AG Bobek
[114] Case C-151/20 *Bundeswettbewerbsbehörde* v *Nordzucker AG, Südzucker AG, Agrana Zucker GmbH* [2021] ECLI:EU:C:2021:681 ("Nordzucker"), Opinion of AG Bobek
[115] Opinion of AG Bobek in the Bpost case (n 113) para 133

coordinating punitive administrative and criminal proceedings for the same facts. That provision could stipulate that whenever a given conduct can be punished both by means of administrative and criminal sanctions, and one sanction has already been imposed, in the event of the imposition of a second penalty, the relevant authority must ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offense identified.[116]

5.3 A roadmap toward protecting fundamental rights at the interface between SSM administrative and national criminal law enforcement

The foregoing recommendations were aimed at improving fundamental rights protection within the SSM enforcement system. What remains to be discussed, and this is the subject matter of the next sub-section, are recommendations which are aimed at improving the synergies between administrative enforcement of prudential banking supervision law by the SSM and criminal law enforcement of prudential banking supervision law by national criminal law enforcement authorities.

Recommendation 9: *Article 136 of the SSM Framework Regulation, should be amended and the receiving legal order should be the home Member State*

Though not "forum choices" in the conventional, private international, and criminal law sense,[117] it was explained[118] that the choices the ECB makes in accordance with Article 136 SSM Framework Regulation, especially in cases involving various jurisdictions, could be termed as a "*quasi*-forum choice." That is because the EU supervisor indirectly chooses which Member State may investigate a criminal case.

The ECB should therefore define specific criteria[119] on the basis of which – in cases of conflicts of jurisdiction – it must decide to which Member State it will transfer criminally relevant information and by extension, on the applicable substantive and procedural law. Allegrezza brings forward three potential solutions.[120] First, the ECB should transfer the information to the *locus commissi delicti* rule.[121] Second, the ECB should report to the NCAs of all national legal orders potentially affected, thereby allowing the national authorities (both administrative and judicial) to coordinate the matter among themselves.[122] Third, establish in the law direct communication and coordination channels between the ECB and national judicial authorities.[123]

I would not opt for the first solution. Reporting to the *locus commissi delicti* presupposes that the ECB makes an assessment of where the *locus commissi delicti* is. However, seeing as the ECB is an administrative and not a judicial authority, in my view, this solution would put too much of an unnecessary burden on the ECB. The second solution, i.e., report to all potentially interested NCAs and allow national authorities to coordinate the issue among themselves, is a proposal in the right direction:

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[116] Case C-524/15 *Menci* [2018] ECLI:EU:C:2018:197
[117] See *inter alia*, Michiel Luchtman (ed), *Choice of Forum in Cooperation Against EU Financial Crime – Freedom, Security and Justice and the Protection of Specific EU-interests* (Intersentia 2013)
[118] Chapter VI, Section 5.1
[119] Michele Panzavolta, "Choosing the National Forum in Proceedings Conducted by the EPPO: Who Is to Decide?" in Lorena Bachmaier Winter (ed), *The European Public Prosecutor's Office – The Challenges Ahead* (Springer 2018) 59-86
[120] All three of them have been brought forward by Allegrezza 2020 (n 25) 39
[121] Ibid
[122] Ibid
[123] Ibid

let Member States and the relevant national (judicial) authorities solve conflicts of jurisdictions among themselves, in accordance with the existing (criminal law) mechanisms and criteria.[124] Nevertheless, I do believe that reporting to all potentially interested legal orders would also place an unnecessary burden on the ECB. I would thus propose that the ECB reports only to the NCA of the home Member State. If the competent judicial authorities of that Member State deem necessary to further liaise about the issue with other Member States' national judicial authorities, they may still make use of the existing mutual legal assistance mechanisms.

At the same time, I also embrace the third solution brought forward by Allegrezza, namely that direct communication channels should be established between the ECB and national judicial authorities, seeing that both sides are mandated with – *inter alia* – preserving financial stability in the EU. This will not only benefit efficient and effective law enforcement, additionally, it would also help in avoiding situations of *ne bis in idem* violations and uncoordinated administrative and criminal responses for the same facts. From a practical point of view, a mechanism establishing direct communication channels between the ECB and national judicial authorities should thus be included in the future amendment of the SSM Regulation (for a detailed explanation of what such a mechanism could look like, see Recommendation 11).

Recommendation 10: *National judicial authorities should be allowed to use information obtained by the ECB or an NCA as evidence in national criminal proceedings for the enforcement of prudential legislation, with the exception of evidence covered by the privilege against self-incrimination*

To safeguard the rights of the defense of natural and legal persons, the ECB should specify in the SSM Framework Regulation that information obtained by an SSM authority, which is covered by the privilege against self-incrimination, shall not be used as evidence in national criminal proceedings for the imposition of criminal sanctions. That information could however serve as starting information,[125] which may be taken into account by national judicial authorities to justify the initiation of a national criminal proceeding.

To ensure a high level of procedural fairness (objective no 2) and to particularly safeguard the privilege against self-incrimination in parallel or follow-up criminal law enforcement procedures, it is essential that privileged information is not used outside the legal context in which a request for information was made. National judicial authorities should still be able to ask the ECB for information[126] and/or receive criminally relevant information by the ECB,[127] but certain limits on the use should be placed. More specifically, national judicial authorities must exclude evidence obtained in violation of the privilege against self-incrimination or incriminating evidence lawfully obtained in a non-punitive stage, i.e., by means of legal compulsion.

Recommendation 11: *An EU "una via" type of provision should be inserted in the SSM Framework Regulation, to mitigate violations of the ne bis in idem principle at the interface between administrative and criminal law enforcement.*

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[124] Eurojust, "Guidelines for Deciding Which Jurisdiction Should Prosecute" (2016) <https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2016_Jurisdiction-Guidelines_EN.pdf> accessed 1 September 2021

[125] Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others* [1992] ECLI:EU:C:1992:330, para 39

[126] Decision (EU) 2016/1162 (n 13)

[127] SSM Framework Regulation, art 136

First of all, it goes without saying that if the "triple identity" test is eventually applied in all areas of EU law,[128] the combination of a punitive administrative sanction by an SSM authority and of a criminal sanction by a national judicial authority for the same act/fact/offence would violate the *ne bis in idem* principle only if a) the two sanctions pursue the same legal interest and b) the severity of all of the penalties imposed is not limited to what is strictly necessary in relation to the seriousness of the offence committed.[129] Of course, as rightly noted by AG Bobek,[130] distinguishing the objectives that each of the two responses pursues and the legal interests protection will, in such a scenario, not be an easy task.

Be that as it may, assuming that the two responses do pass the "tripe identity test", to avoid duplication of proceedings between the SSM and national judicial authorities and/or violations of the *ne bis in idem* principle, I recommend the introduction of an EU rule, inspired by the Dutch *una via* provision, albeit tailored to the composite SSM enforcement setting. Such a provision should accommodate both single track and double-track systems of law enforcement.

What should such a provision look? I distinguish between *una via* enforcement systems, like the Netherlands, and double-track enforcement systems. For *una via* enforcement systems, i.e., systems in which the accumulation of a punitive administrative sanction and a criminal sanction for the same facts/act/offence is not a possibility, before a punitive procedure is commenced at the EU level, the ECB should consult with the home NCA, for instance DNB, and discuss whether the same facts could give rise to criminal enforcement under national law. Should that be the case, a legal provision in the SSM Regulation should foresee that the ECB, the NCA, and the national judicial authorities must consult with each other and take a joint decision as to whether the case should be dealt by the ECB or by the national judicial authorities. If the punitive proceedings are to be commenced by an NCA at the national level,[131] again, the same authorities should consult one another and decide whether the case should be handled by – for instance DNB – by means of administrative enforcement, or, by the national judicial authorities, only by means of criminal law enforcement.

For double-track enforcement systems, i.e., systems in which the accumulation of a punitive administrative and a criminal sanction for the same facts/act/offence is a possibility, I advocate in favor of a similar logic. The SSM Regulation should oblige the three authorities (ECB-NCA – national judicial authorities of the home Member State to coordinate their action along the lines of the following three criteria, as articulated in the *Menci* case:[132]

1) the double response pursues an objective of general interest, as well as additional objectives, typically pursued by criminal law, like retribution, restoration *et cetera*. Arguably, this criterion would be met where the law of the *locus commissi delicti* punishes "prudential offenses" also through criminal law
2) the authorities limit their joint response and the duplication of administrative and criminal proceedings to what is strictly necessary
3) the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offense concerned

[128] Opinion of AG Bobek in the Bpost case (n 113) para 133
[129] *Menci* (n 116), para 54
[130] Opinion of AG Bobek in the Bpost case (n 113) para 146
[131] Following the ECB's request on the basis of Article 18(5) SSM Regulation
[132] *Menci* (n 116) para 63

Obviously, the aforementioned would apply to legal persons only to the extent that the laws of the home Member State foresee the criminal liability of legal persons.[133]

5.4 Suggestions for a future research agenda

This research has focused on the protection of specific fundamental rights in composite SSM enforcement proceedings. In doing so, it has purported to fill a gap in existing academic knowledge. However, during the writing process, I often came across new developments and considered different angles from which one could approach the broader topic of this dissertation. In that respect, this section brings forward a number of final suggestions for a future research agenda.

First of all, it is essential that comparative legal research is keeps being undertaken; by studying the legal systems of additional national legal orders, not taken aboard in this dissertation, the identification of potential gaps in fundamental rights protection, which the specific comparison did not find, could bring forward suggesting for more enhanced fundamental rights protection in the SSM.

Second, a lot of the problems that have been highlighted here, could be studied also from the perspective of other mechanisms that are typically deployed in order to keep administrative action accountable. Think for instance of political accountability. Think also of q*uasi*-judicial bodies of internal review, such as the ECB's Administrative Board of Review. Can, for instance, the ABoR play a role in remedying any of the problems that were found by this research? If so, how?

Third, the findings of the present dissertation could potentially provide inspiration for the future legal design of other ELEAs, which will be enforcing EU law in close cooperation with national competent authorities. For instance, the EU Commission has recently presented a proposal for a regulation[134] concerning the establishment of an EU anti-money laundering authority ("AMLA"). The recommendations presented here could thus prove useful for ensuring that the legal framework of the future AMLA provides for complete fundamental rights protection.

Finally, even though in this dissertation – in addition to administrative enforcement by the SSM – I have focused on the enforcement of prudential norms also through national criminal law, it is not inconceivable that SSM sanctioning competences may often overlap with other areas of national criminal law enforcement. Think for instance of anti-money laundering, tax, and market abuse legislation. Studying therefore the interactions of the SSM with those other areas of national law enforcement and the accommodation of fundamental rights – such as the *ne bis in idem* principle and the privilege against self-incrimination – therein, appears to be a novel and exciting topic worth researching.

[133] For example, Greece does not attribute criminal liability to legal persons. Therefore, an SSM sanction imposed on a legal person and a subsequent criminal sanction, based on the same facts, imposed on a natural person by a national criminal court, would not violate the *ne bis in idem* principle and therefore coordination of such proceedings is not deemed necessary.

[134] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010 COM/2021/421 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0421> accessed 7 February 2022

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Nederlanse samenvatting

Dit proefschrift onderzoekt in hoeverre procedures in het kader van het Gemeenschappelijke Toezichtsmechanisme die uit kunnen monden in nationale of Europese Unie punitieve sancties in overeenstemming zijn met het recht op privacy, de rechten van de verdediging, het recht op doeltreffende bescherming in rechte en het ne bis in idem-beginsel. Dit proefschrift beantwoordt de normatieve vraag hoe het bestaande wettelijk kader inzake het Gemeenschappelijke Toezichtsmechanisme moet worden aangepast om de eerbiediging van voornoemde fundamentele rechten te waarborgen.

Het Gemeenschappelijke Toezichtsmechanisme (*Single Supervisory Mechanism*, SSM) verleent aan de Europese Centrale Bank (ECB) een leidende rol met betrekking tot het toezicht over kredietinstellingen in de lidstaten van de Europese Unie (EU). Het SSM bestaat uit de ECB en de nationale toezichthouders. In 2013 is het toezicht op kredietinstellingen in de eurozone geëuropeaniseerd. Verordening 1024/2013 kent de ECB de exclusieve bevoegdheid toe specifieke prudentiële toezichttaken uit te oefenen ten aanzien van kredietinstellingen in de eurozone.

Binnen het SSM is er een voortdurende wisselwerking tussen de Europese en nationale rechtsordes. Sanctiebeslissingen worden vaak genomen op basis van complexe samengestelde handhavingsprocedures. De verwevenheid van de EU en nationale rechtsordes voor de handhaving van het EU-recht vormt een uitdaging voor traditionele controlesystemen, zoals fundamentele rechten, die zijn ontworpen voor – en ontwikkeld in – de context van individuele rechtsordes.

Dit proefschrift bestudeert voornoemde samengestelde procedures vanuit de invalshoek van fundamentele rechten. Wanneer de EU en de nationale rechtssferen in elkaar overvloeien en de verschillende componenten van diverse samengestelde procedures niet gemakkelijk van elkaar kunnen worden gescheiden, kunnen fundamentele rechten – zoals wij die nu kennen – dan nog wel voldoende bescherming bieden?

Door verschillende aspecten van het Europese en nationale bestuurs-, constitutioneel- en strafrecht samen te brengen, maakt dit onderzoek aanbevelingen die zien op een betere bescherming van grondrechten in het kader van het SSM. Daartoe wordt het juridisch kader van het SSM op EU-niveau bestudeerd, alsook het Nederlandse en Griekse juridisch kader die zien op de samenwerking van nationale toezichthouders met de ECB. Na bestudering van de wederzijdse interacties tussen deze drie rechtsordes concludeert dit onderzoek dat er in bepaalde gevallen lacunes bestaan in de bescherming van grondrechten. Er worden concrete aanbevelingen gedaan om de bescherming van de grondrechten te versterken op (a) het raakvlak tussen de verschillende rechtsordes, en (b) het raakvlak tussen bestuurlijke en strafrechtelijke handhaving.

De uitkomsten van dit onderzoek gaan ook op voor andere rechtsgebieden waar handhaving in toenemende mate plaatsvindt via samengestelde procedures.