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Liability of Supervisory and Resolution Authorities in the European Banking Union

The escape room of the 'sufficiently serious breach' test, compensatory immunity and composite procedures, and the unspoken loopholes in the protection of fundamental rights

ΔΙΔΑΚΤΟΡΙΚΗ ΔΙΑΤΡΙΒΗ

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Τίτλος διατριβής:

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Οι απόψεις και θέσεις που περιέχονται σε αυτήν την εργασία εκφράζουν τον συγγραφέα και δεν πρέπει να ερμηνευθεί ότι αντιπροσωπεύουν τις επίσημες θέσεις του Εθνικού και Καποδιστριακού Πανεπιστημίου Αθηνών.

ΔΗΛΩΣΗ ΠΕΡΙ ΜΗ ΠΡΟΣΒΟΛΗΣ ΠΝΕΥΜΑΤΙΚΗΣ ΙΔΙΟΚΤΗΣΙΑΣ

Προσβολή πνευματικής ιδιοκτησίας θεωρείται η ολική ή η μερική αναπαραγωγή του έργου άλλου προσώπου ή η παρουσίαση του έργου κάποιου άλλου ως προσωπικού του γράφοντος. Η Νομική Σχολή Αθηνών λαμβάνει πολύ σοβαρά υπόψη και καταδικάζει την προσφυγή σε τέτοιου είδους πρακτικές από τους διδακτορικούς φοιτητές της. Σε περιπτώσεις πρόδηλης ή εκ προθέσεως προσβολής πνευματικής ιδιοκτησίας, τα αρμόδια όργανα της Σχολής δύνανται να επιβάλουν ως κύρωση έως και την οριστική διαγραφή από το Διδακτορικό.

Κατά την εκπόνηση διδακτορικής διατριβής, οι διδακτορικοί φοιτητές οφείλουν να τηρούν τις ακόλουθες κατευθυντήριες οδηγίες:

1. Η διδακτορική διατριβή πρέπει να αποτελεί έργο του υποβάλλοντος αυτήν φοιτητή.

2. Η αντιγραφή ή η παράφραση έργου τρίτου προσώπου αποτελεί προσβολή πνευματικής ιδιοκτησίας και συνιστά σοβαρό αδίκημα, ισοδύναμο σε βαρύτητα με την αντιγραφή κατά τη διάρκεια της εξέτασης. Στο αδίκημα αυτό περιλαμβάνεται τόσο η προσβολή πνευματικής ιδιοκτησίας άλλου φοιτητή όσο και η αντιγραφή από δημοσιευμένες πηγές, όπως βιβλία, εισηγήσεις ή επιστημονικά άρθρα. Το υλικό που συνιστά αντικείμενο λογοκλοπής μπορεί να προέρχεται από οποιαδήποτε πηγή. Η αντιγραφή ή χρήση υλικού προερχόμενου από το διαδίκτυο ή από ηλεκτρονική εγκυκλοπαίδεια είναι εξίσου σοβαρή με τη χρήση υλικού προερχόμενου από τυπωμένη πηγή ή βάση δεδομένων.

3. Η χρήση αποσπασμάτων από το έργο τρίτων είναι αποδεκτή εφόσον, αναφέρεται η πηγή του σχετικού αποσπάσματος. Σε περίπτωση επί λέξει μεταφοράς αποσπάσματος από το έργο άλλου, η χρήση εισαγωγικών ή σχετικής υποσημείωσης είναι απαραίτητη, ούτως ώστε η πηγή του αποσπάσματος να αναγνωρίζεται.

4. Η παράφραση κειμένου, αποτελεί προσβολή πνευματικής ιδιοκτησίας.

5. Οι πηγές των αποσπασμάτων που χρησιμοποιούνται θα πρέπει να καταγράφονται πλήρως σε πίνακα βιβλιογραφίας στο τέλος της εργασίας.

6. Η προσβολή πνευματικής ιδιοκτησίας επισύρει την επιβολή κυρώσεων. Κατά την απόφαση επί των ενδεδειγμένων κυρώσεων, τα αρμόδια όργανα της Σχολής θα λαμβάνουν υπόψη παράγοντες όπως το εύρος και το μέγεθος του τμήματος της εργασίας που οφείλεται σε προσβολή πνευματικής ιδιοκτησίας. Οι κυρώσεις θα επιβάλλονται, ύστερα από γνώμη της επταμελούς εξεταστικής επιτροπής και εισήγηση του οικείου Τομέα, και μπορούν να συνίστανται στον μηδενισμό της διδακτορικής διατριβής (με ή χωρίς δυνατότητα επανυποβολής), τη διαγραφή από το Διδακτορικό, καθώς και την επιβολή πειθαρχικών ποινών, όπως η αναστολή της φοιτητικής ιδιότητας.

Βεβαιώνω ότι η διατριβή, την οποία υποβάλλω, δεν περιλαμβάνει στοιχεία προσβολής πνευματικής ιδιοκτησίας, όπως αυτά προσδιορίζονται από την παραπάνω δήλωση, τους όρους της οποίας διάβασα και αποδέχομαι. Παρέχω τη συναίνεσή μου, ώστε ένα ηλεκτρονικό αντίγραφο της διατριβής μου να υποβληθεί σε ηλεκτρονικό έλεγχο για τον εντοπισμό τυχόν στοιχείων προσβολής πνευματικής ιδιοκτησίας.

Ημερομηνία Υπογραφή Υποψήφιας Διδάκτορος

27/02/2024

Έλλη Αναστοπούλου

Ευχαριστίες

Ευχαριστώ θερμά τον επιβλέποντα Καθηγητή μου, κ. Χρήστο Β. Γκόρτσο για την αμέριστη στήριξη, κατανόηση και καθοδήγησή του καθ' όλη τη διάρκεια συγγραφής της διδακτορικής διατριβής μου, καθώς και για τις πολύτιμες ευκαιρίες ακαδημαϊκής τριβής που απλόχερα μου προσέφερε.

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Thesis Statement, Outline and Methodology

1. Thesis Statement

The purpose of this Thesis Statement is to put the Thesis into context and offer a clear picture of the research topic, discussion, and relevant conclusions to the reader.

This research endeavor aims to explore the legal underpinnings of non-contractual liability in the context of financial authorities. It will examine how different legal systems and jurisdictions have addressed the issue, considering both the European Union ('EU') and domestic frameworks. By analysing relevant legislation, case-law, and scholarly discourse, this study seeks to identify emerging trends, challenges, and potential solutions related to the liability of financial authorities.

To a certain extent this Thesis adopts an interdisciplinary approach, drawing on legal and policy perspectives, with the major emphasis being put on the legal dimension. It will investigate the theoretical foundations of non-contractual liability, assess the justifications for imposing liability on financial authorities, and evaluate the practical implications for the affected parties. Additionally, it will examine the interplay between liability, accountability, democratic legitimacy, the protection of the right to property, as well as effective judicial protection in the context of composite procedures.

Ultimately, this research aspires to contribute to the ongoing academic and policy discussions surrounding the non-contractual liability of financial authorities. By enhancing our understanding of the legal frameworks governing financial regulation, this study aims to provide insights into the challenges and opportunities in holding financial authorities accountable and liable for their actions, fostering a more robust and resilient financial system in the process and a more comprehensive judicial protection of harmed individuals.

Let's get down to brass tacks: The well-known concept of non-contractual liability constitutes the beating heart of this Thesis. In particular, the research topic of the Thesis is narrowed down to the complex realm of the non-contractual liability of the financial authorities, namely the supervisory and resolution authorities on EU and national level. The Thesis research pinpoints fundamental aspects of the statutory provisions and the pertinent case-law governing the non-contractual liability on Union level, as well as on Greek law level, whilst the *status quo* in other EU jurisdictions is also examined.

Financial authorities, such as central banks, regulatory agencies, and supervisory bodies, play a crucial role in maintaining the stability and efficiency of the financial system. Their actions encompass a wide range of activities, including setting monetary policy, overseeing banks and financial institutions, and enforcing compliance with regulatory standards or taking resolution action. As supervisory bodies tasked with overseeing and ensuring the stability and integrity of financial markets, these authorities wield considerable power and influence. While their primary objective is to safeguard the overall stability and protect the interests of various stakeholders, there are instances where their decisions or omissions can result in harm to individuals, market participants, or the broader economy.

The topic of the non-contractual liability of the financial authorities is not a novel one. Rather, it has already attracted the interest of the academic universe. Pursuant to Article 340 of the *'Grundnorm'* of the EU, namely the Treaty on the Functioning of the European Union ('TFEU'), the Union shall make good any damage caused by its institutions or by its servants in the performance of their duties 'in accordance with the general principles common to the laws of the Member States'. Article 340 addresses the issue of non-contractual liability of the Union bodies and provides the legal basis for claims for damages caused by the latter. The interpretation and application of Article 340 have been crafted through the case-law of the Court of Justice of the European Union ('CJEU'). The CJEU, as the supreme judicial authority in matters of EU law, has immensely contributed to developing the conditions of the non-contractual liability of the Union bodies, but also of the national authorities as its case-law is adopted by national courts and thus consistency and coherence in determining liability across EU Member States is ensured.

According to the landmark judgment in *Francovich* case and the case-law of CJEU that followed this landmark ruling, an applicant needs to prove the fulfilment of four conditions, so he/she is successful in claiming damages against the Union bodies and/or the Member States. These conditions are the existence of (1) an illegal act or omission of the Union or national body, (2) which constitutes a sufficiently serious breach of a rule of EU law intended to grant rights to individuals, and (3) which led to actual damage, whereas (4) there is a causal link between the illegal act or omission and the actual damage. A sufficiently serious breach – as interpreted by the CJEU case-law – exists where the public body concerned 'manifestly and gravely disregarded the limits on its discretion'. Consequently, it is important to keep in mind that the broader the discretion of a public body, the more difficult it is to hold the latter liable. This remark is of prominent significance as it hints that the CJEU will hardly ever find liable the Union supervisory and resolution authorities since the latter enjoy considerable statutory discretion in their decision-making.

The above is well-established knowledge. Nonetheless, when it comes to the non-contractual liability of the financial authorities, what seemed to be a well-understood legal framework, suddenly becomes a minefield warranting for a cautious mapping.

The evolving landscape of financial regulation, supervision, and resolution, as well as the unprecedented waves of the global financial crisis 2008 and the financial scandals that emerged thereafter, has recently triggered a re-evaluation of the non-contractual liability framework, brought the accountability of financial authorities under intense scrutiny, and revealed many nuances of the non-contractual liability of the financial authorities which have remained under the radar, but deserve attention.

Hence, the *niche* of this Thesis is to delve into the nuances that until now have remained outside the academic literature's perusal and offer a comprehensive analysis of these nuances through the lenses of a fresh and sharp approach which questions the established propositions of the legal framework and the pertinent case-law. Constitutional law considerations are the primary fuel feeding this approach. Ultimately, the Thesis identifies and addresses two primitive questions which surround the non-contractual liability of the financial authorities, and which lead to six conclusions analysed in this Thesis.

'To be or not to be liable?' and *'too much or too little'* are the first two primitive questions that this Thesis addresses in relation to the non-contractual liability of the financial authorities.

In relation to the first question *'to be or not to be liable?'* the Thesis provides an answer to the dilemma of whether the financial authorities should enjoy immunity from liability, or they should be held liable for the damage they caused during the performance of their duties. The constitutional and policy dimensions of this question will clearly point to the first limb ('*to be liable*') as the winner of this dilemma (***first conclusion***). Liability breeds diligent authorities which are 'responsive' to the 'feedback' provided to them through the liability channels. Effectively, the quality of the supervisory and resolution action becomes better as the financial authorities 'learn' which are the limits they should not cross, so their decisions are based on sound legal ground and are not to be overturned in case of judicial review. The concept of non-contractual liability is a natural component of the financial authorities' function. It is beyond doubt that financial authorities should not enjoy complete immunity, but instead they should be liable for their wrongdoings when discharging the extensive powers assigned to them for two principal reasons. First, liability is part of the mechanism that ensures the democratic legitimacy of the independent financial authorities, and second, liability can serve as a springboard towards a more effective, more diligent and of a higher quality supervisory and resolution action.

Then, the focus turns on the potential limitations that are applied to the liability of the financial authorities by exploring the question of whether the current liability framework offers for *'too much or too little'* liability. The limitation of the liability can be achieved through two separate routes, either through strictly interpreting the liability conditions or by means of compensatory immunity to be afforded to the financial authorities. This Thesis argues that the current liability structure in the EU and the EU Member States falls short of a comprehensive liability regime and leans towards the '*too little*' limb. The analysis focuses on the 'sufficiently serious breach' test and concludes that this test introduces a very high threshold of proof, rendering it almost impossible for the aggrieved parties to successfully claim compensation for supervisory or resolution failures in combination with the established case-law of the CJEU which is very reluctant to hold a Union body liable in case the latter enjoys discretion. Therefore, it seems that the CJEU's test of the 'sufficiently serious breach' offers a first gateway for the financial authorities to be spared from the non-contractual liability, as if it is the first key to the riddle allowing financial authorities to break out of the '*liability escape room*' (***second conclusion***). In this context, the Thesis proposes that the CJEU should re-consider and re-establish the content of the 'sufficiently serious breach' test.

Furthermore, the Thesis proposes that the liability standard should be differentiated when substantive and procedural rights are violated. In the event procedural rights are breached, it is proposed that the CJEU should clearly apply a strict liability standard which is justified by the nature of the breached rights (***third conclusion***).

The Thesis also focuses on a less-debated matter, that of the compensatory immunity granted to financial authorities when a guarantee scheme is in place. In this regard, the Thesis argues that the compensatory immunity granted to the financial authorities either by

operation of statute or as a creation of the case-law serves as a second key to the riddle allowing financial authorities to break out of the *'liability escape room'* and thus cannot be tolerable from a constitutional perspective, but it is neither desirable from a policy standpoint (***fourth conclusion***).

A further aspect examined in this Thesis is the unspoken loopholes in the protection of the right to property which emerge from the limitation of the non-contractual liability of financial authorities through the limitation of the right to property of individuals. This situation is primarily brought at the spotlight when the EU resolution framework is triggered, and the bail-in tool is applied. The Thesis identifies a series of issues that questions the effectiveness of the protection of the right to property which include the discretion of the resolution authorities in the application of the resolution tools, the misalignment of the bail-in requirements where the national insolvency proceedings apply in combination with the state aid framework as opposed to where the EU resolution framework is applied, and the disproportionate nature of bailing uncovered deposits in in cases of system-wide crises. The Thesis concludes that the current legislative framework calls for improvement towards a more comprehensive protection of the property right (***fifth conclusion***).

Finally, the Thesis devotes particular attention to identifying accountability gaps between the ECB and respective competent national authorities which should be bridged whereas it equally puts great emphasis on the challenging issue of effective judicial protection in the composite procedures which should fairly be considered to constitute the third key to the riddle allowing financial authorities to break out of the *'liability escape* room' (***sixth conclusion***). In this vein, the Thesis offers proposals on how to sail in the uncharted waters of the composite procedures towards a more comprehensive framework which would ensure effective judicial protection.

Against this background, a clear picture emerges as regard to the research question of this Thesis: *"Quis custodiet ipsos custodes? What is the legal framework governing the non-contractual liability of the financial authorities? How should we de lege ferenda deal with the unspoken loopholes in the protection of fundamental rights as well as with 'sufficiently serious breach' test, the compensatory immunity and the composite procedures which currently serve as keys to the riddle allowing financial authorities to break out of the escape room of non-contractual liability*".

2. Thesis Outline and Structure Methodology

Having established the research question and the conclusions of this Thesis in the preceding section, this section provides an overview to the structure of the Thesis and introduces the reader to the content of each of the five Chapters. The Chapters gradually put the pieces of the 'research question' puzzle together and lead to the final conclusions and proposals of this Thesis.

Chapter 1 on the "*Accountability of financial supervisory and resolution authorities: typology – democratic legitimisation – limitation of liability*" lays down the contours of the current supervisory and resolution framework in the EU by also presenting the novel legal

features inherent in the European Banking Union (‘EBU’). These novel features are the multi-layer vertical and horizontal differentiation, the national law which the EU financial authorities might be called to implement and the dispersed legal instruments which govern the supervisory and resolution legal framework in the EBU. Then the Chapter is devoted to the challenges inherent in the supervisory and resolution action which differentiate the nature of the financial authorities from other independent administrative authorities. Subsequently, the Chapter moves to discussing why accountability is an indispensable element of the operation of the financial authorities and sets forth the typology of accountability which is widely accepted by academic literature. Pursuant to this typology accountability takes the form of parliamentary, ministerial, market-based, financial and judicial accountability. The latter involves the judicial review of the decisions of the financial authorities and awarding compensation to aggrieved parties in the context of the non-contractual liability of the financial authorities, which is the focus of this research.

Hence, Chapter 1 takes a deep dive into the concept of accountability within financial supervisory and resolution authorities. Additionally, it cautiously explores the issue of democratic legitimisation, examining how these authorities, which belong to the sphere of the independent administrative authorities, acquire legitimacy and maintain public trust. Furthermore, the Chapter analyses the conceptual underpinnings of the liability of the financial authorities and the limitations of such liability that may apply to financial supervisory and resolution authorities, considering the arguments in favour and against limiting their liability.

Chapter 2 on “*Non-contractual liability under EU law – Action for damages – Liability of ECB and SRB under EU law – Allocation of tasks between the Union and National Competent Authorities – Composite procedures*” focuses on the non-contractual liability under EU law, particularly within the context of financial supervisory and resolution authorities. First, the discussion is devoted to the concept of an action for damages under EU law and its applicability to these authorities by discussing the statutory conditions of the non-contractual liability as crafted by the CJEU in its case-law. It examines, in particular, the liability of the European Central Bank (‘ECB’) and the Single Resolution Board (‘SRB’) under EU law and issues pertaining to the *locus standi*. It further explores the allocation of tasks between the Union and National Competent Authorities (‘NCAs’) and National Resolution Authorities (‘NRAs’), analysing the division of responsibilities and how this impacts liability. In this vein, the Chapter also identifies the accountability gaps between the ECB/SRB and the NCAs/NRAs respectively. Additionally, the discussion focuses on composite procedures which involve both Union and national authorities in what ends up being a labyrinth of responsibilities in the context of the decision-making process, considering how they affect the liability of these authorities.

Chapter 3 on “*The liability of the ECB and SRB in light of the fundamental right to property – an ambivalent battle*” explores the liability of the ECB and SRB in relation to the fundamental right to property. The tension and complexity surrounding this issue warrants detailed attention. As the ECB’s and particularly SRB’s actions may impact property rights. In the case of the SRB, when resolution action is taken, the right to property of depositors, creditors and shareholders of a credit institution is at stake, especially when the bail-in tool is applied. The Chapter analyses relevant legal principles and frameworks,

considering the balancing between financial stability objectives and the protection of property rights. Furthermore, it discusses the challenges and conflicts that arise when guarantee schemes are in place and serve as 'compensatory schemes' thereby leading to compensatory immunity of the financial authorities. The Chapter finally focuses on the scenario of system-wide crises and suggests that a more comprehensive nexus for the protection of the right to property, especially of depositors, is warranted.

Moreover, Chapter 4 on "*The case-law on the liability of financial supervisory and resolution authorities in the EU (ECtHR – CJEU – selected national courts)*" provides an analysis of the case-law pertaining to the liability of financial supervisory and resolution authorities on Union and national level. The Chapter examines rulings from the CJEU, and selected national courts. By studying these cases, one can identify key principles and legal interpretations that have shaped the liability framework for these authorities. Additionally, the Chapter evaluates the consistency and coherence of the case-law and highlight any divergent approaches or unresolved issues.

Finally, Chapter 5 on "*Synthesis – Evaluation – Proposals – Epilogue*" synthesizes the findings from the previous chapters. It provides an overall evaluation of the accountability and liability framework for financial supervisory and resolution authorities. Based on the analysis included therein, the Chapter puts forth proposals for potential improvements to enhance the effectiveness of this framework. Moreover, the Chapter offers an epilogue that reflects on the broader implications of the research, discussing any future challenges or developments in the field of the accountability and liability of financial authorities.

More specifically, the epilogue focuses on the three keys to the riddle allowing financial authorities in the EBU to successfully break out of the escape room called 'non-contractual liability'. As explained in the preceding section the first key is the very high liability standard set by the CJEU in the form of the 'sufficiently serious breach' test. In this regard, the Thesis suggests that this test should become 'softer' as in its current form it is questionable whether the action for damages is an effective judicial remedy available against defective supervision and resolution, or instead it constitutes a merely theoretical and eventually scatheless weapon in the hands of aggrieved parties. The second key is the compensatory immunity which is granted to the financial authorities in some EBU jurisdictions when a guarantee scheme is available to aggrieved parties. The Thesis suggests that compensatory immunity should be excluded in such cases as it is impermissible for both legal and policy reasons, relating to ensuring an effective legal remedy, attaining the principle of proportionality and avoiding a situation in which moral hazard on the part of the financial authorities is favoured.

The difficulties associated with the non-contractual liability of the ECB and SRB are intensified given the labyrinth of the decision-making process in the context of the SSM and SRM and the emerging problem of 'too many hands' which serves as the third key to the riddle allowing financial authorities to break out of the 'liability escape room'. In this regard, it is submitted that the CJEU should conduct an in-depth judicial review of the national preparatory measures adopted in the context of a composite procedure so as to ensure effective judicial protection of aggrieved parties, whereas in this very context a reverse

reference for a preliminary ruling from the CJEU to the relevant national court could be established to assist the CJEU in this in-depth review.

Finally, as regards the unspoken loopholes in the protection of the right to property when the resolution framework and especially the bail-in tool is applied. The Thesis suggests that this area deserves particular attention and warrants legislative changes in especially in cases of system-wide crises. It is submitted that applying the bail-in in such cases would fail to meet the proportionality test given that it would very likely create destabilising effects and therefore defeat the very purpose of the resolution framework which is the protection of the financial stability and the robustness of the banking system.

The Thesis concludes that the action for damages does not constitute an effective legal remedy in light of the current interpretation and application of the relevant conditions of the non-contractual liability of Union bodies. Without disregarding the precious policy reasons which require the protection of the financial authorities and thus the limitation of their non-contractual liability, the CJEU needs to proceed to a fine-tuning of relevant liability conditions. The CJEU should not stand idle in front of the inherent difficulties of this task, neither should it continue to cast a protective net over the ECB and SRB with the practical effect that the latter will hardly ever be held liable. Ultimately, ensuring that the action for damages is an effective legal remedy should be of primary concern to the CJEU as effective judicial accountability constitutes an essential part of the democratic legitimacy of the ECB and the SRB whose role is of increasing importance in the realm of the EBU and in general of the European Union. After all, effective accountability is the ultimate manifestation of strong democracies and is much needed in the universe of the European Union where the various Union bodies as international actors with incremental powers, risk of becoming a bureaucracy distant from the channels of democratic answerability.

Having outlined the five Chapters of this Thesis, it is now time to lay down the methodology adopted in addressing the research question. The methodology adopted is (a) *a literature review*, (b) *establishing a conceptual framework*, (c) *data collection and comparative analysis*, (d) *findings and interpretation*, and (e) *conclusion and recommendations.* A roadmap of the methodology adopted follows.

First, I employ a *literature-review methodology.* I conducted an extensive literature review to explore existing theories, concepts, and scholarly works related to the research question. This step allowed me to identify the knowledge gaps, establish the theoretical framework, and build a solid foundation for the study and the final conclusions. Based on the literature review, I then developed a *conceptual framework* that outlines the key concepts, variables, and relationships examined in my research. This framework provides a theoretical structure for the analysis and guides the formulation of the research question. The conceptual framework is backed by the *collection of data* methodology combined with a *comparative analysis* approach. This included the collection of relevant data on the non-contractual liability of financial authorities on Union and national levels from the existing literature and pertinent case-law. The data collected are studied based on a content and thematic analysis. The analysis is followed by a presentation of the *findings* of my study in a clear and structured manner. This includes summarising and *interpreting* the results, discussing their implications, and relating them back to the research question. The final

methodological tool employed is the *conclusion and recommendations*. Based on this tool, I draw conclusions based on my findings and provide recommendations towards a more comprehensive liability framework of the financial authorities, by taking into account the peculiar nature of the financial authorities' mandate.

Chapter 1: Accountability of financial supervisory and resolution authorities: typology – democratic legitimisation – limitation of the liability

1. Introduction

The financial crisis of 2007-2008 caused a turmoil in the financial markets and severely destabilised the financial system with spill-over effects across borders. Soon, it affected the public sector and in 2010-2011, it developed into an unprecedented sovereign debt crisis with overwhelming consequences for the banking sector as well. In the aftermath of the crisis, which acted as a catalyst for changes in the euro-area, the European Commission – among other policy responses[1] – called for a banking union with the aim to "place the banking sector on a more sound footing and to restore confidence in the Euro as part of a longer term vision for economic and fiscal integration".[2] The establishment of the European Banking Union ('EBU')[3] was a breakthrough for the Union and a revolutionary step towards European integration.

Despite the emergence of transnational banking groups across the euro-area over the years,[4] mainly fostered by the internal market and capital market union, prudential supervision and resolution of credit institutions rested with the National Competent Authorities ('NCAs') until 2014. The financial crisis evidently demonstrated the inadequacy of the legal frameworks and powers vested with the national supervisory and resolution authorities (or 'financial authorities') with regards prudential supervision of and crisis management in the banking sector.

Vítor Constâncio, former Vice-President of the European Central Bank ('ECB'), has eloquently described the two predominant driving forces that underpinned the decision for establishing the EBU.

First, the **increasing interconnectedness** between financial institutions and markets across the euro area which "affects the impact of supervision and other national policies not only on the domestic banking sector, but also, as an externality, on other countries". According to Constâncio, the combination of cross-border banking with the national supervisory and resolution competences leads to a 'financial trilemma'. The concept of the trilemma encompasses "the impossibility of achieving three objectives in an environment with globalised financial markets. These objectives are: first, financial stability; second,

[1] Apart from the banking union, the EU took decisive steps to lay down a robust financial framework for the single market which included measures to secure better supervision of the financial system, which included the establishment of the three European Supervisory Authorities (EBA, ESMA, EIOPA) and of the ESRB. In addition, the European Council unanimously recommended establishing a single rulebook applicable to all financial institutions in the single market. In this context, measures were taken to enhance prudential requirements. New legislative initiatives included the recast of the Deposit Guarantee Scheme Directive as well as the enactment of the Bank Recovery and Resolution Directive.

[2] Shoenmaker & Véron (2016); Communication from the Commission to the European Parliament and the Council A Roadmap towards a Banking Union (COM/2012/0510 final) p. 1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012DC0510.

[3] For an overview of the European Banking Union: see Gortsos, (2018a).

[4] See Berglöf, De Haas, & Zettelmeyer (2012) and Zilioli & Wojcik (2021).

financial integration; and third, maintaining national financial policies."[5] In light of this trilemma, it is clear that level playing field considerations and cross-borders externalities cannot be taken into account when supervision and resolution competences are exercised on a national level. This results in a less efficient prudential supervision of credit institutions and leaves the banking system prone to failures. Therefore, achieving a harmonised supervision and resolution on a supra-national level, was considered essential to reduce fragmentation of financial markets, counteract deposit flights, avert other threats stemming from the banking sector, prevent future bailouts of credit institutions financed by taxpayers and thus ensure the stability of the financial system.

Second, the deeper rationale for the creation of the EBU was to foster a **higher financial integration**, as a response to the financial fragmentation, in order to also ensure a successful and well-functioning Monetary Union. "The events of the past few years have demonstrated that Monetary Union in Europe requires a high degree of financial integration, in which financial institutions diversify their assets and liabilities across euro area countries. This is essential for an effective transmission of monetary policy".[6] This latter aspect was also emphasised by the European Commission, in 2012, which noted that the increased risk of fragmentation of the EU banking markets "significantly undermines the single market for financial services and impairs the effective transmission of monetary policy to the real economy throughout the Euro Area".[7] By definition, putting surveillance and crisis management of the banking system under a common roof which hosts common practices and harmonised rules constitutes a way to overcome a fragmented regulatory environment.[8]

1.1. European Banking Union Pillars

The EBU project[9] leans on three pillars: the Single Supervisory Mechanism ('SSM') which is composed of the ECB[10] and the National Supervisory Authorities ('NSAs') and entails the transfer of specific supervisory tasks[11] [12] in relation to banks established in the euro area to European level. The Single Resolution Mechanism ('SRM') which is composed of the Single Resolution Board (SRB) and the National Resolution Authorities and aims at

[5] By Constâncio (2012).

[6] *Ibid.*

[7] Communication from the Commission to the European Parliament and the Council a Roadmap towards a Banking Union (COM/2012/0510 final) p. 5 available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012DC0510.

[8] Bruno & Carletti (2019), p. 13.

[9] Gortsos (2015e).

[10] Gortsos (2018b).

[11] The supervisory tasks not explicitly transferred to the ECB will rest with the national supervisors which will remain competent – inter alia – for consumer protection and money laundering.

[12] Gortsos (2015d).

centralising the management of banking crises in order to apply resolution tools in a coordinated way across the euro area, as well as to deal in a more efficient way with cross-border failures. The third pillar of the EBU is the European Deposit Insurance Scheme ('EDIS'). So far, however, only the first two pillars are in place.

Council Regulation (EU) No 1024/2013[13] ('the SSM Regulation' or 'SSMR') vested the ECB[14] with extensive prudential supervisory tasks in relation to credit institutions in the euro-area within the context of the SSM.[15] The SSM does not possess legal personality and under Article 2(9) of the SSMR, is defined as the system of financial supervision composed by the ECB and NCAs of participating Member States as described in Article 6 of the SSMR. This Article should be read as also encompassing Member States with a derogation (i.e. not in the euro area) provided that they have established a close cooperation with the ECB under the terms of Article 7 of the SSMR.[16] From an institutional point of view, the choice to entrust the ECB with prudential banking supervision avoided any potential problems associated with the limits of the delegating discretionary powers to EU agencies under the *Meroni* doctrine.[17]

Under the direct supervision of the ECB fall 115 significant banks of the participating Member States which hold almost 82% of the banking assets in these countries. The main aims of the European banking supervision are to (a) ensure the safety and soundness of the European banking system; (b) increase financial integration and stability; and (c) ensure

[13] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89.

[14] For a general overview of these legal acts, see Gortsos (2015g), pp. 77-80.

[15] The EU Commission mandated a group of experts led by De Larosière to examine the causes of the crisis and bring forward proposals for establishing an 'efficient, integrated and sustainable European system of supervision'. The de Larosière report called for radical reforms in the financial services sector, with a particular focus on supervision. The potential role that the ECB could play in the attempt to centralise and coordinate the supervision of cross-border banks in the EU is mentioned several times throughout the de Larosière report. It should be noted though that the expert group did not embrace such views as – according to it – conferring micro-prudential tasks on the ECB would interfere *inter alia* with its monetary objective. The alternatives options were either to confer the prudential supervisory tasks to one or more of the European Supervisory Authorities' members of the ESFS, and mainly to the EBA, or creating a new pan-European banking supervisory authority. However, in view of the decision of the Euro Area Summit of 29 June 2012 that 'the Commission will present proposals on the basis of Article 127(6) for a single supervisory mechanism shortly', the EU Commission had no alternative but to identify the ECB as the single supervisor. In light of Article 127(6), only the ECB could be the main actor, whereas an existing or newly-established agency could not be vested with such tasks. See in this regard, European Commission, *High Level Expert Group on EU financial supervision to hold first meeting on 12 November*, available at http://europa.eu/rapid/press-release_IP-08-1679_en.htm; de Larosière et al. (2009), p. 171.

[16] See Gortsos (2015b), p. 406, where he rightly points out that "the SSM has a different institutional architecture from the Eurosystem, to the extent that members of the latter are the ECB and (exclusively) the national central banks of the Member States whose currency is the euro (TFEU Article 282(1)) operating under the principle of decentralisation. National competent authorities other than national central banks are not members of the Eurosystem. The same holds for central banks of Member States with a derogation, which, nevertheless, are members of the ESCB (unlike national competent authorities)".

[17] *See inter alia:* Chamon, (2011), p. 1055; Scholten & van Rijsbergen (2014).

consistent supervision. While pursuing its tasks and acting within its mandate, the ECB enjoys the authority to conduct supervisory reviews, on-site inspections and investigations; grant or withdraw banking licences; assess banks' acquisition and disposal of qualifying holdings; ensure compliance with EU prudential rules; and set higher capital requirements ("buffers") in order to counter any financial risks.[18] Within the SSM framework, the ECB also exercises powers by virtue of the Bank Recovery and Resolution Directive ('BRRD'),[19] still in the preventive realm, i.e. it is entitled to require banks to disclose information, to prepare recovery plans. Equally, it is entitled to early interventions in the case when a bank failure becomes likely. So far, in order to accomplish its objectives, the ECB as the single supervisor has focused its interventions on three main areas: (a) first, on requiring banks to improve loss-absorption capacity by raising more and better-quality capital; (b) second, on asking banks to restore their asset quality by mainly tackling the NPLs problem; and (c) third, on producing guidelines to reduce discretion in the usage of internal rating models. The financial crisis evidenced that risk-weighted capital ratios were not a credible indicator of a bank's soundness. Therefore, reducing inconsistency in internal models is important in order to rebuild credibility in risk-based regulatory capital ratios and avoid unnecessary variation in the ratio of the risk weighted assets (RWA) to the total assets of the banks.[20] In the same context and with the view to achieve financial integration the SSM's intervention agenda includes breaking the vicious bank-sovereign circle and also promoting cross-border consolidation, by balancing on the one hand the 'overbanked' character of the European banking system and on the other hand the too-big-to-fail problem.[21] The creation of the SSM was considered vital in order to ensure better cooperation and coordination between supervisors across the euro area,[22] the implementation of the single rulebook in a coherent and effective manner.[23]

On the other hand, under Regulation (EU) 806/2014 ('the SRM Regulation' or 'SRMR') of the European Parliament and of the Council,[24] the SRB, in the context of the SRM, assumed powers for handling crisis management and bank resolution in relation to those

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[18] For an overview see ECB, Single Supervisory Mechanism, available at https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html.

[19] 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, OJ L 173, 12.6.2014, p. 190–348.

[20] Bruno & Carletti (2019), p. 8.

[21] *Ibid*, pp. 14-16.

[22] Recital 5 of SSMR.

[23] Recital 12 of SSMR.

[24] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90.

credit institutions supervised by the SSM in cooperation with the national resolution authorities ('NRAs').[25] The SRB is responsible *inter alia* for drawing up and adopting resolution plans, carrying out resolvability assessments, adopting measures during early intervention, setting the level of MREL, adopting resolution decisions and applying resolution tools.[26] The legal framework of the SRM is complemented by an intergovernmental agreement (Council of The European Union ECOFIN, 2014)[27] on the transfer and mutualisation of contributions to the SRB. This agreement was put in place in order to ensure compliance of SRM with the EU Treaty, according to which the pooling and mutualisation of funds is precluded. The intergovernmental agreement was signed by 26 countries in May 2014 and the regulation entered into force in August 2014. All euro zone countries ratified the agreement by February 2016.

Given the importance of preserving financial stability, the resolution authorities have a prominent and undisputed role to play to that end. The principal objective of the new institutional setup and legal framework on resolution in EBU is to reduce phenomena of disorderly bank failures which can have serious destabilising effects on the financial system and consequently on the real economy. A further primary objective of resolving banks on a Union level is to break the perpetual chain of the negative feedback loop between banks and sovereigns protecting on the one hand the guaranteed deposits and on the other hand the taxpayers from a potential bailout solution and its ensuing fiscal costs.[28]

1.2. Novel legal features of the European Banking Union

Placing supervision and resolution in the hands of the ECB and the SRB respectively creates new legal realities. The EBU came along with a complex legal framework which involves several novel features discussed right below.[29]

Multi-layer vertical differentiation. The administrative powers were transferred to the ECB and the SRB only vis-à-vis the 'significant' credit institutions, while the supervision and resolution of the 'less-significant' banks remain with the national financial authorities. This "multi-layer vertical differentiation"[30] is significant as it creates new legal relationships between the ECB, SRB and the national financial authorities on the one hand, and the supervised credit institutions on the other hand. Identifying these relationships and the respective allocation of competences between the Union bodies and national financial authorities plays an important role for determining the allocation of non-contractual

[25] Gortsos (2019).

[26] Article 7 of SRMR.

[27] Council of The European Union ECOFIN. (2014). Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 8457/14, Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company.

[28] Sum (2016), p. 106.

[29] For more details see Zilioli & Wojcik (2021).

[30] Zilioli & Wojcik (2021), pp. 7-8.

liability among them. As it will be discussed in Chapter 2, the ECB and SRB exercise certain powers in respect of all banks irrespective of their classification as significant or less significant, hence the vertical differentiation does not concern the full spectrum of the ECB and SRB's competences.[31]

Multi-layer horizontal differentiation. A second element is the "multi-layer horizontal differentiation".[32] This element refers to the fact that only the credit institutions established in the euro-area fall within the remit of the SSM and SRM and not the those established in a Member State which national currency is not the Euro. The horizontal differentiation arises in light of Article 127(6) TFEU, which constitutes the primary law basis for conferring supervisory tasks to the ECB,[33] [34] as specified by Article 4 of the SSM Regulation which explicitly confers supervisory tasks to the ECB only with regards to participating Member States, i.e., the Member States which currency is the Euro. Nonetheless, with a view to bridge this horizontal divergence, Article 7 of the SSM Regulation provides for an entryway to the banking union for the non-participating Member States via the "close cooperation" mechanism.[35, 36] The close cooperation mechanism is a novel legal construction from an institutional and constitutional perspective and leads to a *de facto* enlargement of the *ratione loci* scope of the SSM Regulation and thus, to an expansion of the SRB's resolution powers which apply to the credit institutions supervised by the ECB.

Union Bodies apply national law. In addition to the above elements, a further novelty arises when applying the banking union's legal framework, i.e., the Single Rulebook which comprises mainly of the CRR II, CRD V, BRRD II and DGSC.[37] Article 4(3) of the SSM Regulation provides that:

> *For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law*

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[31] For instance, the granting or withdrawing of banking licenses or the use of the Single Resolution Fund in resolution.

[32] Zilioli & Wojcik (2021), p. 8.

[33] With a view to the ECB's primary objective which is the preservation of price stability. In this regard see Goodhart & Schoenmaker (1992); Véron (2013).

[34] On the possible consequences of supervisory tasks on the monetary policy mandate of the ECB, see also Ioannidou (2012).

[35] Bulgaria and Croatia joined European banking supervision through close cooperation in October 2020.

[36] Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5) https://www.ecb.europa.eu/pub/pdf/other/en_dec_2014_05_fen.pdf?5105e4c768e886be0f5844b03a868418.

[37] The Single Rulebook is applicable in all EU Member States, whereas SSMR and SRMR are only applicable to the euro area Member States.

> *is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.*

The ECB, therefore, has an obligation to apply the national law transposing CRD when enforcing prudential rules.

Legal instruments. Furthermore, prudential regulation is not governed by a single legal act. Instead, two legal instruments are employed, i.e., a Regulation (CRR) and a Directive (CRD). Historically, this is explained by the fact that in the past, authorisation and supervision of banks was an exclusive national competence. In order to encapsulate that allocation of competences, the Treaty of the European Economic Community provided that harmonisation on the EU level regarding the taking-up and pursuit of self-employed activities (which is considered to include banking activities) would be achieved via directives. This provision is reflected in Article 53(1) of TFEU which states that:

> *In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.*

2. Delineating the perimeter of supervision and resolution – Complexity of supervisory and resolution duties – Missing bricks on the European Banking Union Wall

2.1. Defining Supervision v. Regulation

First, it is important to define supervision and differentiate it from the closely linked – yet distinct – concept of regulation. Beginning from the latter, *regulation* refers to the imposition of rules which restrict individuals' discretion in a particular field of activity.[38] It could be aptly defined as "the employment of legal instruments for the implementation of social-economic policy objectives".[39] The employment of these legal instruments entails that "individuals or organisations can be compelled by [the] government to comply with prescribed behaviour under penalty of sanctions".[40] In the realm of financial services, regulation captures two levels. First, it creates the institutional framework, sets the rules for the operation of the financial supervisor, and defines the competences and powers that the financial authority enjoys. Second, it determines the content of the supervision itself,

[38] Moran (1986); Baldwin, Cave, & Lodge (2011).

[39] Den Hertog; Moosa (2015), pp. 1-4.

[40] *Ibid.*

i.e., it specifies the substantive rules against which the supervisor assesses the behaviour of the supervised entities.

On the other hand, and as already hinted from the foregoing, *supervision* can be defined as the act of monitoring and ensuring compliance with the regulatory rules.[41] Clearly, successfully implementing a regulatory standard also depends on the quality and effectiveness of the supervision of that standard.[42] In the spectrum of the financial system, supervision can be classified based on the activities exercised by the supervised entities, into e.g. supervision of payment or settlement systems, of financial services intermediaries, regulated markets or stock exchanges etc. The present thesis focuses on the liability of the supervisory authorities arising from the exercise of supervision over the financial services intermediaries.

Considering the above, the direct interplay between regulation and supervision becomes sharper; regulation is a *conditio-sine-qua-non* for planning and implementing supervision, whereas at the same time, regulation would become pointless without any authority supervising the application of the regulatory rules produced.[43] Yet, the said direct interplay between regulation and supervision obscures the boundaries between the two functions and to a certain extent expands the role of the supervisory authority as it will be discussed below.

2.2. Challenges posed to supervision: Nature of supervision – Expansion of the traditional perimeter of the supervisory competences – Regulatory fragmentation – new conditions in the financial sector

Contemporary supervisors, including the ECB, face challenges due to both the complexity of their supervisory duties but also due to novel conditions that continuously emerge in the financial sector. These complexities find their roots *inter alia* in the difficulty of supervision *per se*, in practice, and its prudential nature (2.2.1), the expansion of the *ratione personae* and *ratione materiae* scope of the supervisory duties (2.2.2), the involvement of the supervisors in developing regulatory policies and the need to adopt regulatory standards to the continuously evolving financial sector (2.2.3), and the lack of fully harmonised regulation (2.2.4). At the same time, novel conditions in the market entail that the supervisors need to measure and assess risks that did not use to fall under the traditional perimeter of risks of the banking sector, such as cyber-security risks and climate-change-related risks (2.2.5). These challenges are further described in the paragraphs below.

2.2.1. Difficulty of supervision in practice and its prudential nature

Supervising financial institutions is a challenging task in practice with major consequences if not exercised successfully. Banking supervision in EU is exercised on

[41] For the difference between regulation and supervision see Dempegiotis (2008), p. 132; Lastra (2003), p. 49; Schioppa Tommaso (2004); Llewellyn (1999).

[42] Caruana (2015).

[43] Floros (2012), p. 63.

an *ex ante* and *ex post* level with the ultimate purpose of safeguarding the resilience of the banking system. *Ex ante* supervision involves granting a banking license to an applicant institution and aims at ensuring that the minimum regulatory requirements for entering the "banking market" are complied with. The obligations of the supervisor, though, are not exhausted the moment when the requirements of authorisation of a credit institution are met. Instead, supervision is an on-going process which requires the supervisor to continuously ensure the legality of the activities of the financial intermediaries. To this end, *ex post* supervision involves the monitoring of compliance of the supervised entity with the regulatory rules, as well as repressive measures in the form of sanctions in case where the supervised entity fails to meet these rules. In this context, the supervisor needs to identify the strengths and weaknesses of the supervised entities. In addition, they need to detect the risks these entities are exposed to, and in this regard prepare and implement an action plan to appropriately rectify such risks. Implementing supervision in practice involves a range of practices in the supervisory toolkit, both off- and on-site.[44]

Both *ex ante* and *ex post* supervision are exercised on a prudential basis which means that supervision focuses on **preventing** banking crises and financial instability. However, this adds an extra layer of complexity to the work of the supervisory authorities, as they need not only to punish already manifest illegal behaviour, but also to prevent the occurrence of future and uncertain illegalities and unsound practices of the regulated entities, by employing a forward-looking supervision action plan.

An illustration of the difficulty of exercising efficient supervision in practice was provided by the International Monetary Fund ('IMF') in its Staff Position Note of 2010,[45] in which it highlighted the main challenges that supervision face and that "while progress is being made in putting regulation in place, work remains to be done in many countries to strengthen supervision". The IMF underlined that the financial system has evolved and credit risk is no longer the only source of risk that the regulated institutions encounter. Consequently, supervision is no longer a merely monitoring of loan-making and deposit-taking activities. Further, supervisors should avoid focusing only on observing forthright non-compliance by the institutions, like breach of capital adequacy requirements or liquidity ratios.[46] Instead, they should make sure that they have a profound understanding of the key business drivers and flaws in risk management practices of the institutions under their supervision. This is of outmost importance as it is the only way that the supervisor can prepare an action plan which is forward-looking, which can anticipate and capture – to a large extent – future developments e.g. triggered by innovation (fintech).

[44] For a vivid example of supervision in practice see: Laker (2010).

[45] Viñals et al. (2010).

[46] This risk is distinctly present in relatively detailed rules-based regimes with a more 'compliance-based' approach.

The standards that a 'good' supervisor should meet are notably high. The IMF has identified six key elements which 'good' supervision must be premised on, that is supervision must be *intrusive, sceptical, proactive, comprehensive, adaptive, and conclusive*.[47] In more detail, supervision should be **intrusive** in the sense that the supervisor should not just "let the game flow" limiting itself solely or mainly on offsite analysis, but rather it should focus *"on the match fitness of each [market] participant"*[48] intruding sufficiently into the affairs of regulated institutions. At the same time, supervisors should be **sceptical** questioning the industry's direction or actions even in good times, but also **proactive** interfering countercyclically before bank failures arise. In addition, a good supervisor should not confine the monitoring and measurement of risks only to those faced by the institutions under their direct supervision. Instead, they should be **comprehensive** in their scope taking into account risks arising from interconnectedness, cyclicality, systemically important institutions or even other unregulated subsidiaries. Equally, supervisors should be **adaptive** to the constantly changing financial sector and the emerging new products, new services, new technology and the ensuing new risks. It is important not only to understand and adopt to the changes but also to monitor and assess the business models of the supervised institutions in light of these changes. Finally, good supervision needs to be **conclusive** in the sense that the supervisor should follow up on the issues identified during the supervisory cycle without leaving any aspect outside their assessment and final conclusions.

It is evident, therefore, from the foregoing, that supervision is a demanding and intensive task for which the supervisor is anticipated to meet high standards and expectations. Achieving the elements of good supervision requires also that the supervisor is willing to act, to question common wisdom and take unpopular decisions.[49] Timely and decisive

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[47] Viñals et al. (2010), p. 12.

[48] This sport analogy is inspired by Jonh Laker's speech of 2010 (Laker, 2010), former Chairman of the Australian Prudential Regulatory Authority (APRA), who described APRA's approach to supervision as having a clear goal, i.e. to ensure that APRA's "supervisory judgements about a regulated institution are accurate, timely and robust, and that the supervisory attention afforded to each institution is appropriate". Laker added that after the financial crisis of 2008, APRA materially intensified its supervision "becam[ing] much less inclined to just "let the game flow" and much more focussed on the match fitness of each participant. [APRA] sought more frequent and/or more comprehensive information to understand the different impacts of the crisis and to satisfy [itself] that regulated institutions were employing strategies in line with their capabilities. […] [APRA] engaged more frequently with boards and senior management to ensure they were on top of any difficulties they faced, […] established teams of supervisors and specialist risk staff to monitor and coordinate responses to specific risks and provide a cross-industry perspective, […] undertook a range of stress-tests across our regulated industries, culminating in a major macroeconomic stress-test in banking, to evaluate whether institutions held adequate capital to cope with "severe but plausible" crisis scenarios".

[49] Viñals et al. (2010), p. 14. In its Annual Report of 1998, the Bank for International Settlements (BIS) wrote that "What is also needed is the vision to imagine crises and the will to act preemptively," and "it may be asked whether the proper incentives are in place, in both lending and borrowing countries, for supervisors themselves to act expeditiously before a crisis erupts." BIS (1998). In the context of the great financial crisis, J. Dickson, the head of the Canada's Office of the Superintendent of Financial Institutions (OSFI) said "Regulators do not eliminate the possibility of failure but they reduce it; that said they must constantly demonstrate the will to act, not only in taking steps to minimize the risk of failure but also proactively taking steps to cause an institution to exit from the system when necessary" (see in this regard Dickson (2009)).

action, when prudential concerns so require, might also be hampered, as it is often the case that the supervised entity will challenge the supervisor's decision before the courts.

2.2.2. Expansion of the *ratione personae* and *ratione materiae* scope of supervision

In addition to the above, the expansion of the scope of supervision equally complicates the supervisor's role. The financial intermediaries have extended their traditional field of activities, and consequently their products have been "straddl[ing] the different market segments".[50] Hence the boundaries between banks, securities firms, investment banks, and insurance companies are no longer crystal clear. Thus, the role of the banking sector supervisor becomes more complex. An example of the *ratione personae* expansion of the ECB's supervisory duties was that as of June 2021 the ECB is responsible also for the supervision of systemically important investment firms which carry out bank-like activities and as a result take on the same types of risk that the banks themselves are exposed to.

According to recitals 37-39 of the Investment Firms Regulation,[51] large investment firms are mainly exposed to counterparty credit risk as well as market risk for positions they take on own account.[52] In light of this and given their size and systemic importance, large investment firms pose a threat to financial stability. Despite their significant engagement in cross-border investment banking services, these firms were not subject to prudential supervision by the same competent authority, as different competent authorities could have been designated in the EU Member States under MiFID[53] and CRD IV respectively.[54] This 'dualism' in the supervision of bank services provided on the one hand from the credit institutions and on the other hand from the investment firms, put under question the effectiveness of prudential supervision of both the credit institutions and large investment firms, distorting at the same time competition. As a result, this could equally pose level playing field considerations with respect to the application of the CRR[55] and CRD IV across the Union. Therefore, it was decided that the large investment firms should be given the status of a credit institution "so as to create synergies with regard to the supervision of

[50] Viñals et al. (2010), p. 8.

[51] Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014, OJ L 314, 5.12.2019, p. 1–63.

[52] Client related or not.

[53] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.

[54] 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, OJ L 176, 27.6.2013, p. 338–436.

[55] 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, OJ L 176, 27.6.2013, p. 1–337.

cross-border wholesale market activities in a peer group, promoting a level playing field, and allowing for consistent supervision across groups".[56]

Thus, the scope of the ECB's supervisory powers became wider and more intricate, requiring the development of new methodologies of effective supervision, better access to adequate and consolidated information, ability and skills to examine and supervise some financial activities, as well as attention in applying the supervisory powers and sanctions consistently across the various financial institutions.

2.2.3. The involvement of the supervisors in developing regulatory policies and the need to adapt regulatory standards to the continuously evolving financial sector

As already mentioned above, regulation and supervision are isolated from each other. Save the traditional task of ensuring compliance with the prudential regulatory rules, the supervisor is also engaged in formulating the regulatory rules. As regards the single supervisor in the EBU, the ECB "assists in developing prudential requirements for significant and less significant banks, covering issues such as risk management practices, capital and liquidity levels and remuneration policies and practices. Regulations and supervisory policies for all banks are developed through close cooperation and coordination between the ECB and other bodies such as the European Supervisory Authorities, especially the European Banking Authority, European Systemic Risk Board, Basel Committee on Banking Supervision, Financial Stability Board".[57]

Moreover, the relationship between regulation and supervision is a complementary one. Any regulatory framework, either simple or sophisticated, cannot 'predict' the challenges arising continuous innovation and change in the financial markets and thus capture them under its regulatory tentacles. It is the regulation's intrinsic nature to be 'at the hunt' of such changes, "permanently playing catch-up with the continuously adapting financial sector".[58] In this highly dynamic financial ecosystem, supervision can play an important role in dealing with the financial sector's continuous change, thereby reducing the need for frequent rule adaptation, and thus fostering regulatory stability. An example could be the constraints on banks' internal models with regards the risk-weighted assets which are imposed by the regulation. The supervisor can act supplementary to the regulatory rules by being stricter when approving such models, if the conditions so require, e.g. considering any risks emerging from changes in the financial world.

[56] Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/2014, OJ L 314, 5.12.2019, p. 1–63 , recital 38.

[57] ECB, How does banking supervision work?, available at https://www.bankingsupervision.europa.eu/banking/approach/cycle/html/index.en.html.

[58] Caruana (2015).

2.2.4. Single supervision and resolution, but lack of fully harmonised rules

Although the banking regulation in the EBU has benefited from a swift and unprecedented – for Europe's standards – harmonisation, some national differences in the content of the regulatory rules are still identified leading to regulatory fragmentation. Most of the discrepancies between the national regulatory frameworks are neither a legacy inherited to the contemporary regulatory ecosystem, nor a reflection of country-specific risks. Rather, they are owing to the discretion of the Member States as regards the form and method of implementation of the EU Directives in their jurisdiction. Several provisions of the CRD IV and BRRD have been transposed differently across various member states, thereby giving rise to different rules for the same regulated activity. For instance, in the context of the "fit and proper" requirements,[59] in some member states, the supervisor needs to assess only the appointments of the management bodies' members, whereas in other jurisdictions, the supervisor needs to assess, in addition to that, the appointments of "key function holders". Moreover, "[a]s regards the fit and proper assessment itself, there are further differences: some national authorities make use of questionnaires to be answered by the candidates, others do not. Some national authorities conduct face-to-face interviews with new members of the board, others do not. In some countries, there are timelines for conducting the fit and proper assessment with specific, rather short deadlines, whereas in others there are no such timelines. Even the criteria for assessing the suitability of candidates are implemented and interpreted differently across the various euro area countries".[60] It is briefly recalled that the ECB needs to apply the national law transposing the CRD IV when assessing the fit and proper requirements.[61] In effect, the ECB, in its capacity as a supervisor, needs to apply different rules to alike cases. This situation comes in contradiction with the idea of having a single supervisor in the EBU to ensure uniform and consistent application of same rules in order to achieve equal treatment of credit institutions and thus prevent regulatory arbitrage. It also requires appropriate resources, time, and expertise so the ECB can ensure that the unity and integrity of the financial market is preserved.

Further aspects that increase the regulatory fragmentation is "the supervisory powers under national law that are not explicitly mentioned in CRD IV",[62] or the fact that some non-

[59] Article 4(1)(e) of the SSM Regulation provides that fit and proper assessments should be part of the ECB's supervision of the overall governance of credit institutions. The SSM Framework Regulation in Articles 93 and 94 further elaborates on the competences of the ECB regarding the fit and proper assessment, whereas Article 91 of the CRD IV describes comprehensively the suitability requirements.

[60] Lautenschläger (2016).

[61] Article 4(3) of the SSM Regulation provides that the ECB must apply all relevant EU law, and where EU law is composed of directives, the ECB has to apply the national legislation transposing those directives.

[62] Lautenschläger (2016): a bank acquiring a non-bank, or mergers and de-mergers involving a bank or transfers of assets. In some Member States, these transactions need to be approved by the competent authority (and rightly so), in others they do not.

binding supervision practices under the EU Directives are converted into legally binding requirements in some national legislations.[63]

In conclusion, fragmented rules create an imbalance between supervisory and regulatory harmonisation and ultimately undermine the singleness of the EBU impeding the effectiveness of the ECB's supervision.

2.2.5. Novel conditions in the market – the climate change case

A further layer of complexity is the novel conditions arising in the financial market which pose new challenges to the supervisory process and risk measurement methodologies,[64] and call for a dynamic evolvement and adaptation of supervision to the new features emerged. Such new considerations include *inter alia* climate change considerations that the supervisors need to take into account when assessing banks' vulnerabilities. These are atypical/not traditional risks to be considered for the banking supervision cycle. This adds to the complexity and uncertainty of the supervisory outcome, especially when considering that there is still no specific performance benchmark against which the actions of the ECB as a supervisor could be evaluated. The ECB should swiftly react to climate change risks and set clear supervisory expectations. It should equally urge banks to take initiatives on time in order to be prepared even in a scenario of an abrupt transmission to a low-carbon economy. In this context, lessons can be drawn from the Brexit situation and the action plan for accommodating the 'new normal' in the banking sector in the post-Brexit era. Climate change could well expose the regulators and supervisors to litigation risks, as demonstrated by the recent example of the lawsuit launched against the central bank of Belgium (NBB) by ClientEarth on 13 April 2021. The subject-matter of the lawsuit was the allegation that NBB had failed to meet environmental and human rights requirements when purchasing corporate bonds from fossil fuel companies and other greenhouse-gas intensive firms.[65] ClientEarth eventually decided to withdraw its lawsuit, in November 2022, on the ground that the ECB's policy reform provided for the titling of the bond purchases in the context of the ECB's policy towards greening its monetary policy,[66] and

[63] e.g., the German law on bank resolution delegates to the Ministry of Finance the power to issue regulations in areas such as internal governance and risk management.

[64] ECB, Ramping up climate-related and environmental risk supervision (2020) available at https://www.bankingsupervision.europa.eu/press/publications/newsletter/2020/html/ssm.nl201118_4.en.html.

[65] In this regard see ClientEarth communications dated 13 April 2021 (available at: https://www.clientearth.org/latest/latest-updates/news/why-clientearth-is-suing-the-central-bank-of-belgium-for-climate-failings/) and 29 November 2022 (available at: https://www.clientearth.org/latest/latest-updates/news/we-re-withdrawing-our-lawsuit-against-the-belgian-national-bank/). See also (Toronto Centre, 2019) available at: https://res.torontocentre.org/guidedocs/Climate%20Change%20Issues%20for%20Banking%20Supervisors.pdf.

[66] Scouteris & Anastopoulou (2023).

thus steered away bond purchases from "some of Europe's worst polluters."[67] Although ClientEarth did not offer the Belgian courts the opportunity to adjudicate on the substance of the case, its lawsuit it marks a cornerstone, a turning point where the unquestionable becomes subject to questions. A few years ago, no one would have thought or even dared to take legal action against the bond purchase programme on environmental grounds. Yet, the time has come, and it is this author's view that this trend will intensify in the years to come. Accordingly, the courts might be more inclined in the future to recognise *locus standi* rights to individuals who wish to challenge the omission of public authorities or EU institutions to act in a way that protects the environment and does not contribute to the climate change.[68]

2.3. Challenges posed to resolution: the dilemma between resolution and liquidation – obscure concept of public interest – misalignments between state aid and resolution regimes – lack of proper mentality to implement the resolution framework

Similarly, to the challenges posed to supervision, efficient and uniform resolution across the euro-area is evenly subject to several complexities and obstacles. The major challenges include the fluid relation between resolution and liquidation as well as the interpretation of the 'public interest' concept (2.3.1), the obscure interplay between state aid rules and the resolution (2.3.2), and finally the lack of proper mentality and 'culture' to implement the BRRD rules (2.3.3).[69]

2.3.1. The 'dilemma' between resolution and liquidation and the interpretation of the 'public interest' concept

Following the declaration of a credit institution as 'failing or likely to fail' ('FOLTF'), the SRB faces a 'dilemma', that is to choose the most appropriate action between submitting the credit institution to normal insolvency proceedings or to resolution. Deciding upon this dilemma is not a straightforward task. Under the BRRD and SRMR framework, should a bank be declared FOLTF, winding-up proceedings, by default, need to be initiated, unless the liquidation of the bank is considered to jeopardize the stability of the financial system. In the latter case, overriding reasons of public interest require that the bank enters resolution instead of liquidation.[70] Hence, the SRB, acting in its capacity as the single resolution authority in the EBU, is vested with the challenging task to assess whether the

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[67] See ClientEarth communication dated 29 November 2022 (available at: https://www.clientearth.org/latest/latest-updates/news/we-re-withdrawing-our-lawsuit-against-the-belgian-national-bank/).

[68] In this regard, it is noted that a broad legal standing is recognised in Greek case-law in cases concerning the protection of the environmental (which is enshrined in Article 24 of the Greek Constitution). Relatedly see *inter alia* Galanis (2020).

[69] The classification of the obstacles is inspired by Lastra, Russo, & Bodellini (2019) and Lannoo (2019).

[70] Bodellini (2018).

liquidation of a given bank would lead to instability of the financial system or not. Taking a closer look at the components of this assessment will allow us to appreciate the challenges faced by the resolution authority.

In particular, prior to triggering the resolution process, the SRB needs to undertake four consecutive stages of assessment provided for in Article 23 of the Commission Delegated Regulation 2016/1075.[71] The first and very important stage includes the assessment of the **credibility and then the feasibility of the liquidation of the institution** or group under normal insolvency proceedings in accordance with Article 24 of the Commission Regulation.[72] When assessing the credibility of liquidation, the SRB needs to consider the likely impact of the liquidation on the financial system and whether liquidation would achieve the resolution objectives under Article 31 of the BRRD. On the other hand, in order to assess the feasibility of liquidation, the SRB must consider whether the bank's information systems are able to provide the information required by the DGS Directive.[73]

Independently and irrespective of the credibility and feasibility assessment, the SRB must also assess the impact that liquidation would have on the reliance on extraordinary public financial support as compared to resolution and decide which alternative option (between liquidation and resolution) serves best the public interest, pursuant to Article 24(1) of the Commission Regulation.

Where the resolution authority concludes that it may not be credible or feasible to wind up the institution or group entities under normal insolvency proceedings, or equally that resolution action may otherwise be necessary to safeguard the **public interest** for the reason that liquidation would not meet the resolution objectives to the same extent as the resolution process itself, it shall identify a preferred resolution strategy.[74]

Undeniably, the content of the SRB's obligation described in the paragraphs above is an amalgam of highly complex assessments, which may question the very ability of the SRB to identify in all cases which option genuinely safeguards the public interest according to

[71] Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges, C/2016/1691 OJ L 184, 8.7.2016, p. 1–71 (Commission Delegated Regulation (EU) 2016/1075).

[72] The other three stages are: (b) the selection of a preferred resolution strategy for assessment in accordance with Article 25; (c) the assessment of the feasibility of the selected resolution strategy in accordance with Articles 26 to 31; (d) assessment of the credibility of the selected resolution strategy in accordance with Article 32.

[73] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149.

[74] Commission Delegated Regulation (EU) 2016/1075, Article 24(4).

the legal framework. Indeed, the European Court of Auditors (‘ECA’) has casted some doubts on the aptness of the SRB’s assessments and has highlighted the lack of substantiated reasoning in the SRB’s decisions on why liquidation is not considered credible or why it cannot achieve the resolution objectives and protect the public interest. To quote the words of ECA found in its report on the SRB:[75] “[w]hile most resolution plans concluded that liquidation was not credible, we only found loosely-worded reasons for these conclusions – for example that there would be substantial adverse impacts on the national banking sector. The more specific details required by the Single Rulebook[76] were not provided”.

The SRB’s task becomes even more perplexed because of the abstract legal concept of ‘public interest’ which is not defined in the legal acts. Some clarity regarding its content can be drawn from the BRRD and SRMR which provide that “a resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives referred to in Article 31 and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent”.[77] It derives thereof that the resolution framework associates the public interest concept with the achievement of the resolution objectives which are ranked as follows: (a) ensure the continuity of critical functions; (b) avoid adverse effects on financial stability; (c) protect public funds by minimising reliance on extraordinary

[75] European Court of Auditors (2017).

[76] Commission Delegated Regulation (EU) 2016/1075, Article 24(2): When assessing the credibility of liquidation, resolution authorities shall consider the likely impact of the liquidation of the institution or group on the financial systems of any Member State or of the Union to ensure the continuity of access to critical functions carried out by the institution or group and achieving the resolution objectives of Article 31 of Directive 2014/59/EU. For this purpose, resolution authorities shall take into account the functions performed by the institution or group and assess whether liquidation would be likely to have a material adverse impact on any of the following:

(a) financial market functioning and market confidence;

(b) financial market infrastructures, in particular:

(i) whether the sudden cessation of activities would constrain the normal functioning of financial market infrastructures in a manner which negatively impacts the financial system as a whole;

(ii) whether and to what extent financial market infrastructures could serve as contagion channels in the liquidation process;

(c) other financial institutions, in particular:

(i) whether liquidation would raise the funding costs of or reduce the availability of funding to other financial institutions in a manner which presents a risk to financial stability;

(ii) the risk of direct and indirect contagion and macroeconomic feedback effects;

(d) the real economy and in particular the availability of critical financial services.

[77] Article 18(5) of the SRMR which replicates *mot-à-mot* Article 32(5) of the BRRD.

public financial support to failing institutions; (d) protect covered depositors, investors; and (e) protect client funds and client assets.[78] It is noted that, for the purposes of establishing whether the public interest criterion is met or not, priority should be given to the objective of the financial stability in case where not all the resolution objectives can be achieved simultaneously.[79]

The public interest is also relevant in the context of the bail-in tool. Recitals 72 and 83 of the BRRD provide that the resolution authorities should have the possibility to exempt (totally or partially) liabilities from the application of the bail-in, if bailing-in such liabilities would lead to financial instability triggering serious disturbance to the economy of a Member State, and thus running contrary to the overall **public interests** of that Member State or the Union as a whole.

Despite its fundamental role in the EU resolution framework, the public interest concept remains vague leaving a wide degree of discretion to the SRB when deciding the optimum solution between resolution and liquidation.[80] This broad discretion increases the legal uncertainty and unavoidably the litigation risk faced by the single resolution authority. At the same time, in the author's view, it undermines the effective and consistent application of the SRMR and BRRD thereby raising level playing field considerations.

It has been proposed[81] that setting objective criteria or quantitative thresholds above which the public interest should be presumed (and thus the bank should enter resolution) could provide the system with more legal certainty. Such thresholds are used by the Bank of England ('BoE') when it determines whether it is "reasonable to assume that an institution can generally be expected to enter modified insolvency upon failure rather than being resolved using stabilisation powers*"*. For this determination, the BoE takes into account factors which serve as indicators of how likely it is that the bank is able to enter "modified insolvency" instead of resolution. For instance, the BoE considers that "if the institution does not provide significant amounts of transactional banking services or other critical functions, particularly those which depend on continuous access to a service which would not be provided in a modified insolvency. The Bank considers that provision of fewer than around 40,000 to 80,000 transactional bank accounts (accounts from which withdrawals have been made nine or more times within a three-month period) is generally likely to indicate that a modified insolvency would be appropriate".[82]

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[78] BRRD, recital 45 and SRMR, recital 58 and Article 14(2).

[79] Lastra, Russo, & Bodellini (2019), p. 14; (Biljanovska, 2016, pp. 105-106); (Dewatripont, 2014, pp. 34, 37).

[80] Wojcik (2016); Ringe (2016) on the consensus that traditional bankruptcy procedures are not appropriate to deal with failing global banks; see also Guynn (2012) on how bankruptcy intervention erodes the bank's value exacerbating losses for creditors.

[81] Lastra, Russo, & Bodellini (2019), p. 11.

[82] Bank of England (2018), p. 5.

If such thresholds were adopted (even if their nature was indicative only and not binding), they could serve as guiding factors for the SRB's decisions providing safer grounds to assess whether the public interest criterion is met and thus answering to the resolution-or-liquidation dilemma. Accordingly, injecting elements of objectivity into the SRB's decision-making process would limit the situations of distorted competition owing to the inconsistent application of SRMR and BRRD frameworks. Further, should the SRB's choices be informed by objective criteria and/or thresholds, it would also reduce the litigation risks – and especially civil liability claims – for the SRB, as its decisions would not be the result of a completely discretionary assessment.[83]

2.3.2. Misalignment in the requirements for public intervention under the state aid rules in the liquidation and resolution respectively

Further to the complexities described in the previous section, the characteristics and peculiarities of the EU resolution framework lead to undesirable situations also in view of the EU state aid rules which apply in parallel, due to the misalignment of the requirements for public intervention. As it will be explained below, this 'loophole' creates incentives to opt for liquidation instead of resolution, thus undermining the very objective of the resolution framework introduced in the EU legal order by the BRRD and SRMR.

As a way of introduction, it is useful to refer to the three alternative ways provided for under the European legal framework on banking crisis management to deal with ailing banks:

(a) First, unviable banks can be dealt with by triggering resolution process and bailing-in exposures of the bank towards its shareholders and creditors. Within the resolution scheme, the single resolution fund ('SRF')[84] may – as a solution of last resort – fund certain activities only to the extent necessary to ensure the effective application of the resolution tools.[85] Article 76 of the SRMR explicitly provides that the SRF shall not be used to directly absorb losses or to recapitalise an institution. Yet, it is exceptionally possible to resort to contributions from the SRF in case where the losses cannot be covered even after the write-down of the bank's liabilities or the conversion of certain debt instruments into equity. In this case, it is possible to access the industry-funded SRF, but strictly only under two prerequisites, i.e. that a bail-in of at least 8% of the bank's total liabilities and own funds ('TLOF') has taken place, and that the SRF's contribution does not exceed 5% of the

[83] Beck (2012) who notes that the crisis resolution tools have to strike a balance between the short-term crisis resolution needs and the long-term implementation of the banking union.

[84] established under Article 67 SRMR.

[85] In particular, the SRF funding can be triggered: (i) to guarantee the assets or the liabilities of the institution under resolution; (ii) to make loans to or to purchase assets of the institution under resolution; (iii) to make contributions to a bridge institution and an asset management vehicle; (iv) to make a contribution to the institution under resolution instead of the write-down or conversion of liabilities of certain creditors under specific conditions; (v) to pay compensation to shareholders or creditors who incurred greater losses than under normal insolvency proceedings.

total TLOF. The involvement of the SRF needs to be authorised by the EU Commission on the basis of state aid rules, just as it would for interventions of National Resolution Funds of Member States that do not participate in the Banking Union.[86]

(b) Second and as described in the previous section, if the SRB considers that resolving the bank is not warranted to safeguard the public interest, the institution may be put under normal insolvency proceedings subject to national law. In this context, it is possible that the state intervenes injecting public resources to the wound-up bank if this is necessary for preserving financial stability. Such intervention should be notified and authorised by the European Commission under the state aid framework and the 2013 Banking Communication (as analysed below). In the realm of the burden-sharing requirements (discussed below), shareholders and holders of subordinated debt instruments have to bear the losses before the use of public money, whereas such contribution is not required from the depositors and senior creditors.

(c) Finally, the EU framework foresees the exceptional possibility of a precautionary recapitalisation of a bank by the state (outside the resolution process), in cases where the bank is solvent[87] and not failing or likely to fail, nevertheless it needs an injection of capital to cover capital shortfalls identified during the supervisor's stress tests. The use of public money is scrutinised by the EU Commission as to its compatibility with the state aid rules and related prohibitions.[88, 89]

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[86] European Commission, State aid: How the EU rules apply to banks with a capital shortfall – Factsheet, 25 June 2017.

[87] In the Emergency Liquidity Assistance (ELA) Agreement (version of 17 May 2017) available at: https://www.ecb.europa.eu/pub/pdf/other/Agreement_on_emergency_liquidity_assistance_20170517.en.pdf?23bb6a68e85e0715839088d0a23011db, the ECB has specified what it understands by a solvent institution: *"A credit institution is considered solvent for ELA purposes if: (a) its Common Equity Tier 1, Tier 1 and Total Capital Ratio as reported under CRR on an individual (if applicable) and consolidated (if applicable) basis comply with the harmonised minimum regulatory capital levels (namely 4.5%, 6% or 8%, respectively); or (b) there is a credible prospect of recapitalisation - in case (a) is not met, i.e. the Common Equity Tier 1, Tier 1 and Total Capital Ratio, on an individual and/or consolidated basis, do not comply with the harmonised minimum regulatory capital levels (namely 4.5%, 6% or 8%, respectively) - by which harmonised minimum regulatory capital levels would be restored within 24 weeks after the end of the reference quarter of the data that showed that the bank does not comply with harmonised regulatory minimum standards; in duly justified, exceptional cases the Governing Council may decide to prolong the grace period of 24 weeks."*

[88] The main conditions for a precautionary recapitalisation are the following: (1) the ECB needs to declare that the bank is solvent; (2) the State support shall not be used to offset losses that the institution has incurred or is likely to incur in the future; (3) the State support is temporary (i.e. the State should be able to recover the aid in the short to medium term), and (4) the State support has received final approval under EU State aid rules. For the latter requirement, the 2013 Banking Communication require that: (a) the use of taxpayer money is limited through appropriate burden-sharing measures (shareholders and subordinated debt holders contribute). Depositors and senior creditors are not required to contribute under State aid rules; (b) a credible and effective restructuring plan to ensure the bank is viable in the long-term without further need for State support; and (c) distortions of competition are limited through proportionate remedies.

[89] In 2015 the EU Commission approved Greece's precautionary recapitalisation of two Greek banks, Piraeus Bank (see EU Commission Press Release "State aid: Commission approves aid for Piraeus Bank on the basis of an amended restructuring plan" available at:

It is evident that all three alternative options above may involve the use of public funds, hence state aid rules are triggered[90] with the aim to preserve fair competition across the banks of the Member States. As a general rule under Article 107 TFEU, any state aid is incompatible with the internal market, save where it is exempted under Article 107(2),[91] or approved by the Commission according to the rules set out in Article 107(3) TFEU.[92] Such an approval for the use of public funds can be granted to "*remedy a serious disturbance in the economy of a Member State*" as per Article 107(3)(b) TFEU. In the dawn of the financial crisis of 2008 until 2011, and before the BRRD came into force, the EU Commission adopted six communications (the so-called 'Crisis Communications'[93]) which

https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6193) and National Bank of Greece (see EU Commission Press Release "State aid: Commission approves aid for National Bank of Greece on the basis of an amended restructuring plan" available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6255), as well as the recapitalisation of the Italian bank Monte dei Paschi di Siena in 2017 (see EU Commission Press Release "Statement on Agreement in principle between Commissioner Vestager and Italian authorities on Monte dei Paschi di Siena (MPS)" available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_1502) .

[90] Dewatripont (2014), p. 40.

[91] Article 107(2) provides that "the following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and, (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point".

[92] Article 107(3) of the TFEU provides that: "the following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; and, (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission".

[93] Comprising of: (1) Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('2008 Banking Communication') (OJ C 270, 25.10.2008, p. 8) available at: https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=OJ:C:2008:270:TOC; (2) Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ('Recapitalisation Communication') (OJ C 10, 15.1.2009, p. 2) available at: https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=OJ:C:2009:010:TOC; (3) Communication from the Commission on the treatment of impaired assets in the Community financial sector ('Impaired Assets Communication') (OJ C 72, 26.3.2009, p. 1) available at: https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=OJ:C:2009:072:TOC; (4) Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ('Restructuring Communication') (OJ C 195, 19.8.2009, p. 9) available at: https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=OJ:C:2009:195:TOC; (5) Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ('2010 Prolongation Communication') (OJ C 329, 7.12.2010, p. 7) available at: https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=OJ:C:2010:329:TOC, and (6) Communication from the

clarified the criteria used in assessing the compatibility of state measures with the EU competition rules in the context of coordinated action in support of the financial sector. In view of the advent of the banking union, the EU Commission updated the Crisis Communications in 2013 ('2013 Banking Communication').[94] This Communication made it clear that state support in case of bank failures should be granted on terms which represent an adequate **burden-sharing** by those who invested in the bank. That is, before granting restructuring aid to a bank, all capital generating measures including the conversion of junior debt should be exhausted. To this end, Member States need to ensure that the bank's shareholders and junior capital holders arrange for the required contribution or establish the necessary legal framework for obtaining such contributions.[95, 96] Interestingly though, the burden-sharing mechanism may be excluded if its application "*would endanger [the] financial stability or lead to disproportionate results*".[97]

Remarkably, despite the Commission's efforts to bolster market discipline and reduce moral hazard via the uniform application of harmonised rules, the conditions under which public resources can be used when a bank has failed are not aligned in the case of resolution and that of liquidation. In particular, taking a comparative look at points (a) and (b) above reveals that the SRMR/BRRD framework allows for the use public resources (via the SRF) when at least 8% of the bank's liabilities have been bailed in. This rule entails that also more senior creditors are likely to be affected by the bail-in tool, as opposed to the 2013 Banking Communication according to which there is no quantitative minimum requirement for the burden-sharing[98] but only the requirement to exhaust all capital generating measures, whereas it is also sufficient that only subordinated creditors (and not depositors

Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ('2011 Prolongation Communication') (OJ C 356, 6.12.2011, p. 7) available at: https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=OJ:C:2011:356:TOC.

[94] Communication from the Commission of 30 July 2013 on the application, from 1 August 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis ('2013 Banking Communication'), O.J. 2013, C 216/1.

[95] European Parliament, Precautionary recapitalization under the Bank Recovery and Resolution Directive: conditionality and case practice, 5 July 2017 available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602084/IPOL_BRI(2017)602084_EN.pdf, where it is highlighted that burden sharing "means that the costs of a bank rescue should be minimised by the contributions from shareholders, creditors (through voluntary liability management exercises and a coupon and dividend ban), managers as well as the bank itself (for instance through the sale of assets and various cost reductions)."

[96] Lo Schiavo (2014) arguing that "burden sharing entails that the aid shall be limited to the minimum necessary and that the beneficiary undertakes the required level of 'own contribution' in order to receive the State aid".

[97] 2013 Banking Communication (point 45).

[98] Omran & Asimakopoulos (2021).

or senior creditors) have contributed to the losses before public intervention is permissible.[99]

There is, therefore, a difference in the sternness of using public fund in liquidation and resolution, with the former benefitting from a more relaxed approach.[100] This inconsistent approach deviates from the Financial Stability Board's Key Attributes on Effective Resolution Regimes[101] which emphasised the importance of the limited use of public funds which in any case should be subject to strict conditions that minimise the risk of moral hazard. At the same time, it cannot be justified in light of the different objectives pursued under the two regimes, with the state aid rules aiming at safeguarding competition and resolution aiming at protecting the financial stability, the depositors and investors. In fact, it is commonly accepted that this discrepancy creates incentives to opt for a public-funded liquidation instead of resolution in order to avoid the application of the bail-in tool and its ensuing onerous social and political repercussions.[102, 103] It also raises significant considerations with regard to the protection of the fundamental right to property as it will be explained in Chapter 3.

In addition to the above, there is also a misalignment in the use of the 'public interest' and 'financial stability' concepts. Under the state aid rules, the Commission uses the said concepts to determine whether it should authorise or deny state aid measures, as opposed to the SRB which considers 'financial stability' as the main component of the 'public interest' which, in turn, serves as a basis for deciding whether resolution or liquidation is more appropriate each time.

Two enlightening examples showing the contradictions which can arise by this misalignment are the Italian cases of Veneto Banca and Banca Popolare di Vicenza. The SRB put both banks under liquidation as it assessed that insolvency proceedings did not pose risks to the financial stability. By contrast, the Commission decided that liquidation threatens the financial stability and allowed the injection of public capital in order to preserve the latter. It is argued that the EU institutions controversially opted for a publicly

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[99] Hadjiemmanuil (2017) arguing that the 2013 Banking Communication "is framed in terms sufficiently flexible for enabling the approval of almost every conceivable solution by way of exception".

[100] Lastra, Russo, & Bodellini (2019), p. 18.

[101] FSB (2014): "Jurisdictions should have statutory or other policies in place so that authorities are not constrained to rely on public ownership or bail-out funds as a means of resolving firms. Where temporary sources of funding to maintain essential functions are needed to accomplish orderly resolution, the resolution authority or authority extending the temporary funding should make provision to recover any losses incurred (i) from shareholders and unsecured creditors subject to the "no creditor worse off than in liquidation" safeguard (see Key Attribute 5.2); or (ii) if necessary, from the financial system more widely."

[102] Deutsche Bank (2013): "Those member states which can afford to bail out their banks may be prone to do so, while the remaining countries will have to turn to bail-in procedures. Such a divergence may lead to funding flows to banks located in countries with stable public finances and disrupt the funding of the banks from the fi scally weaker countries".

[103] See also more generally Moloney (2014).

funded liquidation to avoid the stricter requirements of public intervention applicable under the resolution process.[104, 105, 106]

Overall, the misalignment in the state aid requirements between the liquidation and resolution processes creates 'loopholes' in the EU resolution framework, raises disturbing level playing considerations[107] also in view of the discrepancies in the national insolvency regimes, and poses obstacles to the consolidation of a genuine banking resolution 'culture' across the EU.

2.3.3. Lack of proper mentality to implement the resolution framework

Despite the regulatory changes in the field of banking resolution, the way the EU Institutions have dealt with unviable banks so far demonstrate that policymakers are not ready to implement the resolution framework and primarily the bail-in tool. It would not be an overstatement to say that there is a lack of true mentality and willingness to implement the framework which was established for the very purpose of avoiding government bail-outs of ailing banks. The choices made in two recent examples of Italian failing banks, these of Banca Carige[108] and Monte dei Paschi di Siena (MPS)[109] are evidence of this hesitation.[110] The banks were not subjected to the resolution regime and the bail-in tool but rather they were saved by the generous public intervention of the Italian

[104] Lastra, Russo, & Bodellini (2019), p. 13.

[105] It is worth referring to the words of Mauro Grande, an SRB Board Member, who observed that the lesson learnt from the Italian cases is that in practice "state aid is possible in liquidation but not in resolution" (see Grande (2018), p. 10).

[106] In relation to the two Italian banks cases, Andrea Enria (the Chair of the SSM with office term between 1 January 2019 – 31 December 2024) had pointed to the very high bar for resolution: "The decision that there was no EU public interest at stake in the crises of two ECB-supervised banks that were hoping to merge and operate in the same region with combined activities of around €60 billion sets the bar for resolution very high".

[107] The fact that some creditors may incur fewer losses in a liquidation scenario and thus end up being in a better-off situation as compared to resolution, even if the aggregate cost for the state is higher, leads to an unacceptable result. In addition, uneven playing filed situation arises also with regards the banks' funding costs (see IMF, Euro Area Policies: Financial System Stability Assessment, (2019)). Equally, the precedents of Veneto Banca and Banca Popolare di Vicenza in Italy on the one hand, and Banco Popolar in Spain on the other hand, show that, at a large extent, the SRB decisions also depend on policy decisions made by individual member states, not least on the provision of state aid to bank, as pointed by Véron (2019), p. 15. The Italian bank guarantee scheme was approved by the European Commission on 26 June 2016 (state aid decision: C(2016) 4095, available at: http://ec.europa.eu/competition/state_aid/cases/264903/264903_1952481_84_2.pdf).

[108] (Lannoo, 2019). The bank received a state guarantee on bonds of up to EUR 3 billion in January 2019.

[109] There was a partial bail-in of shareholders and junior bondholders, followed by a precautionary recapitalisation by state of EUR 5.4 bn. See Götz, Krahnen, & Tröger (2017) and Miglionico (2019) on the reasons why MPS should have been subject to bail in.

[110] Miglionico (2019) and Götz, Krahnen, & Tröger (2017).

state. This reluctance in applying the resolution tools also derive from the severe consequences that their use would entail and the ensuing political costs thereof.[111]

Arguably, there is a looming risk that such practices undermine the spirit of the BRRD/SRMR rules and ultimately the validity of this regime, with the ultimate result of laming essentially the second pillar of the EBU. It has been argued that this situation also "*sends worrying signals to market participants that there is no single European banking market with a single rule, but a variety of interpretations and procedures according to the circumstances*".[112]

2.3.4. Reflections

When considering the challenges described under Sections 2.3.1, 2.3.2 and 2.3.3 above, the effectiveness of the resolution framework reasonably becomes debatable. The IMF has put forward a number of policy suggestions to be adopted in order to transform the fragmented resolution regime into an effective one, serving the needs of a modern and efficient crisis management framework in Europe. Although such suggestions are not the focus of the present thesis, the author considers it useful to briefly mention few of them. In this regard, the IMF has highlighted the need to align the conditions and triggers of the resolution, state aid, and liquidation regimes; strengthen liquidity support before and in resolution; and enhance capacity to "pre-schedule resolution" to minimise incentives to 'escape' the resolution under the BRRD/SRMR framework.

In addition, the IMF emphasised the discrepancies found in the national legislation governing insolvency which can result in different outcomes and treatment of creditors depending on the jurisdiction where the procedure takes place. To avoid such undesirable consequences, the IMF recommended that the SRB should be assigned with an administrative bank liquidation tool, allowing the SRB to appoint a liquidator and commence proceedings.[113] The IMF also advocated restricting options which allow for more relaxed burden-sharing requirements under the 2013 Banking Communication. This approach, nonetheless, "should be balanced by the introduction of alternative flexibility, in the form of a financial stability exemption, under which departure from the 8 percent bail-in requirements for public support would be allowed at times of severe financial stability risk and subject to strict criteria and appropriate governance arrangements."[114] The IMF considers that such a flexibility option is necessary, given that the tools available under the current BRRD/SRMR framework allow for 'precautionary recapitalisation' as a form of flexibility, but only when the bank in question is solvent and they fail to grant flexibility

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[111] Sinn & Hau (2013), on the controversies surrounding the resolution framework and the shareholders' rights.

[112] Lannoo (2019), p. 12.

[113] IMF, Euro Area Policies: Financial System Stability Assessment, 2019, pp. 7, 27.

[114] *Ibid*, p. 7.

when it is really needed, that is during a system-wide crisis when banks are typically undercapitalised.

2.4. Missing bricks on the European Banking Union wall

Without being an overstatement, the EBU is an ambitious and historical evolution of the EU universe, which could be parallel to a giant's step towards the banking sector and the single market, but also towards establishing a new accountability framework for the actors (both national and supranational) involved in the EBU.[115] Despite the obvious benefits the EBU achieves, one cannot turn the blind eye to some weaknesses of the EBU, some missing bricks on the EBU wall which would be indispensable in order to robust the EBU and accordingly the banking system. The following weaknesses can be identified.

(a) Supervisory gaps in relation to SIs and LSIs: Given the two-tier system of banking supervision in the SSM universe which distinguishes between SIs and LSIs, it cannot be excluded that there will be a divergence in the supervisory practices between the Union and national supervisors. Such divergence could well lead to regulatory distortion, the weakening of the banking system and thus the inadvertent increase of destabilization risk in the banking sector.

(b) Competing competences within the SSM: Such competing competences, which may create tensions, concern the fact the NCAs are entitled to object to bank closures in cases in which the resolution process takes place on national level. Further competing competences are also created in the macro-prudential supervision where although the ECB is entitled to object to national decisions, it cannot prevent them.[116]

(c) SRM framework vulnerabilities: The application of resolution tools pursuant to the SRM framework, especially the application of the bail-in tool, may lead to the opposite results from the pursued ones, namely it can fuel large-scale deposit-runs, distrust in the banking system and thereby spread contingency and destabilise banks. In addition, the SRM resolution system could be seen as lacking credibility, considering the limited funds of the SRF (at least at the moment), the preservation of the bail-out option,[117] [118] the low bail-inable liabilities the banks possess in view of the losses they incurred during the global financial crises of 2008, and the granular way the bail-in tool is applied which creates a two-tier system with different criteria for the triggering of the injection of public funds.[119]

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[115] Elliott (2012).

[116] Deutsche Bank (2013).

[117] Sum (2016), pp. 119-126**.**

[118] Béranger & Scialom (2015), on p. 144, have argued that to render the protection of taxpayers by the SRM more convincing, additional penalties for bail-out would be necessary.

[119] See section 2.3.2. 'Misalignment in the requirements for public intervention under the state aid rules in the liquidation and resolution respectively' in Chapter 1.

It has further been argued that the risk of shifting the resolution costs of an ailing bank onto the taxpayers is intensified by the lack of ex-ante backstops which would enable early intervention and prevent bailout in the event of a systemic crisis at country level.[120]

(d) The EBU being lame: It is common ground that the EBU is lame in the sense that it lacks a pan-European deposit guarantee scheme. This may create competing incentives between the Union supervisors and the national deposit guarantee schemes. It should be acknowledged, however, that a pan-European deposit guarantee scheme presented extensive difficulties especially because it would require a deeper fiscal consolidation between the EU Member States and should be carefully designed so as it does not encroach with the "bail-out" prohibition under the TFEU.

3. *Quis custodes ipsos custodies*? Independence and accountability in the matrix of democracy.

3.1. Supervisory and resolution authorities ('financial authorities') as independent (administrative) bodies

Banking supervision and resolution authorities ('financial authorities') enjoy a substantial degree of independence both on national and on European level. Yet, the extent and content of their independence is not identical to the one granted to the ECB central banking under the EU primary law.[121] In order to better grasp the independence status[122] of the financial authorities, the present section will first examine the independence of the ECB as central bank. [123]

The guarantees of independence provided to the ECB[124] in its capacity as the central bank of the Union are very strong in terms of their legislative source, content and judicial protection of the independence of the ESCB Governors.[125] In particular, the ECB's independence is provided for on a Treaty level as it is enshrined in Article 130 of TFEU.[126] As regards the content of the independence, Article 130 establishes a double prohibition, i.e. that the ECB shall refrain from seeking or taking instructions from the Union institutions or bodies or from the government of any Member State, and *vice versa* that the Union institutions or bodies or any Member State's government shall respect this principle

[120] Béranger & Scialom (2015), p. 144.

[121] Mersch (2018), pp. 634-365.

[122] Iliadou (29 October 2002), p. 155.

[123] On the liability and immunity arrangements of central banks and financial supervisors see IMF (2018), p. 10.

[124] For a comment on the independence status of the ECB see: Amtenbrink & De Haan (2002).

[125] Mersch (2018), p. 5.

[126] Lastra, Wyplosz, Claeys, Domínguez-Jiménez, & Whelan (2020), p. 27.

and refrain from seeking to influence the ECB's decision-making bodies in the performance of their tasks.[127] Finally, as regard to the judicial protection of an NCB Governors' independence, Article 14.2 of the ESCB Statute establishes a legal remedy before the CJEU for a Governor who was dismissed from office contrary to requirements of Article 14.2.[128] Relevant in this regard is the *Rimšēvičs v Latvia* case in which the CJEU ruled that the Latvian government unfairly suspended the head of the country's central bank as there were no sufficient grounds or indications suggesting that he was engaged in serious misconduct for the purposes of Article 14.2. The CJEU also noted that "if it were possible to decide, without grounds, to relieve the governors of the national central banks from office, their independence and, by extension, that of the Governing Council of the ECB itself would be severely undermined".[129]

The independence of the central bank features four dimensions – (a) institutional and legal, (b) personal, (c) functional and operational, and (d) financial and organisational independence. All four dimensions aim to ensure that the decisions of the central bank will not be influenced by short-sighted political cycles which would render them ineffective and incredible.

(a) Institutional and legal dimension: the institutional independence requires that the central bank is free of any third-party influence regarding its structure, functioning, decision-making, and exercise of powers.[130] In addition, the legal dimension refers to the fact that the ECB enjoys its own legal personality and have locus standi before the CJEU. Accordingly, on a national level, the legal independence of the national central banks is reflected in their institutional setup which deviates from the traditional organisational architecture of public bodies. Namely, the central banks have a separate legal personality from the state and operate at arm's length from the government as they are not subject to

[127] Article 130 TFEU: "When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks". Article 130 is mirrored in Article 7 of the Statute of the ESCB.

[128] Judgment of the Court (Grand Chamber) of 26 February 2019, *Rimšēvičs v Latvia*, Joined Cases C-202/18 and C-238/18, ECLI:EU:C:2019:139 (Rimšēvičs case), paras. 48-49: "It is in order to guarantee the functional independence of the governors of the national central banks which, under Article 282(1) TFEU, comprise, together with the ECB, the ESCB, that Article 14.2 of the Statute of the ESCB and of the ECB sets the minimum length of their term of office at five years, provides that they may not be relieved from office unless they no longer fulfil the conditions required for the performance of their duties or if they have been guilty of serious misconduct, and establishes a legal remedy before the Court for the governor concerned and for the Council of Governors of the ECB against such a measure. By directly conferring jurisdiction on the Court to determine the lawfulness of the decision to relieve the governor of a national central bank from office, the Member States have demonstrated the importance which they attach to the independence of the holders of such positions".

[129] *Rimšēvičs* case, para.51.

[130] Mersch (2018), p. 631.

the hierarchical administrative control which typically extends to executive branches of the state.

(b) Personal dimension: personal independence means that the members of the ECB's decision-making bodies (and equally those of the NCBs) must be shielded from third parties influence when taking decisions. To achieve this, the ESCB Statute sets strict rules on the appointment and dismissal of the members of the ECB's Executive Board. Their office term lasts for eight years and only the CJEU can decide their dismissal on specific grounds related to their inability to perform their duties or their serious misconduct. Accordingly, the national law of the Member States should be compatible with the ESCB Statute and provide for a minimum five-year tenure the central bank's Governor,[131] so his/her mandate does not coincide with the electoral cycles.[132]

(c) Functional and operational: this dimension means that the ECB and the NCBs must enjoy all the necessary competencies, so they exercise their tasks autonomously and protected from political pressures. Indeed, the ESCB enjoys exclusive competence in exercising monetary policy in the euro area.

(d) Financial dimension: Article 282(3) TFEU establishes the financial independence of the ECB stating that the central bank is independent in the management of its finances. This encompasses budgetary autonomy and ensuring that the ECB has sufficient capital, staff, financial resources and income to pursue all its tasks independently.[133] In order to safeguard the financial independence of the ECB, the Governing Council, by a majority of two thirds of the votes cast, may exercise a *veto* power and prohibit an NCB from engaging in activities which interfere with the objectives and tasks of the ESCB.[134] Therefore, the NCBs cannot perform functions which could put under risk their ability (from a financial standpoint) to fulfil their ESCB tasks.

This short reference to the main pillars of the central banking independence paves the way to examine the financial authorities' status of independence. Starting from the resolution authority, the SRB is an EU agency whose operation is subject to the Meroni doctrine (principle of delegation of powers to agencies as interpreted by the CJEU). The independence of the SRB is enshrined in Article 47 SRMR which stipulates that: "when performing the tasks conferred on them by this Regulation, the Board and the national resolution authorities shall act independently and in the general interest".

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[131] Article 14.2 ESCB Statute.

[132] For instance, the Governor of Bank of Greece is appointed for a term of six years.

[133] The ECB has its own capital, which is paid up by the national Central Banks (Article 28 ESCB Statute) and other assets, including claims relating to the allocation of euro banknotes within the Eurosystem, securities held for monetary policy purposes, foreign reserves and other financial assets. The ECB's accounts are audited by independent external auditors recommended by the ECB and approved by the Council (Article 27.1 ESCB Statute) and the competence of the European Court of Auditors (ECA) is limited to examining the operational efficiency of the management of the ECB (Article 27.2 ESCB Statute).

[134] Article 14.2 ESCB Statute.

While it is clear that the SRB is established as an EU agency and thus its independence is not set on a Treaty level, the case of the SSM presents peculiarities owing to its hybrid nature. From a functional perspective, the SSM's Supervisory Board is akin to the structure of an EU agency. However, from a legal perspective the SSM features characteristics of an EU Institution as it is established on a constitutional level, i.e. under the Treaty[135] and is situated within the setup of the ECB. The tasks and functions of banking supervision are conferred under secondary legislation. In light of this hybrid nature and also of the concerns related to the potential democratic deficit raised on account of the extensive independence and powers that unelected public authorities (central banks,[136] supervisory and resolution authorities) enjoy,[137] it is argued that the scope of independence enjoyed by the ECB central banking "should be interpreted narrowly and may not be automatically extended to other policy areas".[138] Therefore, tasks and functions conferred on the ECB by secondary legislation do not fall within the scope of the principle of independence in Article 130 of the Treaty, and the four features of Central Bank independence applicable to the ECB as a monetary authority are not applicable *per se*. This stance is also supported in view of the different mandates for monetary policy and micro-prudential supervision assigned to the ECB which can justify the different intensity of independence between separate function of the same institution. [139]

The independence of the ECB banking supervision is enshrined in Article 19 of the SSMR, which does not replicate Article 130 TFEU, but states that when "carrying out the tasks conferred on it by this Regulation, the ECB and the national competent authorities acting within the SSM shall act independently. The members of the Supervisory Board and the steering committee shall act independently and objectively in the interest of the Union as a whole and shall neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or from any other public or private body. The institutions, bodies, offices and agencies of the Union and the governments of the Member States and any other bodies shall respect that independence".[140] Article 19 is read in conjunction with recital 75 of the SSMR which provides that: "[i]n order to carry out its supervisory tasks effectively, the ECB should exercise the supervisory tasks conferred on it in full independence, in particular free from undue political influence and from industry

[135] Article 127(6) and 114 TFEU.

[136] Especially the ECB as central bank which enjoys both instrument and goal independence – see inter alia: De Haan & Eijffinger (2000), p. 395.

[137] As it will be discussed under Section 4.2 in Chapter 1.

[138] Mersch (2018), p. 633, see also Lamandini & Muñoz (April 2020), p. 18, arguing that because of the SSM's hybrid nature it is questionable the conceptual appropriateness of an automatic extension of the specific provisions on access to documents enshrined in Decision/2004/3 beyond the monetary policy context, to embrace also banking supervision. For the latter, the principles and rules set out in Regulation 1049/2001 may prove more suitable, also to avoid undesirable mismatches with the SRM.

[139] Mersch (2018), p. 642. While monetary policy would aim to guarantee price stability, macroprudential policy aims to ensure financial stability.

[140] Mersch (2018), p. 635.

interference which would affect its operational independence". Focusing on the pillars of independence of the central bank which present a different nuance when it comes to the banking supervisor, the following can be highlighted.

First, as regards the **institutional dimension**, in contrast to Article 130 TFEU, Recital 75 gives emphasis to the undue political influence coming from private industry interferences which are less relevant for the monetary policy tasks. Therefore, the types of influences that can affect the supervisor compared to the central bank are different. Moreover, Articles 19 and 26(1) of the SSMR require that the Supervisory Board and the steering committee of the ECB act independently from EU Institutions and bodies and from national governments in the interest of the Union as a whole. However, Article 19 does not expressly prohibit the ECB and the NCBs from taking instructions during the performance of their supervisory tasks. This is due to the fact that in some Member States the NCAs are bound by the instructions of the respective ministries,[141] which needed to be reflected in Article 19 SSMR. [142] All these justify the less intense independence granted to the supervisor from an institutional perspective enshrined in the secondary legislation and not in the primary EU law. The reasons why the ECB banking supervision is not shielded with the strong independence guarantees of Article 130 can be better understood when considering and comparing the tasks of the banking supervisor with those of the central bank. In particular, the ECB's supervisory arm does not have fully automomous regulatory and decision-making powers[143] as it is the case for the ECB central banking in relation to its monetary policy tasks. The ECB, as supervisor, enjoys certain discretion but only within the limits conferred to it by the EU law, the national law transposing EU Directives[144] and the binding regulatory and technical standards (RTS and ITS) developed by the EBA and adopted by the Commission following endorsement.[145] Therefore, the supervisor does not need the high level of protection from external influence afforded under Article 130 as it is not a policymaker.

As regards the **personal independence**, this is limited to the Chair, Vice-Chair and the ECB representatives,[146] and is not extended to all the members of the ECB's Supervisory

[141] E.g., the German supervisory authority BaFin (*Bundesanstalt für Finanzdienstleistungsaufsicht*) is subject to instructions from the Ministry of Finance.

[142] Smaghi (2006).

[143] See Judgment of the Court (Grand Chamber) of 16 June 2015, *Peter Gauweiler and Others v Deutscher Bundestag* C-62/14. Request for a preliminary ruling from the Bundesverfassungsgericht (*OMT* case), para. 75.

[144] See Article 4(3) of the SSM Regulation.

[145] See Article 21(4) of Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

[146] The rules for the ECB representatives in the Supervisory Board are not set out in the SSM Regulation but in the ECB Decision on the appointment of representatives of the ECB to the Supervisory Board (ECB/2014/4), which defines a non-renewable term of office of five years (Article 1(2)) and lists the two specific cases under which they can be dismissed from office by the appointing authority (the ECB's Governing Council). Article

Board. Unlike the members of the Executive Board of the ECB as central bank, the members of the Supervisory Board's minimum term of office is not protected under the law, and there are no limits on the grounds for their dismissal by the appointing authority (except for specific rules regarding the SSM Chair).[147]

In contrast to the above, the ECB as a supervisor still enjoys a high degree of **operational**[148] and **financial** independence. Especially regarding the latter, Article 28 SSMR requires the ECB to provide the necessary financial resources to carry out its supervisory tasks, whereas Article 30 SSMR empowers the ECB to levy fees on credit institutions to cover its expenditure on supervision. The fees are imposed on credit institutions by virtue of Article 30[149] of the SSMR read in conjunction with Recitals 77[150] and 78.[151] The arrangements for the calculation of the supervisory fees are outlined in in its Regulation No 1163/2014 of 22 October 2014 on supervisory fees (ECB/2014/41).[152] Article 5(2) provides that: "*[u]nder Article 5(2) of said regulation 2. The amount of the annual costs shall be determined on the basis of the amount of the annual expenditure consisting of any expenses incurred by the ECB in the relevant fee period that are directly*

26(3) and (4) of the SSMR provide for complex procedures with regard to the appointment and the removal of the Chair and Vice-Chair of the Supervisory Board.

[147] The Chair has a non-renewable term of office of five years (Article 26(3) of the SSM Regulation) and may be dismissed from office following a special procedure by the appointing body (the Council) only in two specifically listed cases (Article 26(4) of the SSM Regulation).

[148] The Basel Core Principles (BCP) for Effective Banking Supervision, first issued in 1997, was the first official document to stress the importance of operational independence for bank supervisory authorities.

[149] Article 30(1) and (2): 1. The ECB shall levy an annual supervisory fee on credit institutions established in the participating Member States and branches established in a participating Member State by a credit institution established in a non-participating Member State. The fees shall cover expenditure incurred by the ECB in relation to the tasks conferred on it under Articles 4 to 6 of this Regulation. These fees shall not exceed the expenditure relating to these tasks. 2. The amount of the fee levied on a credit institution or branch shall be calculated in accordance with the arrangements established, and published in advance, by the ECB.

[150] Recital 77: In order to carry out its supervisory tasks effectively, the ECB should dispose of adequate resources. Those resources should be obtained in a way that ensures the ECB's independence from undue influences by national competent authorities and market participants, and separation between monetary policy and supervisory tasks. The costs of supervision should be borne by the entities subject to it. Therefore, the exercise of supervisory tasks by the ECB should be financed by annual fees charged to credit institutions established in the participating Member States. It should also be able to levy fees on branches established in a participating Member State by a credit institution established in a non-participating Member State to cover the expenditure incurred by the ECB when carrying out its tasks as a host supervisor over these branches. In the case a credit institution or a branch is supervised on a consolidated basis, the fee should be levied on the highest level of a credit institution within the involved group with establishment in participating Member States. The calculation of the fees should exclude any subsidiaries established in non- participating Member States

[151] Recital 78: Where a credit institution is included in supervision on a consolidated basis, the fee should be calculated at the highest level of consolidation within participating Member States and allocated to the credit institutions established in a participating Member State and included in the supervision on a consolidated basis, based on objective criteria relating to the importance and risk profile, including the risk weighted assets.

[152] Regulation (EU) No 1163/2014 of the European Central Bank of 22 October 2014 on supervisory fees (ECB/2014/41) OJ L 311, 31.10.2014, p. 23–31.

or indirectly related to its supervisory tasks". Both provisions aim at ensuring the financial independence of the supervisory arm of the ECB so that both its autonomy and operational independence are not undermined.

3.2. Counterbalancing independence by accountability and transparency. Definition and categories of accountability.

There are several grounds justifying the separation of the supervision and resolution powers from the state core and the transfer of these competences to independent authorities.[153] First and foremost, independence is not an end in itself, rather its purpose is to shield the financial authorities from short-sighted political cycles which could influence the financial authorities' decisions and thus undermine the effective and credible performance of their tasks.[154] Another important reason is the severe impact that the decisions of the financial authorities frequently have on the supervised banks as well as on the depositors. The severe interference in economic life that a supervisory decision may entail, would result in political cost which the elected governments would try to avoid. However, the independence is not absolute and must not be understood as isolation from the democratically elected institutions. As it is discussed below, the financial authorities do not, and should not, operate outside the constitutional checks and balances acting like an "unelected fourth branch of government".[155]

In democratic societies premised on the rule of law, the delegation of public powers to independent authorities is permissible provided that these authorities enjoy democratic legitimacy.[156] Yet, public authority granted to the financial authorities may not be

[153] Banking supervision independence has a prominent place in the 2012 list of Core principles of effective banking supervision of the (Basel Committee on Banking Supervision (2012)). The IMF has also published a stream of research papers providing theoretical and empirical support; in this regard see Quintyn & Taylor (2002); Masciandaro, Quintyn, & Taylor (June 2008); Viñals et al. (2010). However, recent IMF data show that supervisory compliance with the independence provisions warrants further enhancement; Adrian & Narain (2019). Academic literature advocates banking supervision independence, in this regard see (by means of a mere indication) Lastra (1998).

[154] On the central banking independence with regards the monetary policy see paras. 150 and 155 of the Opinion of Advocate General Jacobs in Judgment of the Court of 10 July 2003, *Commission v ECB*, C-11/00, EU:C:2003:395 (*OLAF* case). Advocate General Jacobs, in his opinion in *OLAF* judgment, cited economic literature and the perseverance of price stability constitutes the primary argument in favour of an independent monetary authority as 'governments are tempted to create money for their own ends and in order to produce economic benefits in the short term, which eventually leads to an increase in the rate of inflation.' The Advocate General Jacobs concluded by referring to the following remarks of the cited literature: '[t]heoretical considerations on the relationship between Central Bank independence and the rate of inflation are backed by empirical evidence. On the basis of comparisons of the degree of independence of Central Banks and the inflation record of the respective country a negative correlation between the degree of independence and the inflation record has been generally acknowledged'; Alesina & Summers (1993), p. 159; Amtenbrink (1999), pp. 11-17, 23-26; Cukierman, Webb, & Neyapti (1992).

[155] Giandomenico (1993).

[156] See Goodhart & Lastra (2017) who wrote: "Legitimacy in turn is rooted in the concept of sovereignty.(…) Of course, societal legitimacy can be fickle since public acceptance is also influenced by politics, the media, current events, changes in circumstances, sentiment, and other factors. In any case, when societal legitimacy weakens or is no longer present, the law is bound to change."

considered in line – at least *prima facie* – with the requirements of such legitimacy given that their institutional setup, as the resultant of their independence, breaks the chain of scrutiny and oversight over the financial authorities by the democratically elected parliament via the government.[157]

However, the 'legitimisation deficit' of the financial authorities is solved mainly on two levels. On a first level, financial authority's democratic legitimacy finds its roots in the law, namely it is achieved via a democratic act[158] which serves as the legal foundation for the establishment of the independent authority and delimitation of its mandate.[159] However, the significant public power delegated to the independent financial authorities coupled with the wide discretion that they enjoy may be perceived as creating a democratic deficit. Hence, the law itself is not sufficient to legitimise on a continuous basis the exercise of powers delegated to such authorities.[160] Instead a further layer of legitimisation[161] is required. This second layer is achieved via accountability mechanisms,[162] which possess a distinct role in democratic societies.[163] Similar to the philosophical debate that freedom should go hand in hand with responsibility, independence and power conferred to any authority must be countervailed by accountability.[164] Via accountability, the Financial authorities are able to 'communicate' and explain to the general public the pursuit of its mandate.[165] In the context of supervision and resolution, accountability serves a number of purposes, that is it a) ensures the monitoring and control of the supervisory and resolution function; b) maintains and bolsters democratic legitimacy; b) can prevent the abuse of supervisory power and c) can improve the effectiveness of supervision and resolution by creating incentives for the financial authorities to perform lawfully and diligently their

[157] Iliadou (2010), p. 191; Vlachopoulos (1999), p. 23.

[158] An act of the legislator, a constitutional decision, or a treaty provision like in the case of the ECB.

[159] Lastra (2004); Zilioli (2003).

[160] Lastra, Wyplosz, Claeys, Domínguez-Jiménez, & Whelan (2020), p. 16.

[161] de Boer & van 't Klooster (2020).

[162] *Ibid*; ECB, Monthly Bulletin (November 2002).

[163] Issing (1999); Padoa-Schioppa (2000).

[164] Lastra, Wyplosz, Claeys, Domínguez-Jiménez, & Whelan (2020), p. 14; Amtenbrink & Lastra (2008), p. 121.

[165] Hüpkes, Quintyn, & Taylor (2005), pp. 7-8, who argue that "accountability arrangements provide a public forum in which different stakeholder groups can make representations about agency policies. By creating opportunities for transparent and structured public influence, the incentives for private influence are reduced. Accountability can help transform public understanding into reputation. A strong public reputation for competency, probity, and integrity can help translate a formal grant of independence into the ability to take decisions in the face of strong opposition from vested interests. An agency with a strong reputation is more likely to be trusted by the public and, thus, given the "benefit of the doubt" in controversial cases. Once it has been accepted that accountability generates legitimacy, and legitimacy supports independence, it becomes clear that the relationship between accountability and independence does not imply a trade-off, but is one of complementarities".

duties.[166,167] Legitimacy, therefore, requires the design of accountability mechanisms,[168] which are properly structured. Poorly structured accountability arrangements weaken the financial authorities' legitimacy and as a result intensify the lingering uneasiness towards the independence of the financial authorities from a constitutional perspective.

Accountability could be defined as the obligation of a person (the accountable) to give account, i.e. explain and justify its actions to another person (the accountee[169]), and take responsibility for any fault or damage its actions may have caused.[170] It is important to note that the account is given against certain criteria.[171] In other words, the financial authorities' actions must be assessed against certain objectives or standards which delimit the exercise of public authority delegated to them and specify the particular supervisory and resolution goals to be achieved. Given the complex nature of the financial authorities' duties, setting clear standards of conduct and supervisory/resolution objectives under the law is a hard

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166 Hüpkes, Quintyn, & Taylor (2005), p. 6.

167 The literature on the accountability of the SSM and SRM is extensive, see inter alia: Ter Kuile, Wissink, & Bovenschen (2015); Maricut- Akbik (2020); Smits (2019a); Fromage & Ibrido (2019); Leino-Sandberg (2019); Smits (2019b); Amtenbrink & van Duin (2009); Fromage (2019), p. 48; Amtenbrink (2019); Nicolaides (2019); Fraccaroli, Giovannini, & Jamet (2018); Amtenbrink & Markakis (December 2017); Zilioli (2016), p. 176. Less recent literature sources addressing accountability of financial supervisory authorities still highlights the necessity for supervisory accountability/ In this regard see: Lastra & Shams (2001); Amtenbrink & Lastra (2008); Dijkstra (2010); Hüpkes, Quintyn, & Taylor (2005); As discussed in this Chapter, accountability mechanisms already in place for monetary policy authorities cannot be applied *en bloc* to financial supervisors. In this regard see *inter alia* Amtenbrink (1999)*;* de Haan & Eijffinger (2000); Zilioli & Selmayr (2000).

168 Lastra, Wyplosz, Claeys, Domínguez-Jiménez, & Whelan (2020). p. 14.

169 In its 2000 Codes of Good Practice on Transparency (Section IV), the IMF points that: "[o]fficials of the central bank should be available to appear before a designated public authority to report on the conduct of monetary policy, explain the policy objective(s) of their institution, describe their performance in achieving their objective(s), and, as appropriate, exchange views on the state of the economy and the financial system." The IMF's approach was preceded by the UK House of Commons Treasury Committee which examined in 1997 the best possible approach to hold the Monetary Policy Committee to account. The Treasury Committee and concluded in this respect that: "(...) by bringing information into the public domain we can help clarify the thinking and actions of those responsible for the formulation and delivery of monetary policy and the rigorous scrutiny of the basis for policy decisions will enhance the credibility and effectiveness of the monetary framework as a whole." In the context of this examination "The Parliamentary Accountability of the Bank of England", was ordered by the House of Commons to be printed, 23 October 1997, House of Commons, Session 1997-98, HC 282.

170 For the definition and concept of accountability – by means of mere indication – see: Amtenbrink & Lastra (2008), p. 120; Lastra & Shams (2001), p. 165; Lastra (2003); Bovens (2010), pp. 947-948; Bovens (2007), p. 448, Basel Committee on Banking Supervision (2015), pp. 2, 25-34.

171 The Oxford English Dictionary defines accountability as "obliged to give a reckoning or explanation for one's actions; responsibility." Responsibility is defined as "legally or morally obliged to take care of something or to carry out a duty; liable to be blamed for loss or failure." See also Lastra, Wyplosz, Claeys, Domínguez-Jiménez, & Whelan (2020), p. 11; De Haan & Eijffinger (2000), p. 5. According to Bank for International Settlements (2009), accountability features three main characteristics: (i) scrutiny by others; (ii) regular accounting for one's actions; and (iii) the risk of negative repercussions, if performance is considered unsatisfactory; whereas Bovens (2007) defines accountability as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment and the actor may face consequences".

task. Definitely, the more specific the obligations are, the more effective the exercise of supervision or resolution can be.

Accountability though must not be perceived as merely another word for control. The two concepts are different. Accountability does not entail a simple vertical relationship between the principal (the authority which delegated its power) and the agent (the authority receiving the delegated power) which could only ask the question whether the agent fulfilled its obligations under the 'delegation contract'. By contrast to control, accountability is a network of complementary and overlapping checking mechanisms,[172] in other words "accountability is established through a combination of control instruments in such a way that no one controls the independent agency, yet the agency is 'under control'".[173]

As regards independence and accountability, the relationship between them could be seen as two weights on the opposite sides of a scale. A delicate balance should be achieved between them bearing in mind that too much independence may lead to the constitutionally unacceptable result of a 'state within the state'.[174] On the other hand, too much accountability stripes the financial authority off its independence guarantees and exposes it to third-party influence, mainly the governmental influence.

3.3.Typology of accountability

Depending on the criteria and/or mechanisms used, the literature classifies accountability into different categories.[175] Based on the time criterion, accountability is distinguished in ***ex ante*** and ***ex post***. *Ex ante* accountability is exercised before a decision is taken,[176] whereas *ex post* accountability refers to giving account after a decision is adopted.[177] Based on the content of the obligation to give account to the accountee, we can identify two types of accountability; the **explanatory** and the **amendatory**. The first refers to the duty of the financial authorities to explain their actions, while the second refers to their duty to compensate aggrieved parties for damages caused by their actions.[178] A further nuance in the accountability categories is the distinction between **procedural and substantive** accountability. The former examines whether the financial authority followed the due process rules when taking a decision/action, whereas the latter aims at ensuring that the

[172] Giandomenico (1994).

[173] Terry (1987).

[174] Lastra & Shams (2001).

[175] For a detailed mapping of the possible accountability arrangements see Hüpkes, Quintyn, & Taylor (2005).

[176] e.g., consultation with the stakeholders before the adoption of a supervisory policy.

[177] e.g., the submission of annual reports to parliament.

[178] As it will be discussed in Chapter 4, many central banks have immunity from liability in damages in carrying out their functions provided that they are acting in good faith (see Section 244 of the Banking Act 2009 for the Bank of England).

supervisory actions are justifiable in view of the objectives pursued. **Personal** accountability involves the discharge of responsibilities delegated to individuals (e.g., the head of the financial authority), and finally **performance** accountability refers to the extent to which (measurable) objectives and criteria are met.[179]

The most well-known typology of accountability is the one provided by Hüpkes who uses the criterion "whom the financial authority is accountable to". Based on that, we can identify five types of accountability: (i) parliamentary, (ii) ministerial, (iii) market-based, (iv) financial and (v) judicial. The judicial accountability is twofold as it can take the form of the *judicial review* of the administrative acts of the financial authorities and/or *civil liability* for damages caused by the financial authorities' acts or omissions in the exercise of their delegated supervisory/resolution powers.[180] These types are analysed separately below.

3.3.1. Parliamentary Accountability

Parliamentary accountability is a form of *ex post* accountability. It is exercised by the democratically elected legislator, who is the delegating principal, over the financial authority, which is the 'delegatee'/agent. The purpose of this control is not to interfere with the financial authority's powers and influence its decisions. Rather, the relationship to the legislature aims at examining whether the financial authority fulfils its mandate enshrined in the laws as promulgated by the parliament. Further, the purpose of the parliament's scrutiny is to assess whether the powers that it delegated to the financial authority are exercised effectively and also importantly whether they are suitable to achieve the objectives pursued. It is highlighted that the dialogue between the financial authority and the parliament and the ensuing flow of information is very important as it enables the authorities to communicate to the legislator problems or inefficiencies in the supervisory and resolution practices which the legislator could improve *via* legislative amendments. Parliamentary control is generally exercised through arrangements which include submission of annual reports to and appearances of the financial authorities' representatives in the parliament. [181]

3.3.2. Ministerial accountability

The executive branch of the State bears the ultimate responsibility of the development of financial policies; thus, it is important that the financial authorities are subject to accountability instruments towards the government. The vertical relationship between the financial authority and the executive branch is catered through the ministerial accountability which can take a number of forms. In most jurisdictions, the government or by the head of the state upon the recommendation of the government or the finance minister appoints the Head of the financial authority. Another reflection of the ministerial

[179] Hüpkes, Quintyn, & Taylor (2005), p. 20.

[180] Athanassiou (2011), p. 7.

[181] Hüpkes, Quintyn, & Taylor (2005), pp. 21-23; Athanassiou (2011), p. 7.

accountability is the exercise of oversight authority of the finance ministry over the manner in which delegated supervisory powers are exercised.[182]

3.3.3. Market-based accountability

Another (non-legal) nuance of financial authorities' accountability, which is more relevant for the supervisory authorities, is the one towards the supervised entities and the depositors. Market-based accountability[183] is ensured mainly through two arrangements, i.e. transparency and participation. Supervisory disclosures[184] and public consultations are the means of ensuring transparency of the supervisory decisions and practices.[185] Transparency enhances public confidence in the financial supervisor and 'urges' the supervisor to exercise its duties with due diligence.[186] Transparency and accountability could be seen as two concepts mutually enforcing each other, which both require the sharing of information.

Further, the supervisor should have arrangements in place to cater for involving stakeholders' representatives mainly in the supervisory regulatory process. Although dialogue with the stakeholders is important for developing an efficient and effective supervision, it should remain balanced, so it does not lead to the phenomenon known as "regulatory capture". The economic theory of regulatory capture argues that regulatory agencies may cease to serve the public interest because they come to be dominated by the interests they regulate. In the field of supervision, this phenomenon is translated into a supervisory conduct which protects the interests of the supervised institutions at the detriment of the financial stability and the investors/depositors.

3.3.4. Financial accountability

Rendering account of activities is also achieved via the financial accountability instrument which entails that the financial authority's financial accounts and balance sheets are subject to scrutiny by internal audit committees and external independent auditors. This is a form of explanatory accountability which allows the accountee to ensure that the financial authority spends public money in a wise and prudent manner in the pursuit of their objectives.

3.3.5. Judicial accountability

The purest form of accountability, from a legal standpoint, is the one exercised by the courts. The principle of the *état de droit* requires that parties that have been affected by the

[182] *Inter alia* through the participation of ministerial representatives in the supervisor's Board (see Athanassiou, (2011), p. 7.

[183] Lastra, Wyplosz, Claeys, Domínguez-Jiménez, & Whelan (2020), p. 13.

[184] e.g. reports on supervisory practices, general publications hosted by supervisors' websites, press conferences or the publication of the outcomes of regulatory and/or administrative decision-making.

[185] See Articles 4(3) and 30(2) SSMR.

[186] On transparency and information disclosure see also Gandrud & Hallerberg (2015).

actions of the financial authorities should be able to seek redress in the courts. The judicial scrutiny of the agency's actions and decisions (conducted by an independent and de-politicised judiciary) is a cornerstone of the financial authorities' accountability arraignments and is essential to prevent and control the arbitrary and unreasonable exercise of discretionary powers. "The discretion of public officials should never be unfettered but subject to legal control." [187]

As mentioned before, judicial accountability can take two forms. The first is the *judicial review* of the financial authorities' administrative acts which focuses on ensuring compliance with the due process requirements[188] and the legality of the financial authority's decisions. In cases in which the financial authority enjoys broad discretion, the courts' review is limited in examining whether the financial authority exercised its powers within the limits of its discretion and in compliance with the principle of proportionality. Given also the complexity of the nature of their duties, the courts exercise restraint and examine only whether the technical choices of the financial authority are manifestly illegal or manifestly disproportionate.[189] The second form is the *civil liability* for damages arising on account of the financial authorities' acts or omissions in the exercise of their duties. If through the judicial accountability control it is deemed that the financial authority is liable for the damage it caused, it must make good for it to the aggrieved party. However, the scope of the financial authority's liability is limited in many respects.[190] Both forms of judicial accountability should be time-barred so the financial authority's work does not become ineffective.

3.4. European administrative space and global administrative law

Before turning to examining the accountability arrangements for the ECB and SRB, it is worth shedding some light on the concept of 'European administrative space'[191] which comprises of general administrative law principles deriving from the national legal orders

[187] Lastra & Shams (2001). That the ECB is subject to judicial control by the Court of Justice of the European Union (CJEU) is uncontentious. The ECB's decisions and the acts preparatory to them can only be challenged in front of the CJEU according to Article 263 TFEU and Article 35 of the Statute of the ESCB, which gives exclusive jurisdiction to the CJEU to review the legality of the ECB's acts and decisions. However, in the USA, monetary policy decisions are thought not be justiciable (though supervisory and other decisions are).

[188] Hüpkes, Quintyn, & Taylor (2005), pp. 26-27, note that: "Natural justice requires that the [resolution and supervisory authorities] must observe a number of due-process requirements when it takes decisions affecting individuals or companies, such as issuing or withdrawing licenses and imposing sanctions. These requirements include, for instance, that notice be given of the proposed action and reasons; the parties be given access to the material on which the authority relies in taking the decision and be afforded an opportunity to make representations. Once a formal decision has been taken, the party to whom the decision is addressed must be informed of his or her legal remedies. The purpose of these requirements is to ensure that the procedure be as transparent as possible and that it results in a fair and just decision".

[189] Discussed in detail in Chapter 2.

[190] For the arguments for and against limiting financial authorities' liability see the discussion in Chapter 1, Section 5.

[191] Kingsbury, Krisch, & Stewart (2005), p. 24.

of the Member States. These general national administrative law rules have inspired the case-law of the CJEU and effectively underpin the non-contractual liability arrangements of the EU financial authorities The European administrative space could be seen as a sophisticated manifestation of the 'global administrative space' built upon global administrative law rules.

Global administrative law can be defined as the set of legal rules, concepts, and norms that apply to systems of 'administration'.[192] The concept of global administrative law emerged recently in the early 21st century due to the increasing use of administrative law mechanisms,[193] on a supra-national level. These mechanisms mainly pertain to transparency in decision-making, participation of the public, and accountability of the decision-makers, which are also present in the European administrative space. This increasing use of administrative law mechanisms is explained in view of an emerging 'global administration' created due to the fact that many responsibilities and competences that used to be vested with the states and national governments in the past, have now been transferred on a supra-national level and are exercised by international actors in what could be called as a "global administrative space".[194] Prime examples of this are the IMF, the World Trade Organisation ("WTO"), the United Nations Organisation ("UNO"), the World Health Organisation ("WHO") and the European Union which admittedly is the most sophisticated supra-national legal order.

The transfer of such competences entails that the decision-making is also taking place in the global administrative arena. Albeit being of international nature, global administration may fundamentally affect individuals' rights on a national level, and most importantly can shrink national sovereignty and autonomy of decision-making on a national level. This, in turn, questions the upholding of the democratic principle in national jurisdictions in the sense that the direct chain between the will of people as electorates and the decision-makers is not present in the global administration. The same concerns are present also in the European administrative space and have repeatedly been raised before the German Constitutional court in ample of cases in which the German court examined the compatibility of EU measures with the principle of conferral having and the democratic principle.[195]

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[192] *Ibid.*

[193] *Ibid.*

[194] *Ibid.*

[195] The German Constitutional Court has referred to the German *Grundnorm* and the democratic principle in the *Lisbon* judgment (BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -, paras. 1-421) and *Honeywell* judgement (BVerfG, 6 July 2010, 2 BvR 2661/06, NJW 2010, 3422-30). While in these judgments the German Constitutional Court explained how the constitutional democratic principle can be reconciliated with the European integration endeavour, the court surprisingly departed from this case-law and in its unprecedented *Weiss* judgment (BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 and others). The German Constitutional Court held that the CJEU had acted *ultra vires* as it did not apply the proportionality test correctly and thus it was entitled to depart from the latter's judgment. In doing so the German Constitutional Court held that the ECB's PSPP programme was legally flawed as it did not consider

Global administrative law includes both substantive and procedural rules, which find their sources in the general rules of international law, national administrative law and national public law.[196] The global administrative law effectively draws together principles of different areas of law that pertain to global administration to lay down the legal framework governing said global administration.[197] This framework follows a system of 'checks and balances' where principles such as due process or the principle of legality which requires the decision-makers not to act outside the scope of the powers allotted to them, i.e., not to act *ultra vires*, are key components of the global administrative law.

As the EU is a prime example of an international actor in the global administrative space, it comes as no surprise that such principles of the global administrative law are also present in the EU law and the case-law of the CJEU. Principles deriving from the national laws of the Member States have been extended to and applied on the EU level. The EU law and the case-law of the CJEU provide ample of evidence of such influence regarding both procedural (due process, reasoned decisions[198] [199]) and substantive rules (fundamental rights, principle of legality, principle of proportionality), in what could be seen as the European administrative space.[200] [201] The European administrative space is predominantly "administrative and not constitutional",[202] although the European integration has clear constitutional effects on the national jurisdictions of the Member States.

The European accountability mechanisms as well as the liability standard for the ECB and the SRB have been influenced by the respective rules in place in the Member States for the national financial authorities. This influence will be made clear in Chapter 4 herein where the non-contractually liability regime of some of the Member States will be discussed.

3.5. Accountability arrangements for the ECB (SSM) and SRB

Bolstering EU financial integration by means of establishing the SSM and SRM, came along with the constitutional demand of creating the necessary accountability arrangements

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the full economic consequences it could entail. The German Constitutional Court employed for the first time the theory of the 'constitutional identity' of Germany which derives from the continuing 'popular sovereignty' of the German people. Such 'popular sovereignty' is expressed only by the German Parliament (Bundestag) and it "cannot be delegated, shared or exercised in common with other nations" (see Eleftheriadis (2020)); see also Anagnostaras (2021)).

[196] Kingsbury, Krisch, & Stewart (2005), p. 29.

[197] Harlow (2006), p. 193.

[198] Judgment of the Court of 15 October 1987, *UNECTEF v Heylens*, 222/86, ECLI:EU:C:1987:442. The duty to give reasons is imposed by the EC Treaty in TEC Article 253 (ex 190).

[199] Judgment of the Court of 15 May 1986, *Johnston v Royal Ulster Constabulary*, 222/84, ECLI:EU:C:1986:206.

[200] Kingsbury, Krisch, & Stewart (2005), p. 24.

[201] Shapiro (2001).

[202] Craig (2015), p. 407.

for both mechanisms. The present section will focus on some key aspects of the accountability of the ECB and the SRB, before turning to the specific accountability arrangements set for ECB and SRB under the Union law.

3.5.1. Key aspects of the ECB's accountability as single supervisor

Historically, accountability has been seen as a key component[203] of the ECB which has acknowledged that "in modern democracies, independent institutions bestowed with a public function must be held accountable for their actions. Therefore, the high degree of independence granted to the ECB goes hand in hand with well-defined ways of holding the latter accountable",[204] and that 'first and foremost, [accountability] is understood as an obligation vis-a-vis the "political order" prevailing within the EU and as a crucial cornerstone of the legitimacy of the ECB and its policies'.[205] The ECB has pointed that the 'notion of "being accountable"' means to be 'held responsible for one's decisions and being required to justify and explain them.'

As explained under Section 4.1 above, the independence of the supervisor[206] is not identical to the central banks' independence. Equally, accountability arrangements set for the monetary policy authorities are not entirely suitable to be applied *per se* to the banking supervisor given the differences between them. Thus, before analysing the specific accountability arrangements established for the European single supervisor, it is worth mentioning the different nuances in the banking supervision tasks as opposed to those of monetary policy which influence the accountability arrangements for the supervisor compared to the monetary policy authority.

The first and most important difference is identified in the mandates and objectives pursued by the monetary policy authorities and the SSM respectively. There is a **plurality of objectives** that the SSM needs to pursue as opposed to the monetary policy authority which predominantly pursue price stability. Multiple objectives inevitably require a prioritisation and weighing of the various responsibilities of the supervisor which in many cases is involute. In addition, it is inherently very hard to **measure the performance** of the SSM against its objectives, i.e., to measure whether and to what extent the supervisors attains its goals,[207] bearing also in mind the degree of discretion that the supervisory authority have

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[203] Scheller (2006), p. 125 et seq. See also Delors (17 April 1989), p. 22, which referred to 'accountability' and 'independence' as the two main features of the ECB's status.

[204] European Central Bank, 'The Accountability of the ECB', Monthly Bulletin (2002), available at: https://www.ecb.europa.eu/pub/pdf/other/pp45_57_mb200211en.pdf, p. 45–57.

[205] *Ibid*, p. 45.

[206] On independence of supervisory authorities see reports of the European Supervisory Authorities: European Securities and Markets (2021); European Banking Authority (2021); European Insurance and Occupational Pensions Authority (2021).

[207] Goodhart (2001) argues that "it is difficult to come to any other conclusion except that the achievement of the objectives that have been set for the FSA [the British supervisor] are non-operational in the sense that no measurement of success can be achieved. Accountability in terms of these objectives is effectively impossible (p.153).

and the judgments that it needs to make.[208] By contrast, measuring the success of meeting the inflation target objective assigned to the monetary policy authority is certainly possible and more straightforward.

In addition to the above, the content of the **confidentiality and transparency requirements** that the SSM need to abide by in relation to its decisions is different from the equivalent obligation of the monetary policy authority. In particular, central banks, including the US Federal Reserve Board and the ECB, publish the minutes of the monetary policy meetings. Although monetary policy decisions cease to bear commercial sensitivity after a fairly short period of time, this is not the case for the supervisory decisions which publicity may negatively affect the financial system on both micro- and macro-prudential level. Preserving the depositors' confidence in a bank and generally in the financial system necessitates that the supervisory decisions retain some degree of confidentiality, e.g., in cases in which a bank is required to take corrective measures because it had failed to meet minimum capital requirements or AML requirements.

As regards the supervisory authority in particular, the **enforcement and sanctioning powers** available to it also affects the standards against which it should be held accountable. SSMs' toolkit includes powers allowing it to enforce regulatory and resolution rules as a means to achieve their objectives. These powers, however, which are applied on the supervisor's initiative, are accompanied by a degree of discretion as regards the enforcement measure chosen, the intensity of the sanction etc. also depending on the severity of the violation of the supervised entity. Undoubtedly, therefore, the enforcement and sanctioning powers available to the European supervisor play an important role when considering its accountability. The exercise of discretion from the SSM when using its enforcement powers needs to be publicly justified and at the same time the supervisor needs to "demonstrate that its enforcement policy achieves the right balance between cooperative compliance-oriented enforcement action and deterrence-oriented coercive action".[209]

The greater range of contingencies that the SSM must deal with, influences the way that its success to meet its statutory objectives is measured. Clearly, it is not possible to set a benchmark against which the supervisor will be assessed as to whether it fulfilled its

[208] Hüpkes, Quintyn, & Taylor (2005), p. 14 points that "Measurability of RSAs objectives is also hampered by the fact that the objectives of regulation and supervision inevitably involve a large element of judgment. For example, an RSA that has as its objective the protection of consumers is immediately faced with a number of choices: What is the appropriate level of protection for retail consumers? At what level of sophistication can individuals be reasonably assumed to be able to protect their own interests? Should the same protection be extended to natural and legal persons? Might not a sole trader reasonably expect the same level of protection as a business person as he or she might expect as an individual? Where to draw the line between these legal persons and a multinational conglomerate? These judgments are hard to make in law and, hence, must inevitably be left to regulatory discretion. However, then we return to the problem that if regulators are to be permitted comparatively broad discretion in interpreting their objectives, it will be difficult to use regulatory objectives to call them to account".

[209] Hüpkes, Quintyn, & Taylor (2005), p. 17.

role.[210] Hence, a more tailored-made system of accountability arrangements is required, since the SSM's mandate "is not easily amenable to simple scrutiny".[211]

It is worth noting that despite accountability being the counterpart of the ECB's independence, there is no reference to the 'accountability' of the ECB in the TFEU.[212] Rather the primary law includes only the terms 'tasks', 'responsibility' and the 'reporting obligations' of the ECB. On the opposite, the SSMR in recital 55 specifically refers to 'accountability':

> *the conferral of supervisory tasks implies a significant responsibility for the ECB to safeguard financial stability in the Union, and to use its supervisory powers in the most effective and proportionate way. Any shift of supervisory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements*

3.5.2. Key aspects of the SRB's accountability

As far as the SRB is concerned, it is worth focusing on its accountability from the prism of the constitutional challenges related to the "unelected bureaucracies", i.e., the independent European agencies which are entrusted with important tasks.[213] Ensuring the accountability of the EU agencies and in particular the judicial review of their acts is not only a prerequisite under Union law[214] but also an indispensable element of the delegation of powers to them.[215]

Although the SRB was established following the model of other agencies (e.g., the ESAs) by virtue of Article 114 TFEU, it is argued that the tasks endowed to it represent a "qualitative leap in agencification".[216] This view is supported in light of the fact that the SRB's powers allow it to directly influence policy outcomes[217] through its decisions on resolution action with regard to failing significant credit institutions. It is also premised on the controversial aspect of mutualising losses at euro-area level.[218] The fact that the SRM

[210] Zilioli (2003), p. 401 and Quintyn & Taylor (2002).

[211] Hüpkes, Quintyn, & Taylor (2005), p. 33.

[212] Fromage, Dermine, Nicolaides, & Tuori (2019), p. 12.

[213] On accountability mechanisms in the European Banking Union see, among others, Markakis (2016).

[214] Judgment of the Court of First Instance (Eighth Chamber) of 8 October 2008, *Sogelma v EAR*, T-411/06, ECLI:EU:T:2008:419, paras. 36-37.

[215] Vlachou (2018).

[216] Busuioc, (2013), p. 15; Bozina Beros (2018), pp. 22, 71; (Vlachou, 2018).

[217] Adopting resolution plans, determining the MREL levels, conduct *ex ante* and *ex post* valuations, choosing between the resolution tools and implementing them.

[218] Lamandini, Ramos Muñoz, & Solana Álvarez (2015), p. 16; Moloney (2014).

is assigned with supporting the financial system of the participating Member States was also put under the torturous test of the German Constitutional Court.[219] The German court has held that SRM mandate with regard to the stability of the financial system does not prevent the SRMR, as the legal basis of the SRM, to be premised on Article 114 TFEU.[220]

Despite the concerns raised as to the quality of powers that the SRB enjoys, it is the author's mind that the legal framework sets forth appropriate governance and accountability arrangements which ensure the operational independence of the SBR and at the same time the function of the SRB within the *Meroni* doctrine.[221]

On the governance side, the EU Commission and the Council are involved in the approval of the SRB's decisions which vests SRB with democratic legitimacy. The decision-making process is rather complex and subject to tight deadlines. In terms of judicial accountability, SRB's decisions are subject to the scrutiny on the one hand of an Appeal Panel,[222] and on the other hand of the CJEU. This double-tier judicial accountability system follows the standard set up for the review of the EU agencies' acts. The Appeal Panel operates as a "quasi-judicial" body.[223] Since it is not a court, its processes and decisions are not governed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), but instead by Article 41 of the Charter which provides that "[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union". Decisions of the Appeal Panel are subject to an action for annulment before the CJEU, which is also competent for actions for damages against the SRB.[224] The SRB is also subject to a rigorous scrutiny from the European Parliament. Given its status as an EU agency, the SRB is accountable to the European Commission and the Council.[225]

3.5.3. Specific accountability arrangements for the ECB and SRB.

Having highlighted some unique accountability features inherent to the SSM and SRM setup, it is now time to turn to the specific accountability arrangements for the ECB and the SRB. The SSMR and SRMR set the accountability framework for the supervisory and resolution mechanisms in EBU respectively providing strong accountability safeguards to ensure democratic legitimacy.

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[219] BVerG of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14.

[220] Paragraph 262 of the judgment.

[221] Bozina Beros (2017), p. 6.

[222] See, Article 85, SRMR; SRB, Rules of Procedure, 2020.

[223] See, for example, Judgment of the General Court (Second Chamber) of 18 September 2012, *Schräder v OCVV – Hansson*, T-133/08, ECLI:EU:T:2012:430, para. 127

[224] See Article 87(4, 5) SRMR.

[225] Article 45 SSMR.

The foundation for the **parliament/political accountability** of the SSM is set in Recital 55 of the SSMR which explicitly provides that “any shift of supervisory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements. The ECB should therefore be accountable for the exercise of those tasks towards the European Parliament and the Council as democratically legitimised institutions representing the citizens of the Union and the Member States”. The political accountability arrangements are further elaborated on in Recitals 56 and 57 and duly reflected in Articles 20 and 21 of the SSMR. They include the obligation of the SSM to regularly report and respond to questions by the European Parliament, the EuroGroup and the Council. The SSM is also required to forward the reports addressed to the European Parliament and the Council to the national parliaments which in their turn may request the ECB to reply in writing to any of their observations or questions in the realm of supervisory competences, as well as invite the SSM Chair to participate in an exchange of views in relation to the supervision of banks in that Member State together with an NCA representative.[226] Moreover, the SSM Char must cooperation with the European Parliament on any investigation conducted by the latter under the TFEU.[227]

Analogous to the SSMR, the SRMR establishes a political accountability mechanism for the SRB which is set forth in Recital 42 according to which “[i]n order to ensure transparency and democratic control, as well as to safeguard the rights of the Union institutions, the Board should be accountable to the European Parliament and to the Council for any decisions taken on the basis of this Regulation. For reasons of transparency and democratic control, national parliaments should have certain rights to obtain information about the activities of, and to engage in a dialogue with, the Board”. The specific accountability arrangements of the SRB are laid down in Articles 45-47 of the said Regulation.[228] They include the obligation of the SRB to submit an annual report to the European Parliament, the national parliaments of participating Member States, the Council, the Commission and the European Court of Auditors on the performance of the tasks conferred. The SRB Chair shall present the report in public to the European Parliament and the Council. Both the Parliament and the Council have the right to address questions to the SRB.[229] Further, national parliaments of the participating Member States may request the SRB to reply in writing to any observations or questions submitted by them in respect of

[226] See Ter Kuile, Wissink, & Bovenschen (2015), p. 171, who point that: “However, answering parliaments’ questions and visiting national parliaments – including the preparations for such visits – are time-consuming tasks in practice. Doing this in at least 19 Member States will be challenging for the ECB. Nevertheless, such direct possibility for national parliaments to call the ECB to account seems appropriate given the mixed administration created. It will often be the ECB, rather than the respective NCA, which decides on issues that may have a huge impact in the Member States. Therefore, it seems reasonable that the ECB also gives account at the level where the impact of its work may be felt. This will increase the ECB’s responsibility to – in the end – the people in the Member States, i.e. the ultimate principals”. However, in practice, we have never witnessed any national parliament inviting the ECB to provide answers.

[227] Article 226 TFEU.

[228] It is noted again that the institutional architecture of the SSM’ Supervisory Board and the SRB differ. The SRB is established as an EU agency pursuant to Article 114 TFEU. See also recital 120 SRMR.

[229] Article 45 SRMR.

the SRB's functions. The SRB is obliged to reply to such requests.[230] Notably such obligation does not encumber upon the ECB in its capacity as supervisor when addressed with observations or questions by national parliaments to which the ECB *may* reply.[231]

The accountability regime for the SSM and the SRB is supplemented by specific Interinstitutional Agreements ('IIAs')[232] which develop political accountability in detail and describes how accountability requirements should be discharged in practice.[233, 234, 235] The IIAs also include obligations with regard to access to information. In particular, Article 4 of Section I[236] of both the SSM and SRB's IIAs provide that the ECB and the SRB respectively shall provide Parliament's competent committee at least with a comprehensive and meaningful record of the proceedings of the Supervisory Board and of the executive or plenary session of the SRB, including an annotated list of decisions, that enable an understanding of the discussions.

Ex ante parliamentary accountability is exercised through the appointment procedure of the Chair of the SSM and SRB by the Parliament.[237] Equally, *ex post* accountability checks

[230] Article 46 SRMR.

[231] Recital 56 and Article 21 SSMR.

[232] The conclusion of such IIAs is contemplated in Article 20(9) SSM Regulation, and article 45(8) SRM Regulation.

[233] Lamandini & Muñoz (April 2020). The authors highlight that these accountability frameworks should also be put in relation with the general provisions regulating some of the institutions (European Court of Auditors (ECA) or European Ombudsman) or agencies (European Banking Authority (EBA), in particular with its EBA Review Panel, established with the aim to develop the methodological framework for peer reviews and conduct them on a regular basis) that perform, in different ways and with different purviews, an accountability function.

[234] The SSM has entered into an IIA and an MoU: Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU) OJ L 320/1 30.11.2013, and Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), signed 11 December 2013. Whereas the SRB has entered into an IIA: Interinstitutional agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism OJ L 339/58 24.12.2015.

[235] On the parliamentary accountability practices followed in the US see Athanassiou (2011) p. 6: "For instance, the New York Federal Reserve (Fed) is accountable both to the US Congress and to the House of Representatives. More specifically, the Fed reports annually on its activities to the House of Representatives' Speaker, and biannually on its monetary policy stance to the Congressional banking committee. Fed officials also make ad hoc appearance before Congress as and when requested. Similarly, the Bank of England is accountable to Parliament, with its Annual Report being laid before the House of Commons Treasury Committee annually, before being made public, and with Bank of England officials appearing before other select committees, as and when require".

[236] accountability, access to information and confidentiality.

[237] Article 26(3) SSMR provides that following the proposal by the ECB and the approval by the Parliament, the Council appoints the Chair. Article 56(6) SRMR provides that following a proposal by the European

by the EU Parliament is achieved by means of dismissing the Chair of the SSM and SRB respectively.[238]

It is noted that in the Greek legal framework, the financial authorities are also accountable – *inter alia* – to the parliament. According to the BoG Statute,[239] the BoG submits an annual report[240] on the monetary policy to the Hellenic Parliament and the Council of Ministers. During the same year of the annual report, BoG also submits a supplementary report on the monetary developments and monetary policy. Since the establishment of the ESCB, the BoG contributes to the fulfilment of the ECB's reporting obligations under Articles 109(b)(3) TFEU and Article 15 ESCB Statute. Further, the BoG submits an annual report to the Greek parliament on the exercise of its supervisory authority. In the context of the parliamentary accountability, the Governor of the BoG is invited to appear before a competent committee of the parliament in order to inform the committee on matters within the competence of the central bank. For the same reason, the Governor may request on his/her own initiative from the president of the parliament to be invited to appear before the committee. Without prejudice to the independence of the central bank, the BoG Governor shall be invited and may attend meetings of the Council of Ministers or of relevant committees of the Council of Ministers when matters relating to the purposes and responsibilities of the bank are discussed. Equally, the Hellenic Capital Market Commission (HCMC) submits an annual report[241] to the parliament and the Minister of Finance, whereas the HCMC's president appears in front of the relevant parliament committee at least twice a year to inform the committee about issues falling under HCMC's competence.

In the field of **administrative and financial accountability**, the body which exercises the control over both the SSM and the SRB, is the European Court of Auditors ('ECA').[242] The scope of the ECA's scrutiny of SSM and SRB's actions is different. In particular, as regards the SSM, the scrutiny is limited to an examination of the "*operational efficiency of the management of the ECB*" (including the supervisory branch), whilst the audit mandate conferred upon the ECA by Article 287 TFEU, which applies to the SRM, is wider. The different scope is justified in view of the status of the ECB/SSM which is an EU institution and the SRB which is a European agency. The picture of the administrative control of the SSM and SRB is also supplemented by the role of European Ombudsman. The

Commission and the approval by the European Parliament, the Council shall adopt an implementing decision to appoint the SRB's Chair.

[238] Ter Kuile, Wissink, & Bovenschen (2015), p. 170.

[239] Article 5B.

[240] See BoG's annual reports available at: https://www.bankofgreece.gr/en/the-bank/culture/library/e-publications-and-announcements/archive-of-annual-report-of-activities.

[241] See HCMC's annual reports available at: http://www.hcmc.gr/el/annualreports.

[242] The ECA's competence is set in Article 27.2 ESCB Statute and Article 20(7) SSMR with regard to the SSM, and Article 45(2) SRMR and Article 287 TFEU with regard to the SRB.

Ombudsman primarily scrutinises cases of maladministration[243] after receiving the direct complaints of citizens,[244] or undertake inquiries following complaints or on its own initiative, save where the alleged facts of a complaint are subject to legal proceedings.[245, 246]

Turning to the **judicial accountability**, the decisions of both the ECB and the SRB are subject to actions for annulment (Article 263 TFEU), actions for failure to act (Article 265 TFEU) and actions for damages (Article 340 TFEU) before the CJEU. Already a considerable number of cases against the ECB and the SRB have been brought before the CJEU.[247] The major challenge in the judicial scrutiny of the supervisory and resolution decisions lies in the fact that the decision-making process in both bodies is carried out based on composite procedures which involve high complexity. This impacts the effective judicial accountability as it might be difficult to determine which of the decisions in the composite procedure is '*"the" relevant decision*'[248] which should be the subject of the judicial review. In many instances said procedures may obscure the boundaries of allocation of accountability – and thus liability – not only between the European bodies and the national authorities, but also between the ECB and SRB.[249] [250] Some leading CJEU's judgments have shed light on some of these difficult questions as it will be discussed in Chapter 4 Section 1 below.

[243] Article 228 TFEU and Article 2(1) European Ombudsman Statute.

[244] Article 228 TFEU and Article 2 European Ombudsman Statute.

[245] Article 228 TFEU and Article 3 European Ombudsman Statute.

[246] For more details on the Ombudsman as well as on the EBA's administrative review in the context of the promotion of supervisory quality and convergence across the European Union as part of the administrative accountability of the SSM see: Lamandini & Muñoz (April 2020), pp. 20-22.

[247] See list of cases and brief summary by René Smits and Federico Della Negra, The Banking Union and Union Courts: overview of cases as of 30 December 2022, available at: https://ebi-europa.eu/publications/eu-cases-or-jurisprudence/.

[248] Lamandini & Muñoz (April 2020), p. 23.

[249] Article 18(1) (FOLTF determination), (6) (adoption of resolution scheme by the SRB), and (7) (Commission and Council intervention) SRM Regulation, and Article 14 (5) (withdrawal of license) SSM Regulation.

[250] Lamandini & Muñoz (April 2020), p. 23. The authors argue that "The specific context of bank crisis-management also involves a sequential decision-making by the ECB, which determines that a bank is failing or is likely to fail (FOLTF), the SRB, which decides on the occurrence of a public interest in resolution and then, if such occurrence of a public interest is established, on the application of resolution measures, a decision that is endorsed by Commission and, in particular cases, by the Council, and then possibly a decision by the ECB to withdraw the bank's license (subject to the SRB opinion). This gives rise to a jigsaw puzzle, where the technical question of determining what is "the" relevant decision subject to challenge is instrumental to the more general question of ensuring effective legal accountability. Recent case law by EU courts has clarified some of these aspects, while leaving others unresolved".

4. Conceptual underpinnings of liability

Liability refers to someone's legal responsibility for his/her actions and omissions. A person or entity that wilfully or negligently caused damage to another person or entity can be held civilly liable for the monetary value of the damages caused. The present thesis examines the third-party civil liability of the supervisory and resolution authorities in the EBU. In particular, the ECB as the single supervisor and SRB as the single resolution authority in the EBU can be held liable by a third-party (e.g. depositors, shareholders, or bondholders) who suffered damages due to shortcomings in the performance of the supervisory and resolution duties by the ECB and SRB respectively. Third-party liability of the ECB and SRB has come to the spotlight attracting an ever-increasing attention also in view of the ongoing 'Europeanisation' of supervisory and resolution law.

The legal literature classifies liability into two main categories, namely the no-fault (objective) liability and the fault-based liability. Under the no-fault liability category, the liability is not dependant on the existence of fault. In other words, the existence of intention or negligence is not required in order to hold someone liable for his/her unlawful conduct.[251] The plaintiff therefore can claim compensation for damage he/she suffered without being required to prove intention or negligence on the defendant's part.[252]

To hold a person liable under a fault-based liability regime requires either negligence (ordinary or gross) or wilful misconduct (bad faith) on the part of the tortfeasor (behavioural standards). The standard of liability in ordinary negligence is rather low as it requires to prove that the wrongdoer failed to exercise ordinary care. The content of ordinary care, also referred to as reasonable care or due care, is determined by the law and/or by the courts.[253] Gross negligence, on the other hand, refers to a conduct or failure to act which is so thoughtless and careless that it demonstrates a substantial lack of concern on the part of the wrongdoer for whether damage will result.[254] The boundaries between simple and gross negligence are not always easy to define in practice. Finally, the wrongdoer will be held liable for acting in bad faith when he/she acts with the knowledge that this action is likely to cause damage to a third party.

On the opposite side of liability lies the immunity that may be afforded to the supervisory and resolution authorities by the law. With regard to the supervisory and resolution authorities, immunity could be distinguished into two types, namely (i) immunity from their liability and (ii) in certain cases, immunity from their obligation to compensate the aggrieved parties. The first refers to the protection of public institutions, their decision-makers, and staff from liability for their actions and omissions in the sense that they are shielded against lawsuits and effectively third parties cannot sue them. The latter (i.e.,

[251] Dijkstra (2015), p. 14.

[252] van Dam (2006).

[253] European Group on Tort Law (2005).

[254] Dijkstra (2015), p. 15.

compensatory immunity) could be available to a public institution in cases in which the aggrieved parties could be compensated *via* a compensation mechanism (e.g., deposit guarantee scheme) for the damage they suffered.

Considering the above, the question that arises is the following: *which is the optimal policy choice for the liability of the financial authorities?* Should financial authorities be liable for damages *vis-à-vis* third parties or should they enjoy immunity. If they should be held liable, then under what conditions and subject to what limitations should their liability be established? Which is the behavioural standard that should be set? Should it be gross negligence, or would ordinary negligence be sufficient? Should the liability be limited only to cases in which the financial authority acted in bad faith?

From a constitutional point of view and as *a matter of legal principle*, it is undisputed that the financial authorities, as public institutions, should be held liable and make good for any damage they caused to third parties. As discussed above in section 4, civil liability is a form of judicial accountability and an essential element for the democratic legitimisation of the independent financial authorities. The principles of *état de droit*, the rule of law[255] and even the principle of 'natural justice'[256] make unacceptable in a democratic society to prevent aggrieved individuals from bringing a tort claim and a claim for compensation against the financial authorities, especially where the loss suffered by the aggrieved third party cannot be recovered from an alternative source.[257] The opposite would equal to striping individuals from judicial redress, thus violating a fundamental constitutional right both on national and European level.

While it is well-established that a financial authority needs to make good for any damage it caused to third parties as a result of wrongful performance of its tasks of public nature, there is no straightforward answer with regard to which should be the scope/extent of the liability of the financial authorities.

The scope of the civil liability varies across the EU jurisdictions, yet there is a clear tendency to limit the financial authorities' liability. The limitations set to the civil (or non-contractual liability in the terminology of the TFEU) liability of the national supervisors and resolution authorities are not streamlined across the EU Member States. Some jurisdictions opt for a liability standard requiring the plaintiff to prove gross negligence or bad faith, whereas others set the bar higher requiring the proof of bad faith or even provide some statutory immunities to the financial authorities. Equally, there is no streamlined interpretation of the behavioural standards and of the other requirements for establishing non-contractual liability amongst the jurisdictions owing to the different historical and cultural background of each Member State.

[255] with the meaning of the principle of legality.

[256] A profound discussion of natural justice considerations is to be found as early as in the ancient Greek tragedy play of Sophocles *Antigone*.

[257] Athanassiou (2011), p. 34; Anagnostaras (2001), p. 289.

Towards this tendency, we should explore what are the underlying reasons for limiting the financial authorities' liability and whether such limitation achieves the objectives pursued or not. The legal literature is rich of arguments both in favour and against this limitation. The purpose of the present Chapter is not to provide an exhaustive presentation of all the arguments and their nuances, but rather to highlight the most important of them. The evaluation of these arguments and the answer to the question *which is the optimum policy choice* for the non-contractual liability of financial authorities *vis-à-vis* third parties will follow in Chapter 4 of this thesis.

4.1. Arguments in favour of limiting financial authorities' liability

4.1.1. The inhibit argument

The inhibit argument is one of the most invoked arguments in favour of limiting financial authorities' liability. It suggests that strict liability would render the financial authority a lame duck because of the chilling effects that the liability threat can have on the financial authority's work. In particular, the financial authorities would hesitate to take tough decisions (e.g., suspend a bank's licence) and it would exercise its supervisory or resolution tasks less efficient and effective in fear of being exposed to liability claims.[258] The inhibit argument attracts some criticism in the legal literature. It is argued *inter alia* that the empirical findings do not suggest that financial authorities would engage in defensive conduct as a result of the liability threat.[259] In addition, it is argued that the inhibit argument "attributes to supervisors concerns and preoccupations that are more appropriate to ordinary human beings than to agencies pursuing a public interest agenda".[260]

4.1.2. The floodgates argument

One of the most well-known arguments advocating the limitation of the financial authorities liability is the floodgates argument. The supporters of this argument note that unlimited liability would open the Pandora's box risking a flood of tort and compensation claims against the financial authorities. It could be said that this argument is the heart of the policy choice to limit financial authorities liability. Equally, the floodgates consideration is taken into account by the courts, even in the absence of statutory limitations. The courts both on national and European level are very reluctant to allow claims for damages against financial authorities setting a high standard of proof of the requirements for holing an financial authority liable. Equally, even if the court finds the financial authority liable, the damages awarded are reasonable. Yet this argument does not answer to the question *which should be the extent of limiting financial authorities' liability.* Undoubtedly, it should not be the premise for excessively limiting the financial authorities' liability, in view of the constitutional law considerations referred to in section 4 above.

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[258] Tison (2003); Singh (2007); Proctor (2004), pp. 23-28; Delston & Campbell (2008); Booth & Squires (2005).

[259] Dijkstra (2015), p. 128.

[260] Athanassiou (2011), p. 35.

4.2. Arguments against limiting financial authorities' liability

4.2.1. Incentives Arguments

One of the most common arguments against limiting financial authorities' liability is the 'incentives argument' which is the counterpart of inhibit argument. This argument is based on an economics and sociology analysis that liability and its imminent financial consequences create – at least in theory – incentives for the financial authorities to have a particular course of action, i.e. to exercise their duties diligently and with "*an efficient level of care*".[261] The basis of this economics and sociology analysis is that the actor is always incentivised to act in a way that will minimise its costs and increase its wealth.[262] Although the financial authorities are not a private company driven by profit-making goals, budget considerations are likely to incentivise the financial authorities to act diligently in order to avoid the financial consequences of their tort.[263] In addition, reputation reasons also play a role in incentivising the financial authorities to perform their tasks with adequate care. However, the legal literature points out that the 'incentives argument' is based on an assumption[264] since there is no conclusive evidence that indeed liability can keep the financial authorities "*on their toes*" and deter against any complacency in the performance of their tasks.[265]

4.2.2. Equal treatment

In the heart of this argument lies the idea that financial authorities as public authorities should be held liable without enjoying any immunities as the supervised undertakings are exposed to tort claims and can be held liable when failing to perform diligently their fiduciary duties *vis-à-vis* their shareholders and other creditors, particularly if they failed to prevent the insolvency of the undertaking.[266] Yet this argument is not convincing as it overlooks the fact that there is a contractual relationship between the financial undertaking and its shareholders and other creditors, and that in this context the officers and directors owe fiduciary duties to them. In light of this, the equal treatment argument is not deemed to be convincing as it is premised on a misleading starting point, namely the equation of financial authorities' duties with those of the supervised undertakings.

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[261] Dijkstra (2015), p. 44.

[262] *Ibid.* Dijkstra notes that: "the underlying [economic] model refers to the 'Homo Economicus'. People will act egoistically rational in that they will minimise the costs they are faced with in order to maximise their wealth".

[263] Rosenthal (2006).

[264] Dijkstra (2015), p. 44.

[265] Athanassiou (2011), p. 32.

[266] *Ibid,* p. 34.

4.2.3. Reliance argument

Due to the fundamental role that the financial authorities play in preserving the harmonious function of the financial system, third-parties recipients of financial services put a reliance on the public authorities[267] expecting[268] that the latter will undertake all necessary actions not only to maintain financial stability but also to safeguard the interests of the third-parties.

Third-parties such as depositors do not possess the necessary knowledge and expertise to assess the policies of the credit institutions they are holding their money with. Therefore, it is reasonable that they rely on the financial authorities. The latter as gatekeepers monitor the activities of the supervised entities, aim to ensure that said entities pursue sound and prudential policies and effectively aim to bridge the information asymmetry between the supervised entities and the third parties.

The reliance argument provides a solid ground for advocating that the liability standard in cases in which financial authorities have violated obligations which do not involve the exercise of discretion or complex assessments (for instance when they have violated obligations of due process) should be that of simple negligence as it will be elaborated on in Chapter 5.

5. Final remarks – Evolving nature of the accountability process

The financial authorities constitute a prime example of an independent public authority acting at arms' length from the government both at national and European level. Their special status is justified in view of their critical mission which can only be accomplished in an effective way if it remains unaffected by political influences.

As a result of their independence, financial authorities are not subject to administrative hierarchical control. This falls far, though, from entailing that the financial authorities' actions do not benefit from democratic legitimacy. Such legitimacy is ensured *inter alia* by means of accountability mechanisms. As an *ex post* accountability mechanism, the financial authorities are required to answer to the parliament about their doings so the latter can establish whether the financial authorities have fulfilled their mandate enshrined in the laws as promulgated by the parliament.

The accountability of the ECB as supervisory authority and more recently the accountability of the SRB has become an increasingly topical issue, especially in view of the rich role the ECB has acquired since the establishment of the EBU. The ECB itself has acknowledged the importance of its accountability and specifically the evolution of its accountability in light of the mandate endowed to it as prudential supervisor in the EBU.[269]

[267] Floros (2012), p. 153.

[268] See Tison (2003), p. 5, who talks about a "legitimate expectation".

[269] Fraccaroli, Giovannini, & Jamet (2018).

Accountability comes as the natural counterpart of independence of the financial authorities and plays a pivotal role in ensuring their democratic legitimacy (input accountability). Accountability can also exercise the necessary degree of pressure to the financial authorities leading the latter to improve their policies and the implementation of such policies (output accountability). Accountability mechanisms can only yield effective results if the performance of the financial authorities and whether they successfully completed their mission can be credibly measured.

Considering the mandate of the financial authorities, the test to measure their performance is whether they achieved financial stability in the banking system and the orderly resolution of failed credit institutions respectively. Except that such test is primarily based on economic evidence, it could prove hard to implement in practice given the plurality of objectives pursued by the financial authorities, the various interests that need to be balanced, and the complex nature of the supervisory and resolution decisions to be taken. These features also raise the issue whether the obligation of the financial authorities to achieve financial stability is an obligation of result or an obligation of conduct. Before answering to this question, the concept of 'financial stability' should first be explored.

Neither the SSMR nor the SRMR provide a definition of the concept 'financial stability' and there is not one 'universally acceptable' definition.[270] Financial stability may be defined in different ways given its multidimensional nature. A broad and comprehensive definition could be the one provided in an IMF working paper of 2004 which reads as follows: [271]

> *"A financial system is in a range of stability whenever it is capable of facilitating (rather than impeding) the performance of an economy, and of dissipating financial imbalances that arise endogenously or as a result of significant adverse and unanticipated events."*

Elaborating on the components of this definition, the IMF paper stipulates that a financial system is in stability when it is able "(a) to facilitate both an efficient allocation of economic resources—both spatially and especially intertemporally—and the effectiveness of other economic processes (such as wealth accumulation, economic growth, and ultimately social prosperity); (b) to assess, price, allocate, and manage financial risks; and (c) to maintain its ability to perform these key functions—even when affected by external shocks or by a build-up of imbalances—primarily through self-corrective mechanisms".[272]

Effectively, within the boundaries of such broad definition, the ECB/SSM and the SRB must demonstrate that the policies and instruments they adopt are "the most appropriate and effective" [273] to achieve financial stability. However, it is hard in practice to measure

[270] Nicolaides (2019), p. 138. On the definitions see Schinasi (2004).

[271] Schinasi (2004), p. 8.

[272] *Ibid*, see also Schinasi (2009).

[273] Nicolaides (2019), p. 138. On the definitions see Schinasi (2004).

whether the financial authorities have achieved 'financial stability' first and foremost because financial stability cannot be quantified like price stability.[274]

In the absence of a specific benchmark, the financial authorities' performance can only be measured and assessed by means of comparing their behaviour under certain circumstances with the behaviour that would actually be expected from them under such circumstances.[275] Therefore, measuring the financial authorities' performance is not a process exclusively based on objective standards and data, but involves the subjective assessment of the behaviour of the financial authorities which act within a complex policy and legal environment.

In addition, especially with regard to the supervisory authorities, preserving financial stability is not a straight road to go down. The supervisor should discharge its duties based on a forward-looking approach and be able to timely respond to unexpected developments which every so often might not even be related to the financial system itself, like natural disasters or pandemics. Furthermore, the supervisor's decisions often involve trade-offs "between resilience and efficiency… For instance, in the sphere of prudential policies, higher solvency requirements will reduce the risk of a bank not being able to absorb an adverse shock but will also imply capital costs and foregone investment opportunities". [276]

Given the inherent difficulties in defining 'financial stability' and accordingly measuring the performance of the financial authorities, but also considering the complexities involved when discharging the obligation of preserving financial stability, it would be very restrictive if the financial authorities were subject to an obligation of result. Instead preserving financial stability must be considered an obligation of conduct.

Accountability mechanisms do not only ensure democratic legitimisation, but also constitute an incentive for the financial authorities to improve their performance. In light of the fact that the supervisory and resolution objectives are not and cannot be precisely defined, the more experience the financial authorities gain, the higher the threshold of assessing their behaviour becomes.[277] In other words, given that the financial authorities are constantly learning and adjusting their action based on the experience they gain, it follows that the authority which the financial authorities are accountable to also evolves and adjusts based on the knowledge and experience it acquires over time. Effectively, it could be argued that accountability mechanisms are evolving and thus the benchmark for

[274] See Haldane (2004) on possible wat to quantify financial stability.

[275] See Nicolaides (2019), p. 138, according to whom "When a benchmark cannot be meaningfully defined in advance or when several such benchmarks can be credibly defined, we can only ask how someone else would have performed in similar circumstances. An action is justified when another person, equally qualified, would act in a similar fashion".

[276] Schinasi (2004), p. 12.

[277] Nicolaides (2019), p. 150.

assessing whether the financial authorities completed their mission effectively is continuously adjusted.[278]

On the EU level, this evolvement in the accountability, which also applies for the monetary policy side, is evident from that fact that the decisions of the ECB benefit from greater and more detailed justification over the time. For instance, in the monetary policy spectrum, the justification in the recitals of the legal act laying the contours for the PEPP programme supporting and explaining the ECB's decision was comprehensive and drew upon the ruling of the CJEU in *Weiss* and *Gauweiler* cases. The justification found therein also seems to be an indirect but rather loud 'response' to the decision of the German Federal Constitutional in *Weiss* regarding the PSPP. The said judgment indisputably violated the principle of supremacy of the EU law, it nonetheless triggered an adjustment of the ECB regarding the way it justifies its regulatory instruments. Effectively, this proves that that accountability is an evolving process which impels the supervisory or resolution authority to always improve and better justify its policy decisions.

The authority which the financial authorities are accountable to is equally evolving in terms of assessing whether the financial authorities' have effectively achieved their objectives. An interesting example in this respect, again from the monetary policy realm, is the judgment of the CJEU in the *Steinhoff* case[279] which relates to the PSI (private sector involvement) programme applied to Greek government bonds held by private investors. Said programme resulted in the bondholders suffering a reduction in the face value of the government bonds which were subject to a notional haircut of 50% of the nominal value thereby diminishing the right of the bondholders to repayment of that value upon the maturity of the bonds. derived from the implementation of a unilateral haircut of the nominal value of sovereign bonds almost by 50%. The purpose of the haircut, which took place in March 2012, was to alleviate the Greek sovereign debt burden and ensure its sustainability by restructuring sovereign bonds issued by the Greek state and selected state-owned entities.[280]

The PSI programme was implemented by virtue of Greek law no. 4050/2012 which introduced rules amending the terms applicable to marketable securities issued or guaranteed by the Greek State under agreements with their holders for the purpose of restructuring the Greek public debt, based, in particular, on the application of collective action clauses ('CACs'). Before the enactment of the relevant Greek law no. 4050/2012 and the implementation of the PSI programme, the Greek government submitted to the ECB[281] a request for an opinion on draft law no. 4050/2012, on 2 February 2012.

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[278] *Ibid,* p. 139.

[279] Judgment of the General Court (Third Chamber) of 23 May 2019, *Steinhoff and Others v ECB*, T-107/17, ECLI:EU:T:2019:353 ("*Steinhoff and Others v ECB* case").

[280] Cheng (2020), p. 4. On the PSI see: Andritzky, Christofzik, Feld, & Scheuering (2018); Zettelmeyer, Trebesch, Gulati, Monacelli, & Whelan (2013); Smaghi (6 June 2011); IMF (2013); IMF (2003).

[281] Pursuant to Article 127(4) TFEU, read in conjunction with Article 282(5) TFEU.

In summary, the ECB relevant opinion of 17 February 2012 (CON/2012/12),[282] highlighted the following:

> *first, [that] 'it is important that the Member States preserve their ability to honour at all times their commitments, also with a view to ensuring financial stability'; secondly, 'the case of the Hellenic Republic is exceptional and unique' (point 2.1); thirdly, the aim of the draft law is to promote private sector involvement and in particular to introduce a procedure to facilitate, in accordance with CACs, negotiation with holders of Greek bonds and the securing of their agreement to an exchange offer by the Hellenic Republic for its bonds and, therefore, a possible restructuring of the Greek public debt (point 2.2); fourthly, 'the ECB welcomes that the terms of such exchange is the result of negotiations held between the Hellenic Republic and the institutions representing its bondholders' (point 2.3); fifthly, 'the use of CACs as a procedure to achieve an exchange of bonds is broadly aligned with general practice …' (point 2.4); and sixthly, 'it remains the sole responsibility of the Government of the Hellenic Republic to take the necessary action that will ultimately ensure its debt sustainability' (point 2.6).*[283]

The applicants in *Steinhoff* case argued that the ECB is responsible for the loss the bondholders suffered on account of the PSI programme and must incur non-contractual liability because it failed, in its opinion, "to draw the attention of the Hellenic Republic to the unlawful nature of the proposed restructuring of the Greek public debt by a mandatory exchange of bonds".[284] The CJEU reiterated the test of the 'sufficiently serious breach'[285] which is the standard of liability applicable in cases of non-contractual liability of EU institutions. In the words of the CJEU:

> *only the unlawful conduct of an institution constituting a sufficiently serious breach is capable of establishing the non-contractual liability of the European Union. The decisive test for finding that a breach of EU law is sufficiently serious is whether the institution manifestly and gravely disregarded the limits on its discretion*[286]

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[282] Opinion of the European Central Bank of 17 February 2012 on the terms of securities issued or guaranteed by the Greek State (CON/2012/12), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012AB0012.

[283] *Steinhoff and Others v ECB* case, para 15.

[284] *Ibid*.

[285] The test will be analysed in detail in Chapter 2, section 2.1.2.

[286] *Steinhoff and Others v ECB* case, para. 53 and the case law cited therein: see Judgment of the Court of 4 July 2000, *Bergaderm and Goupil v Commission*, C-352/98 P, EU:C:2000:361, para. 43 and the case-law cited therein, and Judgment of the Court of 4 April 2017, *European Ombudsman* v *Staelen*, C-337/15 P, EU:C:2017:256, para. 31 and the case-law cited therein. Further strand of case-law clearly reiterates that the

It is interesting to note that as opposed to actions for annulment, the action for damages is admissible irrespective of whether the "measure causing the alleged damage was in the nature of a decision or was binding. All conduct causing damage is capable of establishing non-contractual liability".[287] In this respect, the CJEU noted that in principle, a sufficiently serious breach of Article 17(1) of the Charter establishing the right to property by the ECB can give rise the non-contractual liability of the ECB pursuant to Article 340(3) TFEU.

The CJEU then noted, in paragraph 98 of its judgment, that:

> *In addition, the fundamental nature of that rule [i.e., of Article 17 of the Charter] protecting individuals and the corresponding obligation for the ECB to promote compliance with it means that those individuals are entitled to expect the ECB to draw attention to the breach of such a rule when exercising its powers. It has already been held in the context of a financial assistance facility provided by the European Stability Mechanism to the Republic of Cyprus that Article 17(1) of the Charter can be infringed by the European Commission not only by positive action, but also by 'passive' conduct or the failure to take a measure where the Commission is under a specific obligation to do something.*[288] *Similarly, the special status conferred on the ECB within the institutional framework of the Treaties does not exempt it from the requirement to respect the fundamental rights of the Union or from its duty to contribute to the attainment of the objectives of the Union as set out in Articles 2, 3 and 6 TEU.*[289]

The key point in the paragraph above is that according to the CJEU the "individuals are entitled to expect the ECB to draw attention to the breach of [the violation of the right to property] when exercising its powers". Effectively, the CJEU set a benchmark against

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mere infringement of EU law suffices to establish the sufficiently serious breach test only where an EU body enjoys no discretion or only significantly reduced discretion (in this regard see Judgment of 7 October 2015, *Accorinti and Other*s v *ECB*, T-79/13, EU:T:2015:756, para 67 and the case-law cited therein). Case-law has clarified that the test of a sufficiently serious breach of law applies to both an individual act, and of an individual omission (see, to that effect, Judgment of 16 November 2017, *Acquafarm* v *Commission*, T-458/16, not published, EU:T:2017:810, para. 44 and the case-law cited therein).

[287] See, to that effect, Judgment of 23 March 2004, *Ombudsman v Lamberts*, C-234/02 P, EU:C:2004:174, paras. 50 to 52 and 60. Regarding the breach of an obligation to take or to refrain from taking an actionsee also Judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paras. 55 to 59, 67 and 68; in relation to a reasoned opinion see Judgment of 18 December 2009, *Arizmendi and Others v Council and Commission*, T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04, EU:T:2009:530, paras 66 to 69; and, regarding an individual omission, see Judgment of 16 November 2017, *Acquafarm v Commission*, T-458/16, not published, EU:T:2017:810, para 44 and the case-law cited therein. See also Judgment of 23 March 2004, *Ombudsman v Lamberts*, C-234/02 P, EU:C:2004:174, para 61 where the court emphasised that if an EU Court were unable to assess the legality of the conduct of an EU institution or body, the procedure provided for in Article 268 and the second and third paragraphs of Article 340 TFEU would be rendered ineffective.

[288] In this regard see, Judgment of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paras 57, 59 and 66 to 75.

[289] See, to that effect, Judgment of 10 July 2003, *Commission v ECB*, C-11/00, EU:C:2003:395, para. 91.

which the conduct of the ECB must be assessed, i.e., that it should point to potential violation of a fundamental right when opining on draft national laws.

This is a prime example of the evolving nature of the accountability process. The judicial review, which is an *ex post* accountability mechanism, specified how the ECB is expected to discharge its duties. Evidently, such feedback loop between the accountable and the accountee provides the latter with a clear outline of its obligations and incentivises it to improve its action and meet the highest standards for effectively accomplishing its obligations. Hence, the objectives pursued by the financial authorities which are not and cannot *ab initio* be precisely defined, could be specified through the accountability process over time.

The judicial review either in the form of an action for annulment or an action for damages is, arguably, the most intensive *ex post* accountability mechanism which the financial authorities are subject to. Apart from being a source of evolvement of the accountability process, the judicial review also specifies the liability standard of the financial authorities.

The action for damages is available in the cases of the non-contractual liability of the financial authorities. Whereas in an action for annulment, *locus standi* is limited to those whom the financial authorities' decision is addressed to, in an action for damages also third parties might be entitled to bring an action before the courts against the financial authorities.

More specifically, the non-contractual liability of the financial authorities presents the distinctive characteristic that it involves three (instead of two) actors, i.e., (i) the financial authority, (ii) the financial institution under supervision or resolution and (iii) the individual who has suffered loss on account of a defective supervisory or resolution decision. There is no direct contractual relationship between the individual and the financial authority, however the latter can be held liable in the event their conduct constitutes a breach of law and has caused damage to the individual who is entitled in this case to bring an action for damages against the financial authority.

The judicial review is unquestionably a delicate exercise in view of wide margin of discretion the financial authorities enjoy when performing their duties and the principle of separation of powers, so the court does not substitute their decisions for that of the financial authorities.

Furthermore, the distinctive nature of the financial authorities' powers and responsibilities requires that the financial authorities are not subject to unlimited liability. Instead for policy and legal reasons a limitation of their liability is warranted. Such limitation is evident from the liability standard applicable by the national and European courts.

More specifically, on the EU level, the CJEU applies the "manifest error" test when it reviews the decisions of EU authorities which enjoy discretion. In the field of the monetary policy the CJEU has held that the ECB is required to "make choices of technical nature and to undertake complex forecasts and assessments" and that the court when reviewing the proportionality of the measures adopted by the ECB as the monetary policy authority

"is required to ascertain […] whether the ESCB made a *manifest error* of assessment in that regard".[290] The same approach also applies for the supervisory or resolution action as the in these fields the ECB and the SRB respectively enjoy discretion. This approach was confirmed in the 2017 judgments of the General Court in the cases regarding the legality of the resolution action in Banco Popular:[291]

> *105 First, with regard to situations in which the EU authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts, in order to determine the nature and scope of the measures which they adopt, review by the EU Courts is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the EU Courts cannot substitute its assessment of scientific and technical facts for that of the authorities of the European Union on which alone the FEU Treaty has placed that task.*
>
> *106 Second, as regards the review by the EU Courts of the complex economic assessments made by the EU authorities, that review is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. In the context of this review, therefore, it is not for the EU Courts to substitute its economic assessment for that of the competent EU authority.*
>
> *107 Since the decisions which the SRB is required to adopt in the context of a resolution procedure are based on highly complex economic and technical assessments, it must be concluded that the principles stemming from the case-law referred to in paragraphs 105 and 106 above apply to the review which the Court is called upon to carry out.*
>
> *108 However, while the SRB is recognised as having a margin of discretion with regard to economic and technical matters, that does not mean that the EU Courts must refrain from reviewing the SRB's interpretation of the economic data on which its decision is based. As the Court of Justice has held, even in the case of complex assessments, the EU judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be*

[290] Judgment of the Court (Grand Chamber) of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000, para. 24.

[291] Judgment of the Court (Grand Chamber) of Third Chamber, Extended Composition of 1 June 2022, *Algebris (UK) Ltd, Anchorage Capital Group LLC v European Commission*, T-570/17, ECLI:EU:T:2022:314. See also Judgment of the Court (Fourth Chamber) of 21 July 2011, *Etimine*, C-15/10, EU:C:2011:504, para. 60; Judgment of the General Court (Seventh Chamber, extended composition) of 7 March 2013, *Bilbaína de Alquitranes and Others v ECHA*, T-93/10, EU:T:2013:106, para 76; Judgment of the General Court (Fifth Chamber) of 11 May 2017, *Deza v ECHA*, T-115/15, EU:T:2017:329, para. 163 and the case-law cited therein.

> *taken into account in order to assess a complex situation and whether it is capable of supporting the conclusions drawn from it.*[292]
>
> *109 In that regard, in order to establish that the SRB committed a manifest error in assessing the facts such as to justify the annulment of the resolution scheme, the evidence adduced by the applicants must be sufficient to make the factual assessments used in that scheme implausible.*[293] [294]

The General Court spelled out the test it applies when assessing the decisions of the SRB and laid down clear guidance with regard to the boundaries of the judicial review of resolution action, which is extended to the supervisory action as well, and which is limited to only ascertaining whether there is a *manifested error of assessment* or *a misuse of powers* by the ECB acting as supervisor or the SRB.

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[292] See Judgment of the Court (First Chamber) of 22 November 2007, *Spain v Lenzing*, C-525/04 P, EU:C:2007:698, para. 57 and the case-law cited; Judgment of the Court (Grand Chamber) of 26 March 2019, *Commission v Italy*, C-621/16 P, EU:C:2019:251, para. 104 and the case-law cited; and Judgment of the Court (Second Chamber) of 10 December 2020, *Comune di Milano v Commission*, C-160/19 P, EU:C:2020:1012, para 115 and the case-law cited therein.

[293] Judgment of the Court (Grand Chamber) of Third Chamber, Extended Composition of 1 June 2022, *Algebris (UK) Ltd, Anchorage Capital Group LLC v European Commission*, T-570/17, ECLI:EU:T:2022:314.

[294] See, by analogy, Judgment of the Court (Tenth Chamber) of 14 June 2018, *Lubrizol France v Council*, C-223/17 P, not published, EU:C:2018:442, para. 39; Judgment of the Court of First Instance (Fifth Chamber, Extended Composition) of 12 December 1996, *AIUFFASS and AKT v Commission*, T-380/94, EU:T:1996:195, para. 59; and Judgment of the General Court (Third Chamber, Extended Composition) of 13 December 2018, *Comune di Milano v Commission*, T-167/13, EU:T:2018:940, para 108 and the case-law cited therein.

Chapter 2: Non-contractual liability under the EU law – Action for damages – Liability of ECB and SRB under EU law – Allocation of tasks between the Union and National Competent Authorities – Composite procedures

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1. Fundamental principles of EU law and judicial protection

As mentioned earlier in this paper, the topic of the present research is *inter alia* the standard and limits of the non-contractual liability of the financial authorities of the European Banking Union, i.e., the liability of the ECB acting as the single supervisor within the SSM and SRB acting as the single resolution authority. Nonetheless, before turning to the standard and the limits of the liability of the ECB and SRB, it would be beneficial to examine the characteristics of the action for damages.

The European system of judicial protection is a "*complete and coherent system*".[295] It is complete as it offers sufficient legal measures and remedies for the judicial review of the Union Bodies' acts in front of the CJEU or the national courts.[296] At the same time, it is coherent as the judicial protection and the enforcement of the rights can be requested by the CJEU in direct (Article 263 of the TFEU) and indirect routes (Article 267 of the TFEU).[297]

At the core of the European judicial protection system lies the principle of upholding the *rule of law*.[298] The rule of law, being a common principle in the legal orders of the Member States, is enshrined in Article 2 of the TEU and Article 47 of the Charter[299] and constitutes one of the pivotal keystones of the EU. The rule of law was already declared by the CJEU as one of the founding principles of the EU in its landmark judgment in *Les Verts,*[300] where the Court ruled that:

> *the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the court of justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the court by reason of the special conditions of admissibility laid down in the second paragraph of article 173 of the Treaty.*[301]

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[295] Lenaerts, Maselis, & Gutman (2014), p. 1.

[296] Lenaerts (2003); Lenaerts (2008).

[297] Lenaerts (2007); Jeager (1999).

[298] Baere (2010).

[299] By virtue of Article 6(1) TEU, The Charter has the same legal values as the Treaties.

[300] Lenaerts (2010).

[301] Judgment of the Court of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, Case 294/83, ECLI:EU:C:1986:166, para. 23; Judgment of the Court of 23 March 1993, *Beate Weber v European*

The principle of conferral laid down in Article 5(2) and 13(2) of the TEU[302], states that the Union shall act only within the limits of the powers conferred upon it by the Member States under the Treaties. Competences not conferred upon the Union under the Treaties remain with the Member States' prerogative. Consequently, the Court of Justice and the General Court do not have the presumption of jurisdiction, or in other words the "*inherent jurisdiction*"[303] to adjudicate any case that involves European law matters. Instead, their jurisdiction is limited to specific cases provided for in the Treaties,[304] whilst the rest of the cases fall within the residual competence of the national courts,[305] which are vested with the power to safeguard the individuals' rights protected under European law.[306]

The national courts, therefore, play an important role in the European system of judicial protection as main *fora*[307] for adjudicating cases involving issues of Union law on the one hand between individuals (natural and legal persons) and on the other hand between

Parliament, C-314/91, ECLI:EU:C:1993:109, para. 16; Judgment of the Court of 23 March 1993, *Beate Weber v European Parliament*, C-314/91, ECLI:EU:C:1993:109, para. 8; Judgment of the Court of 10 July 2003, *Commission of the European Communities v European Investment Bank*, C-15/00, ECLI:EU:C:2003:396, para. 75; Judgment of the Court (Grand Chamber) of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P, ECLI:EU:C:2008:461, para. 81; Judgment of the Court (Grand Chamber) of 29 June 2010, *E and F,* C-550/09, ECLI:EU:C:2010:382, para. 44; Order of the Court of First Instance (Fourth Chamber) of 17 January 2002, *Stauner and Others v Parliament and Commission*, T-236/00, ECLI:EU:T:2002:8, para. 50; Judgment of the Court of First Instance (First Chamber) of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision v Council*, T-299/05, ECLI:EU:T:2009:72, para. 57; Judgment of the Court of First Instance (Third Chamber) of 21 March 2002, *Joynson v Commission*, T-231/99, ECLI:EU:T:2002:84, para. 32; Opinion of the Court of 14 December 1991, Opinion 1/91, Draft Agreement between the Community, on the one hand, and the countries of the Euroepan Free Trade Association, on the other, relating to the creation of the European Economic Area, ECLI:EU:C:1991:490, para. 21.

[302] Article 5(2) TEU "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

[303] Lenaerts, Maselis, & Gutman (2014), p. 3.

[304] Judgment of the Court (Grand Chamber) of 14 June 2011, *Miles and Others*, C-196/09, ECLI:EU:C:2011:388, para. 45.

[305] Article 274 TFEU 'Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'.

[306] Judgment of the Court of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, ECLI:EU:C:1978:49, para. 21; Judgment of the Court (Second Chamber) of 29 April 1999, *Erich Ciola v Land Vorarlberg*, C-224/97, ECLI:EU:C:1999:212, para. 29-34; Judgment of the Court (Fifth Chamber) of 18 April 2002, *Johann Franz Duchon v Pensionsversicherungsanstalt der Angestellten*, C-290/00, ECLI:EU:C:2002:234, para. 31; Judgment of the Court (Grand Chamber) of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, ECLI:EU:C:2004:584, para. 111; Judgment of the Court (Grand Chamber) of 15 April 2008, *Impact v Minister for Agriculture and Food and Others*, C-268/06, ECLI:EU:C:2008:223, para. 42.

[307] Judgment of the Court of 5 February 1963, *van Gend & Loos*, Case 26-62, ECLI:EU:C:1963:1, para. 3.

individuals and competent authorities. Given, however, the supremacy of EU law[308] and the exclusive jurisdiction of the CJEU[309] to interpret[310] the EU law, the Treaties provide for the mechanism of the preliminary ruling.[311] This mechanism ensures the dialogue[312] between the national courts and the Union courts, and thus the uniform implementation of the Union law across the EU.

2. The Action for Damages in European Law

The two main judicial remedies under the EU law are the action for annulment and the action for damages.[313] The latter is established under Article 340 TFEU and constitutes a significant judicial remedy in the context of non-contractual liability for losses suffered by a party on account of an unlawful act of an EU body and it is subject to a five-year limitation period.[314] It is well established in the CJEU's case-law that an action for damages has an autonomous character and hence its admissibility does not depend on the fulfilment of the conditions of admissibility of an action for annulment.[315] In the seminal *Francovich* case[316] [317] the CJEU held that it is inherent in the system of the EU Treaties that the Member States

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[308] Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, Case 6-64, ECLI:EU:C:1964:66.

[309] On its nature and competence see Itzcovich (2014).

[310] Lock (2015).

[311]Article 267 TFEU empowers the Court of Justice to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

[312] Opinion of the Court (Full Court) of 8 March 2011, Opinion 1/09, Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties, ECLI:EU:C:2011:123, pp. 66-69. Corthaut (2012); von Danwitz (2010); Lenaerts (2007), pp. 1625-1659; Prechal (2006); Resolution of the European Parliament of 9 July 2008 on the role of the national judge in the European Judicial system (2009); Lenaerts (2007); Rosas (2008).

[313] Petrašević & Krmek (2017), pp. 256-272**.**

[314] Article 46 of the Statute of the Court of Justice. As regards the point in time in which the period begins see relevant discussion in Judgment of the Court of First Instance (Fourth Chamber) of 7 February 2002, *Erwin Kustermann v Council of the European Union and Commission of the European Communities*, T-201/94, ECLI:EU:T:2002:26; Judgment of the Court of First Instance (Fourth Chamber) of 7 February 2002, *Schulte v Council and Commission*, T-261/94, ECLI:EU:T:2002:27.

[315] See Judgment of the Court of 14 July 1967, *Firma E. Kampffmeyer and others v Commission of the EEC*, Joined Cases 5,7 & 13-24/66, ECLI:EU:C:1967:31; Judgment of the Court of 28 April 1971, *Alfons Lütticke GmbH v Commission of the European Communities,* Case 4-69, ECLI:EU:C:1971:40.

[316] Judgment of the Court of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined cases C-6/90 and C-9/90, ECLI:EU:C:1991:428 ("*Francovich* judgment"); Judgment of the Court (Fifth Chamber) of 16 December 1993, *Teodoro Wagner Miret v Fondo de Garantía Salarial,* C-334/92 ECLI:EU:C:1993:945; Judgment of the Court of 14 July 1994, *Paola Faccini Dori v Recreb Srl*, C-91/92, ECLI:EU:C:1994:292; Judgment of the Court (Sixth Chamber) of 7 March 1996, *El Corte Inglés SA v Cristina Blázquez Rivero*, C-192/94, ECLI:EU:C:1996:88.

[317] Letelier (2009); Granger (2007).

are obliged to make good for any loss or damage to the aggrieved party.[318] As it will be analysed in the discussion that follows it is crucial whether the loss flows from the exercise of a discretionary or non-discretionary power.[319]

2.1.Action for damages – Subject Matter – Liability Standard

According to Article 268 TFEU:[320]

> *The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.*

Article 340[321] provides that:

> *The contractual liability of the Union shall be governed by the law applicable to the contract in question.*
>
> *In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.*
>
> *Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.*
>
> *The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.*

The CJEU has interpreted broadly the term "institutions" so as to encompass all Union bodies established under the Treaties.[322] The action for damages is independent from the legal remedy of action for annulment, thus if a party has exercised the latter, it is not precluded from bringing also an action for damages before the CJEU. Yet, a claim for damages will not be admissible if it aims to circumvent a decision dismissing an action for

[318] On the corrective or distributive justice as a justification for state liability see Letelier (2014).

[319] Craig (2006).

[320] Former Article 235 TEC.

[321] Former Article 288 TEC.

[322] Judgment of the Court of 2 December 1992, *SGEEM and Etroy v EIB*, C-370/89, ECLI:EU:C:1992:482; Judgment of the Court of First Instance of the European Communities (Third Chamber) of 10 April 2002, *Lamberts v Commission*, EU:T:2002:94.

annulment having the same subject-matter as the action for damages, or if it aims at indirectly 'nullifying' the legal effects of an administrative measure which has otherwise become definitive. The latter would be the case for instance if a sanction was imposed to a party which then brought proceedings claiming damages for the exact same amount as the sanction imposed (taking also into consideration other relevant *ad hoc* circumstances).[323]

With regard to the jurisdiction to adjudicate an action for damages, the CJEU has interpreted the Article 268 narrowly and has held that the CJEU enjoys exclusive jurisdiction to find a Union body non-contractually liable.[324] The *ratio* behind the exclusive jurisdiction of the CJEU is twofold. On one hand, it is to ensure the uniform implementation of the liability rules applicable to the Union bodies, and on the other hand, it is to safeguard the Union's independence to the extent that the Union's acts are not subject to the judicial review of the national courts.

It should be noted that in *Brasserie* case, the CJEU took the opportunity to clarify that Member States may incur non-contractual liability for damages arising from any state organ, including the legislator.[325] Consequently, compensation should be available to individuals for breach of Union law arising from national legislation.

As regards the liability standard of the Union bodies this is set out in Article 340 TFEU which provides that the Union shall make good any damage caused by its institutions or by its servants in the performance of their duties 'in accordance with the general principles

[323] Craig (2006), p. 765, and the cited case-law: Judgment of the Court (First Chamber) of 12 November 1981, *Anton Birke v Commission and Council of the European Communities*, Case 543/79, ECLI:EU:C:1981:265, para. 28; Judgment of the Court (Second Chamber) of 5 March 1998, *Pesqueria Vasco-Montanesa SA (Pevasa) and Compania Internacional de Pesca y Derivados SA (Inpesca) v Commission,* Joined cases C-199/94 P and C-200/94 P REV, ECLI:EU:C:1995:360, paras. 27–28; Judgment of the Court of First Instance (First Chamber) of 4 February 1998, *Bernard Laga v Commission of the European Communities*, T-93/95, ECLI:EU:T:1998:22; Judgment of the Court of 14 September 1999, *Commission v AssiDomän Kraft Products AB*, C-310/97 P, ECLI:EU:C:1999:407, para. 59; Judgment of the Court of First Instance (Third Chamber, extended composition) of 24 October 2000, *Fresh Marine Company SA v Commission of the European Communities*, T-178/98, ECLI:EU:T:2000:240 ("*Fresh Marine S/A* judgment"), para. 50; Judgment of the Court of First Instance (Third Chamber) of 3 April 2003, *Eduardo Vieira SA, Vieira Argentina SA and Pescanova SA v Commission*, T-44, 119, 126/01, ECLI:EU:T:2003:98, paras. 214–216.

[324] Judgment of the Court (Fourth Chamber) of 17 July 2008, *Commission of the European Communities v Cantina sociale di Dolianova Soc. coop. arl and Others*, C-51/05 P, ECLI:EU:C:2008:409, para. 68. Judgment of the Court (Fifth Chamber) of 27 September 1988, *Asteris AE and others v Hellenic Republic and European Economic Community*, Joined cases 106 to 120/87, ECLI:EU:C:1988:457, para. 15; Judgment of the Court (First Chamber) of 18 April 2013, *European Commission v Systran SA and Systran Luxembourg SA.*, C-103/11 P, ECLI:EU:C:2013:245, in which the CJEU held that "[a]n action for damages brought against the European Community on the basis of non-contractual liability, even if it is brought under national legislation establishing special statutory rules which differ from the ordinary rules of law governing civil liability in the Member State concerned, does not – pursuant to Article 235 EC, read in conjunction with the second paragraph of Article 288 EC – fall within the jurisdiction of the national courts".

[325] Para. 34: "[In] international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply a fortiori in the Community legal order since all State authorities including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.*"*

common to the laws of the Member States'. This broad (umbrella) reference to the liability standard has been interpreted and specified by the CJEU.

According to the landmark judgment in *Francovich*, four criteria need to be fulfilled so as an applicant is successful in claiming damages against the Union bodies and the Member States,[326] namely (1) an illegal act or omission, (2) which constitutes a sufficiently serious breach of a rule of law intended to grant rights to individuals, (3) which caused actual damage, and (4) where there is a causal link between the illegal act or omission and the actual damage caused.[327] A sufficiently serious breach exists where the Union body concerned has 'manifestly and gravely disregarded the limits on its discretion'. As a result, the broader the discretion of a Union body, the more difficult it is to hold the latter liable. The last criterion of the causal link is the most difficult to prove in practice. The sections 2.1.1 – 2.1.4 following below further elaborate on these criteria.

In *Brasserie*, the CJEU reiterated that a Member State must compensate aggrieved parties for losses the latter suffered following the national rules on state liability. However, it further emphatically noted that the conditions to establish state liability under national law "*must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation*".[328] Effectively, national law should not "*make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law*".[329] Furthermore, Member States are not allowed to introduce elements to the liability regime additional to those already recognised and established by the court in *Francovich.*[330] The

[326] The Court firmly established this *ius commune* in its *Laboratoires pharmaceutiques Bergaderm* judgment (Judgment of the Court of 4 July 2000, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities*, C-352/98 P, ECLI:EU:C:2000:361).

[327] Judgment of the Court of 10 July 2003, *Commission of the European Communities v Fresh Marine Company A/S*, C-472/00 P, ECLI:EU:C:2003:399, para. 25. Zilioli & Wojcik (2021), p. 224.

[328] Judgment of the Court of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Joined cases C-46/93 and C-48/93, ECLI:EU:C:1996:79 ("*Brasserie* judgment"), para. 67. See also Judgment of the Court of 9 November 1983, *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, Case 199/82, ECLI:EU:C:1983:318.

[329] In this regard see *Brasserie* judgment para. 71 where the CJEU clarified, by way of example, that in light of *Francovich* liability requirements, Member States are not entitled to grant to individuals the right to seek compensation only in cases in which the state organ breached a provision of law which is particularly addressed to an individual situation (as the cases was in Germany): "The condition imposed by German law where a law is in breach of higher-ranking national provisions, which makes reparation dependent upon the legislature's act or omission being referable to an individual situation, would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law, since the tasks falling to the national legislature relate, in principle, to the public at large and not to identifiable persons or classes of person".

[330] *Brasserie* judgment para. 79: "The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order".

CJEU's express words in *Brasserie* reveals its intention to achieve uniform liability conditions among the EU Member States. [331]

It should be noted that the criteria laid down in the case-law are common with the ones established in the national legal frameworks of the Member States, being essentially part of the global administrative law rules, as discussed under Chapter 1, section 4.4.

2.1.1. Act or omission

In light of Article 340(3) TFEU and Article 87(3) SRMR, the ECB and SRB will only be held liable in case they acted unlawfully by either an action or omission. An omission could be established if the ECB and SRB had a duty to act enshrined in the relevant piece of legislation.[332] The unlawful act or omission must have occurred in the performance of their duties. It should be noted that proving the existence of an unlawful omission in the financial authorities' conduct is one of the hardest barriers that the claimant of the action for damages must cross.[333]

Third parties that have suffered damage because of the actions or omissions of the ECB or SRB's employees respectively can request compensation from the ECB and SRB directly which are responsible for making good any damage caused by their servants in the performance of the latter's duties.[334] [335] Should the ECB and SRB incur such external liability towards third parties, they are entitled to recourse against their servants pursuant to Article 340(4) TFEU and Article 87(6) SRMR. For the SRB, internal recourse is possible

[331] It is worth noting that *Brasserie* judgment involved liability of the state arising from violation of a Treaty provision, instead of a failure to implement a Directive as the case was in *Francovich*. The CJEU did not distinguish between the two situations and extended the general provisions of state non-contractual liability articulated in *Francovich* to actions and omissions resulting in a violation of any category of Community law provided that such law is intended to grant rights to individuals.

[332] See Judgment of the General Court (Third Chamber) of 23 May 2019, *Frank Steinhoff and Others v European Central Bank*, T-107/17, EU:T:2019:353, para. 53 and the case law cited therein.

[333] Such cases arise from the failure to conduct a timely audit of a financial service provider, despite complaints of serious misconduct, or from failing to take necessary measures to prevent damage to third parties, where the law requires their protection (e.g., withdrawing the entity's license before the entity onboards new customers and before the losses from its subsequent failure increase).

[334] This is reflected in the Protocol on the Privileges and Immunities of the EU. Consolidated version of the Protocol No 7 on the privileges and immunities of the European Union [2012] OJ C326/266. For the application of the immunities and privileges to the ECB and its staff, see Article 22 of the Protocol, and Article 80 SRM Regulation for the application to the SRB and the latter's members of staff.

[335] Almhofer (2021), p. 224: "This may include persons having an employment contract with an NCA or NRA, but who are authorised to act on behalf of the ECB or the SRB and have to follow the latter's instructions by virtue of EU law, 13 such as NCA staff acting in their capacity as members of the ECB's Joint Supervisory Teams."; D'Ambrosio (2015), pp. 77, 120 et seq. See also Judgment of the Court (Sixth Chamber) of 22 March 1990, *Le Pen and Front National v Puhl and Others*, C-201/89, ECLI:EU:C:1990:133, para. 14 (*e contrario*).

if the staff member has set a serious misconduct.[336] For the ECB, should there be gross negligence or wilful misconduct on the part of the ECB staff, then internal recourse is open to the ECB.[337]

According to the case-law of CJEU, third parties will not be able to establish external liability against the ECB and SRB if the damage is caused by their servants in the performance of their duties, but it arises from a conduct that it is not necessarily connected to the duties assigned to them. In the words of the CJEU, the Union "is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions".[338] A characteristic example would be when a servant drives its private car even if this would be in order to perform an on-site inspection. In principle, this would not satisfy the conditions of the case-law as set out right above. "A reference to a servant's private car in a travel order does not bring the driving of such car within the performance of his duties, but is basically intended to enable any necessary reimbursement of the travel expenses involved in the use of this means of transport to be made in accordance with the standards laid down for this purpose".[339]

"Only in the case of force majeure or in exceptional circumstances of such overriding importance that without the servant's using private means of transport the community would have been unable to carry out the tasks entrusted to it, could such use be considered to form part of the servant's performance of his duties […]".[340]

An interesting question that arises is whether compensation for damage caused by lawful acts can be sought. The earlier case-law of the General Court had recognised the possibility – at least in theory – of holding an EU body liable for lawful acts, under specific circumstances. In *Dorsch Consult* case,[341] the Court laid down three preconditions for such a possibility, namely the EU can incur liability for lawful acts if the damage occurred (1) affects a particular circle of economic operators in a disproportionate manner by comparison with others (special damage), (2) and exceeds the limits of the economic risks inherent in operating in the sector concerned (unusual damage),[342] (3) without the

[336] Article 22 of Regulation No 31 (EEC) and No 11 (EAEC) Regulation, laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community.

[337] para. 6 of the ECB's conditions of employment (to be found on its career website https://www.ecb.europa.eu/careers/pdf/conditions_of_employment.pdf).

[338] See Judgment of the Court of 10 July 1969, *Sayag and Others v Leduc and Others*, Case 9/69, EU:C:1969:37, para. 7.

[339] *Ibid*, para 10.

[340] *Ibid*, para. 11.

[341] Judgment of the Court of First Instance (Second Chamber) of 28 April 1998, *Dorsch Consult Ingenieurgesellschaft v Council and Commission*, T-184/95, ECLI:EU:T:1998:74.

[342] Judgment of the Court of 13 June 1972, *Compagnie d' approvisionnement, de transport and de crédit and Others v Commission*, Joined cases 9 and 11-71, ECLI:EU:C:1972:52, paras. 45 and 46; Judgment of the Court

legislative measure that gave rise to the alleged damage being justified by a general economic interest. The theoretical possibility of EU liability for lawful acts was upheld in *Beamglow* case,[343] where the Court specified that a damage is special and unusual if it exceeds the limits of the economic risk inherent for a given sector. Even so, the possibility of liability for lawful acts remained only on a theoretical level with no claimant having successfully invoked it, whereas in the more recent case-law, the CJEU rejected the possibility of such liability.[344] In the author's view, however, there should be the possibility to hold a Union body liable for lawful acts under strict preconditions especially in cases of violation of fundamental rights[345] as it will be discussed in Chapter 5.

Finally, it should be mentioned that the liability for damages also requires that the breached rule was intended to confer rights on individuals binding upon the EU body. The relevant rules that may be breached and trigger the ECB or SRB's liability are related to fundamental rights, or the rules laid down in the single rulebook. It has been acknowledged that conferring rights to individuals does not need to be the exclusive or overriding objective of the law.[346] Until this point in time, in the realm of EU banking law, the CJEU has denied compensation on the ground that the rule breached did not confer rights on individuals in the much-debated *Peter Paul* case.[347] [348] Considering the extensive development of EU banking law and the ever-expansive scope of EU banking regulation over the last years, it is highly doubtful that CJEU would reach the same conclusion today.[349]

2.1.2. Illegality – Test of the sufficiently serious breach

As explained above, in order to establish the non-contractual liability of Union bodies, the applicant is required to establish that there is illegality on the part of the Union bodies, i.e., that there is an act or omission of such bodies which constitute a breach of law. However,

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of 6 December 1984, *SA Biovilac NV v European Economic Community*, Case 59/83, ECLI:EU:C:1984:380, para. 28; Judgment of the Court (Fifth Chamber) of 24 June 1986, *Développement SA and Clemessy v Commission*, Case 267/82, ECLI:EU:C:1986:253, paras. 16 and 17.

[343] Judgment of the Court of First Instance (Grand Chamber) of 14 December 2005, *Beamglow v Parliament and Others*, T-383/00, ECLI:EU:T:2005:453.

[344] Judgment of the Court (Grand Chamber), 14 October 2014, *Buono and Others v Commission*, Joined Cases C-12/13 P and C-13/13 P, ECLI:EU:C:2014:2284, para. 43.

[345] For further discussion on the aspect of the fundamental rights see Chapter 3.

[346] Almhofer (2021), p. 226; Tridimas (2001); see also Judgment of the Court of 14 July 1967, *Firma E. Kampffmeyer and others v Commission of the EEC*, Joined cases 5, 7 and 13 to 24-66, ECLI:EU:C:1967:31.

[347] Judgment of the Court (Full Court) of 12 October 2004, *Paul and Others v Bundesrepublik Deutschland*, C-222/02, EU:C:2004:606 (*Peter Paul* judgment), para 50.

[348] The *Peter Paul* judgment is analysed under Chapter 4 section 1.1.

[349] Busch & Keunen (2019).

not any breach can lead to finding the wrongdoers liable, but only a *sufficiently serious breach.*[350]

The CJEU had already formulated the test of the sufficiently serious violation in its case-law as early as in 1971. In the *Schöppenstedt* case,[351] the CJUE held that, in relation to unlawful discretionary acts, the claimant must prove that a "sufficiently serious breach of a superior rule of law [set] for the protection of the individual" has taken place (the so-called *Schöppenstedt* formula). The "sufficiently serious breach" requirement introduces a limitation to the liability of EU bodies in cases of discretion and this can be "better explained from a public perspective of distribution of power than a private one focused only in a corrective of commutative justice".[352]

Later, in *Brasserie*[353] and a series of other cases,[354] the CJEU held that the right to compensation should not be conditional upon "fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law".[355] Effectively, the CJEU expressly reiterated the

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[350] See *Laboratoires pharmaceutiques Bergaderm* judgment, paras 42–43; Judgment of the Court of 10 December 2002, *Commission of the European Communities v Camar Srl and Tico Srl*, C-312/00 P, ECLI:EU:C:2002:736, para. 53; Judgment of the Court (Second Chamber) of 19 April 2007, *Holcim (Deutschland) v Commission*, C-282/05 P, ECLI:EU:C:2007:226, para. 47.

[351] Judgment of the Court of 2 December 1971, *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities*, Case 5/71, ECLI:EU:C:1971:116.

[352] Letelier (2009), p. 289.

[353] *Brasserie* judgment, paras. 75-80. *Brasserie* case relates to a claim for damages brought before the Bundesgerichtshof (German Federal Court of Justice) against the German state by a French company producing beer. The claim for damages followed the CJEU's ruling that German law was in violation of Article 30 of the Treaty establishing the European Community which at the time precluded prohibitions or restrictions on imports. The French Company argued that it had sustained losses because German authorities had decided to exclude its product from circulation in the German market on the ground that said product did not meet the purity requirements imposed under German law (in violation of the relevant EC law provisions). Bundesgerichtshof referred to the CJEU questions regarding *inter alia* whether it was entitled to apply the German law conditions for state liability in light of *Francovich* doctrine. In answering the question, the CJEU further populated the liability standard (i.e., that of the 'sufficiently serious breach") applicable in cases of state liability.

[354] Judgment of the Court of 8 October 1996, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland*, Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, ECLI:EU:C:1996:375 ("*Dillenkofer* judgment") (*Dillenkofer* judgment), para. 28. In *Brasserie* judgment the CJEU unified the conditions of liability for the Member States and Community.

[355] *Brasserie* judgment, para. 55; *Dillenkofer* judgment, para. 13; Judgment of the Court of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, C-213/89, ECLI:EU:C:1990:257 ("*Factortame III* judgment"), para. 4. It is noted that at the centre of the *Factortame III* judgment were certain strict requirements under British law in relation to registration of vessels. These requirements were specifically set forth in order to prevent Spanish fishers from registering their vessels with the British vessels' registry and thus prevent them from fishing in British waters. Spanish fishers who were deprived of registration by operation of the statute, brought a claim for damages before the British courts. The referring British court (i.e., the House of Lords) inquired the CJEU whether it is possible, in light of *Francovich*, that national law excludes a liability for losses arising by reason of legislation. The CJEU noted the following (paras. 86-87): "[t]he Bundesgerichtshof asks whether national legislation may generally limit

"sufficiently serious breach" test and provided some doctrinal clarity as regards its content. The CJEU also provided an example of what could constitute a sufficiently serious breach by stating that such breach would be a case where "a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement".

Subsequent case-law has further elaborated on the sufficiently serious breach test. In the recent *Kantarev* case,[356] the Court held that the obligation to make good for loss or damage caused to individuals cannot depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of EU law, in the sense that such a breach implies a manifest and grave disregard by the Member State for the limits set on its discretion.[357]

The determination of the liability of the EU bodies is eventually a matter of interpretation of vague and general legal norms and concepts. In this regard, the CJEU has developed in its case-law guiding criteria based on which a misconduct can be qualified as a 'sufficiently serious breach' of EU law. In *Bergaderm* case, the Court held that in order to determine whether there is a sufficiently serious breach "the complexity of situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question" should be taken into account.[358] The CJEU has clarified in other cases that the seriousness of the breach depends on the relative clarity of the breached rule, the degree of discretion enjoyed by the authorities, whether the error of law was excusable or not (thus it takes into account elements of fault[359]), and whether the breach was intentional or voluntary,[360] or the fact that the position taken by a Community institution may have contributed towards the omission.[361] Especially with regard to discretion, the CJEU evaluates whether the EU body

the obligation to make reparation to damage done to certain, specifically protected individual interests, for example property, or whether it should also cover loss of profit by the claimants. It states that the opportunity to market products from other Member States is not regarded in German law as forming part of the protected assets of the undertaking. Total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible".

[356] Judgment of the Court (Fifth Chamber) of 4 October 2018, *Nikolay Kantarev v Balgarska Narodna Banka*, C-571/16, ECLI:EU:C:2018:807 ("*Kantarev* judgment").

[357] *Kantarev* judgment, paras. 105, 127.

[358] *Laboratoires* judgment, para. 40; *Fresh Marine A/S* judgment.

[359] Almhofer (2021), p. 225.

[360] Craig (2006), p. 772.

[361] *Brasserie* judgment, para. 4.

'manifestly and gravely' disregarded the limits of its discretion.[362] Relatedly, the General Court has eloquently acknowledged that:

> *[...] the requirement of a sufficiently serious breach of Community law [...] seeks, whatever the unlawful nature of the measure in question, to avoid the situation where the risk of having to bear the losses alleged by the undertakings concerned hinders the ability of the institution concerned to fully exercise its competences in the general interest, both in the context of its activities that are regulatory or involve economic policy choices and in the sphere of its administrative competence [...].*[363]

A characteristic example of a sufficiently serious breach would be the case in which the ECB does not take any measure in the context of its oversight responsibilities pursuant to Article 6(5) SSMR, should it come to its attention that there are several wrongdoings on the part of an NCA when exercising its supervisory duties over less significant institutions.[364] Effectively, in such cases, the CJEU examines whether the public authority acted within the limits of its discretion.[365] The intensity of the court's review stretches up to the point where the court does not substitute the public authority in its (the authority's) assessment.[366]

The requirement of a 'sufficiently serious breach' turns the non-contractual liability of EU bodies into a fault-based liability.[367] It is interesting to note that the CJEU has not revealed the standard of proof (e.g. 'clear preponderance' or 'very high probability') it applies so as it is satisfied that the claimant has established the non-contractual liability of the EU authorities.[368]

The sufficiently serious breach test is altered for cases where the Union bodies have considerably limited or zero discretion. In these cases, the CJEU has held that merely the infringement of a rule is sufficient to fulfil the 'sufficiently serious breach' test.[369]

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[362] Judgment of the Court (Grand Chamber) of 12 July 2005, *Commission of the European Communities v CEVA Santé Animale SA and Pfizer Enterprises Sàrl.*, C-198/03 P, ECLI:EU:C:2005:445.

[363] Judgment of the General Court (Sixth Chamber) of 3 March 2010 *Artegodan GmbH v European Commission*, T-429/05, ECLI:EU:T:2010:60, para. 55.

[364] Judgment of the Court (Second Chamber) of 4 July 1989, *Benito Francesconi and others v Commission of the European Communities*, Joined cases 326/86 and 66/88. ECLI:EU:C:1989:282, paras 11-12.

[365] McMeel (2022), p. 282; Caranta (2008), p. 185.

[366] Bailey (2003); For a critical approach towards CJEU rulings see Forrester (2009a) and Forrester (2009b).

[367] Brüggemeier (2015), p. 74, has described this criterion as allowing for fault in the form of 'institutional fault' and 'gross maladministration'.

[368] Brüggemeier (2015), p. 76.

[369] *Laboratoires* judgment, paras. 42–44; *Fresh Marine A/S* judgment; Judgment of the Court of 10 December 2002, *Commission of the European Communities v Camar Srl and Tico Srl*, C-312/00 P, ECLI:EU:C:2002:736, paras 54-55; Judgment of the Court of First Instance (Fifth Chamber) of 3 February 2005, *Comafrica SpA and*

Nevertheless, it should be noted that in cases of unlawful non-discretionary acts, a question arises with regards to what constitutes 'illegality'. The CJEU has interpreted narrowly the concept of illegality with the result that an infringement will not always lead to compensation. For instance, the Court has held that incorrect interpretation of a regulation[370] or absence of diligence by the EU Commission when applying EU law[371] do not constitute illegality.

2.1.3. Damage

Awarding compensation for loss in cases of non-contractual liability aims at placing the aggrieved party in the same situation that the party would have been if the wrongful act or omission had not taken place. The applicant must prove that he or she suffered damage which is[372] *certain*. Hypothetical or future damage which is not foreseeable with sufficient certainty is not compensated. The applicant must also prove that the damage is *specific*, in the sense that it affects the applicant's interests in a special and individual way. In this context, the applicant needs also to show that he actually sustained the damage. Finally, the applicant needs to prove that the damage is *quantifiable*. The compensation may cover both the loss/reduction in a person's assets (*damnum emergens*), but also loss of profit (*lucrum cessans*),[373] although in practice it is difficult to prove that the individual suffered loss of profit.

If the action for damages is successful, the CJEU rules that the EU body is found liable, and it leaves the parties to reach an amicable agreement regarding the calculation of the compensation amount. If such an agreement is not reached then the parties can bring the case to the Court again so the latter decides on the amount of damages to be awarded.

Dole Fresh Fruit Europe Ltd & Co. v Commission of the European Communities, T-139/01, ECLI:EU:T:2005:32, paras. 134-136; Judgment of the Court of First Instance (Fourth Chamber) of 16 March 2005, *EnBW Kernkraft GmbH v Commission of the European Communities*, T-283/02, ECLI:EU:T:2005:101, para. 87; Judgment of the Court of First Instance (Fifth Chamber) of 3 February 2005, *Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co. v Commission of the European Communities*, T-139/01, ECLI:EU:T:2005:32, para 142.

[370] Judgment of the Court (First Chamber) of 28 May 1970, *Denise Richez-Parise and others v Commission of the European Communities*, Joined cases 19, 20, 25 and 30-69, ECLI:EU:C:1970:47.

[371] *Fresh Marine A/S* judgment, para. 61.

[372] Judgment of the Court of First Instance (Fifth Chamber) of 3 February 2005, *Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co. v Commission of the European Communities,* T-139/01, ECLI:EU:T:2005:32, paras. 163–168; Judgment of the Court of First Instance (First Chamber) of 2 July 2003, *Hameico Stuttgart and Others v Council and Commission*, T-99/98, ECLI:EU:T:2003:181, para 67; Judgment of the Court of 21 May 1976, *Société Roquette frères v Commission of the European Communities*, Case 26-74, ECLI:EU:C:1976:69.

[373] Judgment of the Court of 19 May 1992, *J. M. Mulder and others and Otto Heinemann v Council of the European Communities and Commission of the European Communities*, Joined cases C-104/89 and C-37/90. ECLI:EU:C:1992:217.

2.1.4. Causal Link

Traditionally in most jurisdictions (the EU included), the requirement of causal link is the most difficult to prove in practice. In many instances, the cause of an event that is the source of the loss can be traced back in many factors or operators that either simultaneously or successively produced direct or direct effects that led to the event that caused the loss. According to the CJEU's case-law, the applicant must show cumulatively that the action of the Union body caused the loss and that the chain of causation between the said action and the loss was not interrupted by an action of the applicant or a Member State.[374] Thus, the causality must be 'direct, immediate and exclusive' which is the case only when the damage arises directly from the conduct of the Union body and does not depend on the interference of other positive or negative causes.[375] If the Union body's act is one of the several circumstances that led to the damage, this might not be sufficient to establish a causal link and thus holding the Union body liable. In general, it could be said that the causal link test applied by the CJEU entails that causality exists in cases where the damage would not have occurred in the absence of the wrongful act or omission.[376] This test resembles the *conditio-sine-qua-non* requirement under national liability laws.[377]

2.2. Action for damages against the ECB and the SRB

The liability of the ECB is established by primary law under Article 340(3) TFEU.[378] Article 35.3 of the ESCB/ECB Statute repeats that the ECB shall be subject to the liability regime provided for in Article 340 TFEU. The provision of Article 340 TFEU is mirrored in Recital 64 SSMR which explicitly states that the ECB should make good any damage caused by it or its servants in the performance of their duties. Hence the ECB is subject to liability also for its supervisory function.

Equally, the SRB is subject to non-contractual liability by virtue of Article 87 SRMR which wording almost replicates Article 340(2) TFEU. It is worth noting that the SRB enjoys a

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[374] Judgment of the Court of 30 January 1992, *Finanziaria Siderurgica Finsider SpA (in liquidation), Italsider SpA (in liquidation) and Societa Acciaierie e Ferriere Lombarde Falck SpA v Commission of the European Communities*, Joined cases C-363/88 and C-364/88, ECLI:EU:C:1992:44, para 25; Judgment of the Court of First Instance (Fifth Chamber) of 6 March 2003, *Banan-Kompaniet and Skandinaviska Bananimporten v Commission and Council*, T-57/00, ECLI:EU:T:2003:59, para 40; Judgment of the Court of First Instance (Third Chamber) of 13 February 2003, *Meyer v Commission*, T-333/01, ECLI:EU:T:2003:32, para 32; Judgment of the Court of 14 July 1961, *Société commerciale Antoine Vloeberghs SA v High Authority of the European Coal and Steel Community*, Joined cases 9 and 12-60, ECLI:EU:C:1961:18; Judgment of the Court of 28 April 1971, *Alfons Lütticke GmbH v Commission of the European Communities*, Case 4-69, ECLI:EU:C:1971:40, paras 336-338.

[375] Craig (2006), p. 777.

[376] *Ibid.*

[377] Almhofer (2021), p. 228.

[378] which is a *lex specialis* to 340(2) TFEU which regulates the non-contractual liability of the Union bodies.

separate legal personality[379] and thus its acts or omissions are attributable to it and any liability claims are directed against it. There is a notable exception from this rule in the case in which the financial resources of the SRB are not sufficient to cover the damages its actions caused. In this case, a residual liability of the Union is triggered (as it will be developed further below).

The legal bases for the liability of the ECB and SRB does not provide the liability standard to be applied but rather limit themselves to referring that the principles common o EU member States are applicable when establishing the liability of the ECB and SRB. In light of the scarce of guidance on the liability rules, it is the CJEU that has developed the law in respect and especially the rules on the liability standard based on the national law rules on liability.

The jurisdiction of the CJEU to adjudicate actions for damages against the ECB is enshrined in Article 268 TFEU, read in conjunction with Article 274 TFEU and Article 35.1 ESCB/ECB Statute, whereas the respective jurisdiction to adjudicate actions for damages against the SRB is founded on Article 87(5) SRMR.

In terms of the procedure, usually the CJEU first establishes whether the ECB or the SRB should incur non-contractual in an interlocutory judgment. Then the parties are to engage in discussions to agree on the amount of compensation. If the parties do not reach an agreement, the CJEU will determine the level of compensation with a second judgment.[380]

The aggrieved party should file an action for damages within a time period of five years.[381] Following the lapse of this limitation period, an action for damages will be dismissed by the CJEU if filed.[382]

An action for damages against the ECB and SRB would be successful provided that the CJEU would be satisfied that there is an ‘illegal’ act or omission meeting the three criteria, as set out under Chapter 2, section 2.1 above, on the part of the ECB and the SRB. For instance, the ECB could be held liable for illegal omission if it failed to act pursuant to

[379] Although the SRM as such does not enjoy legal personality, but instead it only “*brings together the Board, the Council, the Commission and the resolution authorities of the participating Member States*” (Recital 120 SRMR).

[380] the interlocutory judgment in the Judgment of the Court of 19 May 1992, *J. M. Mulder and others and Otto Heinemann v Council of the European Communities and Commission of the European Communities*, Joined cases C-104/89 and C-37/90, ECLI:EU:C:1992:217 and the ruling on the amount of damages to be paid (that followed the judgment on the merits): Judgment of the Court (Sixth Chamber) of 27 January 2000, *J.M. Mulder, W.H. Brinkhoff, J.M.M. Muskens, T. Twijnstra and Otto Heinemann v Council of the European Union and Commission of the European Communities*, Joined cases C-104/89 and C-37/90, ECLI:EU:C:2000:38, paras 1–7.

[381] Article 46 of the ECJ Statute and Article 87(5) SRMR.

[382] Order of the General Court (Fifth Chamber) of 25 September 2019, *Triantafyllopoulos and Others v ECB*, T-451/18, ECLI:EU:T:2019:715.

Article 6(5) SSMR, despite being aware of irregularities in the supervision of LSIs by the NCAs.[383]

Should the CJEU find liable the ECB, the latter will be required to make good for any damage it may have caused. Given the ECB's independence, financing of compensation claims does not take place *via* the Union budget. Instead, it has been argued that the compensation could be financed by the supervisory fees imposed on banks.[384]

As regards the SRB case, it can also be argued that the financing of claims for damages is levied from the annual contributions of banks to the SRBs budget according to Article 65 SRMR. This argument can be supported in view of Article 58 SRMR which provides that the SRB's budget is autonomous from the Union's budget, read in conjunction with Article 59 SRMR which provides that the administrative expenses of the SRB are to be financed by the afore-mentioned annual contributions of the banks. However, given that the financial independence of the SRB is enshrined only in secondary legislation and not in the Treaties, it cannot be excluded that the Union will be residually held liable to damages should the financial resources of the SRB prove to be insufficient to cover the damage incurred by third parties.[385] The residual liability of the Union is explained also in light of the fact that the EU Commission and the Council are empowered to legally adopt the SRB's decisions given that the latter is an agency of the Union.[386]

The causal link poses the most major challenges in establishing the ECB and SRB's liability especially in the case of composite administrative procedures which deserve particular attention. Although this point will be further analysed in Section 8 of this Chapter, it is pertinent to make some preliminary remarks at this stage. In the cases in which both the Union and national authorities have "set a condition for the damage, but the conduct of one authority is too remote and indirect for ultimately attributing the damage to it",[387] then only the other authority will be held liable. Assessing whether the causal link is broken or not in the case of composite administrative procedures depends on the allocation of tasks between the Union bodies and the national authorities[388] and on which authority

[383] Almhofer (2021), p. 228.

[384] *Ibid*, p. 227: The author argues that financing *via* supervisory fees "would also be compliant with the banks' fundamental rights, as long as such interference with their rights is proportionate (which may likely be the case for compensation that does not significantly increase the percentage of fees levied".

[385] Craig & de Búrca (2015), p. 595.

[386] Almhofer (2021), p. 228.

[387] Almhofer (2021) p. 229. See also Craig & de Búrca (2015), p. 599.

[388] Judgment of the Court of 15 January 1987, *Krohn v Commission*, C-175/84, ECLI:EU:C:1987:8, para. 23; see also Judgment of the Court (Second Chamber) of 27 March 1980, *Sucrimex SA and Westzucker GmbH v Commission of the European Communities*, Case 133/79, ECLI:EU:C:1980:104, paras 22–25.

has the power to take the final decision in the composite procedure taking also into account the level of discretion granted to the other authority in such procedure.[389]

In light of the above, even if both the ECB and the NCA have contributed to an act, only the ECB should be held liable if it is the final decision-maker and the NCA merely followed the ECB's illegal instructions,[390] or where the NCA prepare draft decisions, but the final decision is taken by the ECB.[391] The same observations hold true also for the case of the SRB.

It clearly follows that where both the Union and national authority have jointly contributed to the damage, they will incur joint and several liability. This could be the case, for instance, where an NCA issues an illegal supervisory act binding upon an LSI and despite the ECB being aware of this it does neither make use of its power under Article 6(5)(a) SSMR to issue any relevant regulations, guidelines or general instructions to the NCA, nor of its power under Article 6(5)(b) SSMR it intervene.[392]

3. Action for damages against financial authorities in Greece. [393]

Having examined the conditions to be met to establish the non-contractual liability of the European financial authorities, the present section will lay the contours of the respective conditions under the Greek legal framework that must be fulfilled in order for the Greek financial authorities, i.e., the BoG and the HCMC, to be held non-contractually liable. Given that the conditions of non-contractual liability under the latter framework are inspired by the general rules of liability to be found in the national legislation of the Member States, they are identical to a large extent to the conditions found under the Greek law. It is noted that the allocation of tasks between the ECB and the BoG in the context of the SSM is key element to determine whether the liability rests with the former or the latter.[394]

Greek financial authorities comprise of the Bank of Greece (the "BoG") and the Hellenic Capital Markets Authority (the "HCMC"). Unlike other central banks which were established by virtue of national legislation, in the case of Greece an international treaty constitutes the incorporation instrument of BoG. The latter was established in 1927 under

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[389] (Almhofer, 2021, p. 229).

[390] Article 9(1) subparagraph 3 of SSMR.

[391] See case Judgment of the Court (Grand Chamber) of 19 December 2018, *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, C-219/17, ECLI:EU:C:2018:1023 ("*Berlusconi* judgment"), paras 40 et seq with regard to Art. 263 TFEU.

[392] Almhofer (2021), p. 229.

[393] This section is based on Gortsos & Anastopoulou (2022).

[394] On the allocation of tasks within the SSM, see Gortsos (2015h).

Article 4 of the Geneva Protocol of 15 September 1927.[395] The HCMC is a rather 'new-born' public authority as it was established by virtue of Article 76 of Greek Law 1969/ 1991. The Greek financial authorities are vested with powers deriving from pertinent Union and national legislation.

The non-contractual liability of the BoG and HCMC in cases of shortcomings when discharging their duties is not governed by specific provisions in the Greek legal framework. Rather their liability is based on the general provisions of the non-contractual liability of the state to be found in the Constitution and the law.

The pertinent provisions are first to be found on a constitutional level. The Greek '*grund norm*' provides in Article 4(5)[396] that all Greek citizens are equal in the sense that they "*shall, without discrimination, contribute towards sharing the burden of public expenditure according to their ability".* The Greek courts have held that this provision is the constitutional basis for aggrieved parties invoking compensation against the Greek state for damage they have suffered arising from the latter's failures in its actions. To refer to the ruling of the Greek Conseil d' Etat "*equality in sharing the public burdens requires [inter alia] the compensation of the damage caused from the state action performed in the public interest, in case this action is unlawful*[397] *or in case it is lawful*[398] *but causes particular and great damage to such an extent that in order to achieve the public interest it pursues, it exceeds the limits that are tolerated by the Constitution*". [399]

On a law level, the spectrum of rules regulating the state's non-contractual liability is composed of Articles 105-106 of the Greek Law 2783/1941 read in combination with the general tort rules under the Greek Civil Code.[400]

Article 105 of Law 2783/1941 provides that: "*The State shall be liable and shall pay compensation for illegal acts or omissions of State bodies in the course of exercise of state authority appointed to them, unless the act or omission was in breach of a provision intended to benefit public interest. Without prejudice to special provisions regarding the liability of ministers, the liable natural persons serving in the State bodies shall be liable jointly and severally with the State*", whereas according to Article 106: "*the previous*

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[395] Ratified by Greek Law 3423/ 7.12.1927.

[396] Although the Greek case-law refers to Article 4(5) as the constitutional legal basis for the state's non-contractual liability, the Greek literature correctly establishes the state's liability not only on Article 4(5) but in addition on the general principle of rule of law and on to Article 20 of the Greek Constitution which reads as follows: "*Every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law*".

[397] Greek Council of State decision no. 980/2002.

[398] Greek Council of State decision no. 5504/2012.

[399] Greek Council of State decision no. 1501/2014 .

[400] Articles 914-938, 297-300 of the Greek Civil Code.

articles[401] shall apply with regard to the liability of municipalities, communities and other legal entities of public law in respect of acts or omissions of bodies operating under their management".

Bearing in mind that Articles 105-106 are applicable to legal entities of *public law* a question arises as to whether they apply to the non-contractual liability of the BoG given that the latter is incorporated as a société anonyme (S.A.).[402] Despite the BoG being a legal entity of private law, Greek case-law classifies the BoG as a '*legal person of mixed character*'[403] given that it exercises public authority with respect to the issuance of banknotes, the management of foreign exchange reserves and the micro-prudential supervision of certain entities of the financial sector. Hence, when exercising public authority, the BoG is subject to Articles 105-106.[404]

Following this brief introduction on the legal framework regulating the non-contractual liability of the BoG and HCMC, it is pertinent to examine the specific conditions that should be met so a claim for damages is successful before the courts. In particular, an aggrieved party that seeks to be awarded compensation for damage suffered on account of a Greek financial authority's failure must substantiate that[405] there is an *unlawful act or omission* of the *financial authority* taking place during the *performance of the authorities' duties* (relativity element) and is *causally linked* to the *damage* incurred by the applicant. Article 105 of the Greek Law 2783/1941 includes one further condition, namely that the law breached by the financial authority was not enacted only in the public interest. The Greek courts have interpreted narrowly this condition, thereby limiting its "*effect on the state bodies' liability*".[406] These conditions are applicable to the non-contractual liability of the Greek financial authorities subject to the interpretative rules laid down by the Greek case-law, which are examined under section 2 of Chapter 3.[407]

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[401] i.e., Articles 104-105.

[402] BoG Statute, Article 1.

[403] Greek Court of Cassation decision no. 214/2003.

[404] Greek Council of State decision no. 2080/1987, Greek Cour de Cassation decision no. 214/2003, Greek Cour de Cassation decision no. 1/2006 (which clarified that BoG's relationships with its staff are governed by private law).

[405] Athens Administrative Court of First Instance decision no. 365/2019, Greek Council of State decision no. 1963/2018, Greek Council of State decision no. 1634/2017, Greek Council of State decision no. 237/2011.

[406] Gortsos & Anastopoulou (2022).

[407] Section 2.3 is based on Gortsos & Anastopoulou (2022).

3.1.Act or omission of the financial authority

As to the first condition, the applicant must prove that an unlawful act or omission of the financial authority took place. According to settled case-law,[408] the condition of an "unlawful act or omission" is interpreted broadly so as to cover also all unlawful *material* actions or omissions of the financial authorities. The courts' rationale behind this teleological interpretation is the following. *Material* actions or omissions are not subject to an action for annulment before the administrative courts thereby potentially leaving a gap in the judicial protection of individuals affected by the unlawful conduct of the financial authorities. Hence, subjecting all *material* actions or omissions to an action for damages affords comprehensive judicial remedies to aggrieved parties.[409]

"Acts" include both regulatory[410] and individual administrative acts,[411] which may establish obligations, abolish[412] or confer rights, either be enforceable or not.[413] In case of acts that confer rights, the liability of the financial authorities may arise in two instances. On the one hand, if the financial authority is responsible for the issuance of an unlawful act which subsequently revokes provided that the individual to whom the act conferred rights (supervised entity) was neither responsible nor had in any way contributed to the issuance of the unlawful act.[414] On the other hand, liability arises in cases where such act conferring rights cause damage to third parties.[415] [416]

Lastly it is noted that proving in practice that the financial authorities committed an unlawful *omission*, is one of the hardest hurdles an applicant in the action for damages must

[408] Greek Supreme Special Court decision no. 5/1995, Greek Supreme Special Court decision no. 53/1995, Greek Supreme Special Court decision no. 6/1996, Greek Supreme Special Court decision no. 10/2003, Greek Supreme Special Court decision no. 3/2004, Greek Supreme Special Court decision no. 21/2005, Greek Council of State decision no. 3626/2001, Greek Council of State decision no. 3457/2003, Greek Council of State decision no. 3069/2004, Greek Council of State decision no.1042/2007, Greek Council of State decision no.2287/2009, Greek Cour de Cassation decision no. 607/2001, Athens Administrative Court of Appeal decision no.5/2009.

[409] Pavlopoulos (1986), pp. 45-46. Such illegal and harmful material actions or omissions may arise during the improper on-site inspection in the offices of a supervised entity from the authorised organs (natural persons) of the supervisory authority.

[410] Liability can arise from regulatory acts which have immediate effect without requiring subsequently the issuance of an individual administrative act. See Mitsou (2006), p. 1001; Fortsakis (2002), p. 347.

[411] In Greek, "κανονιστικές και ατομικές διοικητικές πράξεις".

[412] e.g., withdrawal of license.

[413] e.g., the provision of information to the supervised entity.

[414] e.g., by deceiving the supervisor.

[415] (Fortsakis, 2002, p. 346).

[416] See Gortsos & Anastopoulou (2022).

overcome.[417] As it will be argued under Chapter 5, this is justified in view of the wide margin of discretion the financial authorities enjoy and should continue to enjoy.

3.2.Act or omission during the exercise of public authority (internal relevance)

The second condition requires that the unlawful act or omission of the financial authority has taken place in the course of exercising the public authority entrusted to it[418] and not merely in the context of the private management of its property. Neither should the unlawful act or omission be attributable to a fault of the financial authority's organs whereby the latter acted outside the scope of their official duties of public nature.

The case-law refers to this condition as the "internal relevance" between the exercise of public authority and the damage caused and should be distinguished from the condition of the causal link that must be present between the unlawful conduct and the damage caused. Effectively, the internal relevance condition entails that the Greek financial authorities can incur liability only in the case in which the unlawful conduct took place when their organs exercise public authority, whilst in cases in which the organs engage in conduct exclusively related to the activity of the financial authorities outside the sphere of public authority, the latter's liability is excluded.[419]

It should be noted that the internal relevance must be direct. A conduct of the financial authorities' organs would qualify as direct when it would take place within the "scope of their official (supervisory/ resolution) duties and it is not sufficient that the damage merely occurred during, or at the place of the performance of the supervisory duties, or 'on the occasion' of them".[420]

The internal relevance condition is an important aspect in determining the nature of the dispute, namely whether it is of public or private law, and accordingly in determining the jurisdiction of the courts. The Greek legal framework on the non-contractual liability of public authorities distinguishes between 'genuine' and 'non-genuine' non-contractual liability. The first is established when the internal relevance is present thereby triggering the jurisdiction of the administrative courts under Article 105. On the contrary, when the internal relevance is absent, the public authority has acted either as *fiscus*[421] or the damage

[417] Such cases arise from the failure to conduct a timely audit of a financial service provider, despite complaints of serious misconduct, or from failing to take necessary measures to prevent damage to third parties, where the law requires their protection (e.g., withdrawing the entity's license before the entity onboards new customers and before the losses from its subsequent failure increase).

[418] Indicatively, Greek Council of State decision no. 21/2005, Greek Council of State decision no. 1042/2007, Greek Council of State decision no. 2287/2009, Greek Cour de Cassation decision no. 607/2001.

[419] e.g., during an on-site inspection the organ of the supervisor steals a valuable object from the premises of the supervised entity.

[420] See Gortsos & Anastopoulou (2022).

[421] For example, when the BoG causes damage to another bank not during the exercise of supervision, but during the exercise of its joint transactional activities. This case encompasses acts or omissions related to the management of the private property of the supervisory authority.

is caused during, or at the place, or on the occasion of performing supervisory duties.[422] In these cases, the dispute that arise is of private law nature thereby giving rise to non-genuine liability and establishing the jurisdiction of civil courts to adjudicate on the dispute as per Article 104 of Law 2783/1941.[423]

It is evident that the assessment of whether the internal relevance exists can either broaden[424] or restrict[425] the cases in which a public authority, including the financial authorities, can incur non-contractual liability. When conducting such assessment, the courts should do so by paying due regard to the constitutional right of effective judicial protection,[426] so as they neither overly expand nor unjustifiably restrict the scope of genuine non-contractual liability of public authorities, including in particular of the financial authorities.

Assessing whether internal relevance exists is an exercise conducted on an *ad hoc* basis. It cannot be excluded that distinguishing between *fautes de service public* and *fautes personelles* in order to prove the internal relevance may be challenging in practice.[427]

3.3.Unlawfulness

In order to establish the non-contractual liability of the financial authorities, the aggrieved party should further prove, as required by Article 105, that the act or omission of the

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[422] Such a case is, for example, the theft of a valuable articles by an official of the supervisory authority during an on-site check at the offices of the supervised entity or the insult of a representative of the audited bank. More broadly, an "occasional" exercise of public authority, which excludes genuine supervisory liability, exists if the unlawful and harmful conduct could have taken place independently of the exercise of public authority, i.e., outside the scope of the public authority duties.

[423] The criterion of acting as a public authority or as a *fiscus* also determines the allocation of the jurisdiction between administrative and civil courts. Pavlopoulos (1986).

[424] In some court cases on state liability (not related though to financial supervisors) the broad interpretation was adopted: see Greek Cour de Cassation decision no.1114/1986, Greek Cour de Cassation decision no. 103/1985, Greek Cour de Cassation decision no. 161/1987, Greek Cour de Cassation decision no. 752/1998, Piraeus Administrative Court of Appeal decision no. 1863/2004, Athens Administrative Court of Appeal decision no.2900/2005.

[425] Equally, some court cases (again not related though to financial supervisors) have adopted the restrictive approach and require, in the form of a negative criterion of internal relevance, that the unlawful and harmful conduct "is not due to a personal fault of the state organ which acted outside the scope of its official duties": Piraeus Administrative Court of Appeal decision no.1863/2004, Athens Administrative Court of Appeal decision no.160/2001, Greek Supreme Special Court decision no. 5/1995, Greek Supreme Special Court decision no. 53/1995, Greek Supreme Special Court decision no. 6/1996.

[426] Articles 8 and 20 of the Greek Constitution.

[427] Floros (2012), pp. 213-217 and Gortsos & Anastopoulou (2022): "An example where it would be difficult to prove the internal relevance would be when an authorised official (natural person) of the financial authority deliberately spreads false news to harm a supervised entity for reasons of "personal revenge". However, even though this conduct is not relevant to its supervisory duties (since it could take place independently of them), it could be linked to those if the damage resulted due to the supervisory capacity of the organ, e.g., the market lost confidence to the financial institution because it relied on the information provided by the natural person who the market expected to be acting in his/her capacity as a supervisor".

financial authority was unlawful. Effectively, this means that the financial authorities should have infringed a rule of law governing their actions and laying down their duties,[428] either by acting or omitting to act. The condition of unlawfulness should not be confused with the liability standard of the financial authorities. The liability standard test applied by the Greek courts is the one of the *manifest and serious error* of the supervisor, whereas in the case of the BoG acting as resolution authority the liability test is that of *gross negligence or bad faith*.[429]

As per general principle of Greek administrative law, the unlawfulness of an administrative decision or the omission of an action required under the law are assessed against the legal rules applicable at the time the decision was adopted or the failure to adopt such decision took place.

Establishing the unlawfulness of an omission is hard in practice as it requires the court to assess whether the financial authority acted on due time in order to avert an unlawful conduct of the supervised entity or other regulatory violation by the latter, and accordingly prevent damage to third parties by the said misconduct (e.g., act timely and revoke the operation license of a supervised entity). According to the case-law in assessing whether the financial authority acted in due time it is crucial to examine when the financial authority received knowledge of the misconduct or other regulatory violation.[430]

However, not every infringement of the law would qualify as an ‘unlawful’ act or omission. Such qualification can be established only where the law infringed was intended to “protect individual rights or direct legal interests[431] over tangible or intangible goods”.[432]

Another case of unlawfulness which is similar but distinct to the omission is the situation where the financial authorities breach of their *duty of care*, namely the failure to take precautionary measures[433] in order to ensure the “safety and protection of third parties or goods”.[434] The content of the duty of care is specified on a case-by-case basis by the courts. This is a delicate exercise in view of the risk involved that adopting a rather broad approach

[428] Pavlopoulos (1986), p. 276.

[429] As it will be analysed in Chapter 4, section 2.

[430] This criterion of knowledge was introduced by the Athens Administrative Court of Appeal in a case relating to the liability of the HCMC (Athens Administrative Court of First Instance decision no. 15526/2003; Athens Administrative Court of Appeal decision no. 1367/2008; Greek Council of State decision no.1607/2016) where the plaintiffs argued that the supervisor failed to intervene on time to avert the harmful misconduct

[431] Greek Cour de Cassation decision no. 463/1997, Greek Council of State decision no. 2171/2000, Greek Council of State decision no. 3624-3625/2001, Greek Council of State decision no. 1686/2002, Greek Council of State decision no. 3214/2004, Greek Council of State decision no. 4400/2005, Greek Council of State decision no. 1140/2006.

[432] Gortsos & Anastopoulou (2022). See also Spiliotopoulos (2017).

[433] Mitsou (2006), p. 1002.

[434] Gortsos & Anastopoulou (2022).

as to what falls under the scope of the duty of care would overly expand the scope of obligations of the financial authorities, thereby extending the scope of their liability leading to unwarranted results.[435] In conducting this exercise, the courts should consider such duty of care as an *obligation of conduct* which requires the financial authorities to act diligently, rather than an *obligation of result* which requires the financial authorities to achieve a specific result, e.g., to ensure that no situation will arise which will cause damage to supervised entities or third parties.[436]

When adopting their decisions, the financial authorities should be objective and impartial,[437] exercising their discretion within the red lines set by the principle of proportionality.[438] Assessing whether the conduct of the financial authorities qualifies as proportionate and thus whether it is lawful is a hard exercise. This is due to the wide discretion that the financial authorities enjoy, the various conflicting interests that they need to balance and the fact that the financial authorities examine only the legality of the supervised entities' actions and not the purpose of these actions.

3.4.Damage

Similar to the rules under the European legal framework, damage is also a condition under Greek law required to establish the non-contractual liability of the Greek financial authorities. The concept of damage pursuant to the Greek civil law entails "any loss or harm caused to a person's tangible or intangible assets".[439] This includes property loss but also moral injury.[440] Proving the extent of damage sustained by the aggrieved party will

[435] See Tsene (2008), pp. 43, 126, who notes that the breach of the duty of care, as a condition for triggering BoG's and HCMC's civil liability, goes beyond the scope of Article 105.

[436] In this regard see Gortsos & Anastopoulou (2022) where the authors note: "It is highly relevant for establishing liability in cases in which the supervisor failed to avert a situation which caused damage to the supervised entities or their clients. Given the complexity of the supervisory objectives, the inherent risks of the financial sector, the plethora and diversity of interests involved and potential external events, the illegality of the supervisory conduct cannot be determined merely based on the supervisor's failure to prevent damage in the context of its duty of care. Hence, it is considered that the financial supervisors discharge their duty of care when they act diligently and employ all lawful and appropriate means with the aim to achieve a specific result and avoid causing damage irrespective of the end result (obligation of conduct). The opposite view, i.e., that the duty of care is an obligation of result, would unreasonably expand the supervisor's liability and lead to undesirable consequences. It is noted that the standard of due diligence is set against the de lege artis fulfilment of supervisory duties, as determined by the generally accepted rules of the relevant field of law, the common experience and good faith, and based on the diligence that the average prudent supervisor of the banking, investment or insurance sector must show".

[437] Greek Council of State decision no. 664/2006, Greek Council of State decision no. 3370/2007.

[438] On the principle of proportionality see Katsigiannis (2001).

[439] Georgiadis (2015), p. 133; Gortsos & Anastopoulou (2022).

[440] In Gortsos & Anastopoulou (2022) the authors note: "Specifically, if a financial undertaking were to be the victim of the unlawful and harmful supervisory conduct, the courts may also award compensation for moral damage in accordance with Art. 59 or 932 of the Civil Code, provided that the legal personality of the supervised entity is harmed and that the supervisor is found liable under Art. 105. Case-law is very conservative when awarding damages for moral harm. It is thus expected that the risk of excessive [compensatory] amounts in such cases is remote, and that compensation will be reasonable".

determine the amount of compensation that the aggrieved party is entitled to, based on Articles 297-300 of the Greek Civil Code.[441] The compensation is of a pecuniary and not punitive nature and extends to (a) out-of-pocket losses[442] which correspond to the amount by which the property of the aggrieved party was decreased, as well as to (b) loss of profit,[443] which corresponds to the amount by which the property of the aggrieved party was expected to be increased "in the ordinary course of events and under the specific circumstances of the case had the illegal supervisory conduct not taken place".[444]

Prior to the Council of State's pilot judgment of 2014, in view of the pecuniary nature of the compensation and in order to avoid situations in which the aggrieved party (i.e., depositors, investors and insurance policyholders) could obtain compensation by different sources, the Greek literature[445] had suggested that the financial authority should be able to raise a set-off defence against a claimant who could have recourse to different compensation mechanisms. This could be the case where the aggrieved party, including the shareholders, could receive compensation from the liquidation proceeds or from the respective deposit guarantee or investor compensation schemes. Especially in situations in which the aggrieved third party could benefit from two distinct legal procedures (insolvency proceedings on the one hand and action for damages on the other), the literature had suggested that *de lege ferenda* the aggrieved part should be precluded from taking action both against the financial institution and the financial authority in parallel. Instead, it was argued that aggrieved parties should seek first compensation from the financial institution. However, this theoretical discussion has no merit ever since the 2014 pilot judgment of the Counsel of State which set a clear framework for the compensation of the recipients of financial services who incurred losses because of supervisory (or resolution) failures.

Regarding the amount of compensation to be awarded, it is commonly accepted by both literature and case-law[446] that only reasonable compensation suffices in case of supervisory shortcomings and that a full compensation as per the general rule of Article 105 would not be appropriate. Deviating from said general rule is both justifiable and legitimate in light of the enormous compensation which could be granted to the aggrieved parties for *damnum emergens* and *lucrum* cessans,[447] in combination with the complex and highly technical nature of the supervisory and resolution action which cannot be flawless. These two elements can well expose the financial authorities to huge compensation claims which

[441] This is subject to the case-law rules as developed by the Greek Council of State which are analysed in detail in Chapter 4, section 2.

[442] *damnum emergens.*

[443] *lucrum cessans.*

[444] Gortsos & Anastopoulou (2022).

[445] Greek Council of State decision no. 920/2009; Georgiadis (2015), p. 152.

[446] Pilot judgment of Greek Council of State decision no.3783/2014.

[447] Floros (2012), pp. 269-276.

would undermine their budget and lead to unwarranted effects, such as inhibiting the authorities from exercising efficiently their supervision or resolution duties fearing potential action for damages against them. Evidently, the choice of the Greek Council of State to limit the compensatory liability of the Greek financial authorities to reasonable compensation only, thereby granting them partial compensatory immunity appears to be a well-balanced approach.

According to case-law, a third party can be awarded compensation only if it has suffered a *direct* damage, whereas an *indirect* loss does not qualify for compensation and would deprive a claimant from enjoying *locus standi* before the courts.[448] This restrictive approach confines the number of eligible claimants[449] so the financial authorities are not exposed to a large group of potential claimants seeking compensation for supervisory or resolution shortcomings is also obvious. By way of exception to the afore-mentioned, Greek law and case-law allow the compensation of indirect loss if this is explicitly provided for under the pertinent legislation.[450] The direct nature of the loss could be described as follows:

> *The criterion of direct loss is met when the loss derives directly from the supervisory relationship between the authority and the financial undertaking. In case of shareholders of a bank asking for compensation, the difference between the direct and indirect loss is illustrated by the courts as follows.[451] Any eventual "reflective" adverse effects of the improper supervision on the property and personality of the shareholders, such as the reduction of the shares value or the moral harm, is only an indirect injure. This is due to the fact that the alleged damage sustained is not a direct result of the unlawful supervisory action, but a further consequence of the damage caused by that action.* [452]

3.5.Causal link between the illegal act or omission and the damage

The claimant can establish the civil liability of the Greek financial authorities only if he/she can satisfy the court that there exists a *causal link* between the unlawful conduct of the financial authorities and the damage caused to the claimant. Under Greek law, the doctrine of causation which prevails both in the legal theory and case-law and which is used to assess whether a causal link exists, is the doctrine of *causa adaequata*, i.e., the doctrine of appropriate cause.

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[448] Greek Cour de Cassation decision no.decision no. 1950/2008.

[449] Where this is possible in light of the Greek Council of State's pilot judgment.

[450] Greek Council of State decision no. 243/2011, Greek Council of State decision no.439/2012, Greek Council of State decision no. 3132/2013, Greek Council of State decision no. 89/2017.

[451] Athens Administrative Court of First Instance decision no. 365/2019.

[452] Gortsos & Anastopoulou (2022), p. 259.

Pursuant to this doctrine, there is a causal link between the unlawful conduct and the damage caused only when the financial authority's conduct is "objectively adequate and appropriate in the ordinary course of events and based on the circumstances of the specific case"[453] to cause the damage in question. Any possible or hypothetical events must not influence the courts when the latter assess the existence of a causal link.

The doctrine of *causa adaequata* justifiably is considered to be the most appropriate doctrine of causation to be applied for the non-contractual liability of the financial authorities as it strives a balance. The doctrine of the equivalence of conditions (*conditio sine qua non*) would dangerously extend the scope of the financial authorities' liability as it requires that the act is a necessary condition for leading to the result. In other words, a causal link would exist between the financial authorities' act and a damage when said damage would not have arisen but for the act. On the other hand, the doctrine of the purpose of the rule of law (Normzwecklehre) "would disproportionally limit the scope of the liability as, even in the case of appropriate causation, the causal link does not exist as long as the infringed law provision does not intend to protect the specific interests at stake".[454]

The greatest obstacle a claimant faces in order to be awarded compensation by the courts is to establish that a causal link exist between his/her damage and the unlawful conduct of the financial authority. Often it happens that multiple causes led to the damage suffered by the claimant and thus the failure in the supervisory or resolution action is not the sole reason causing the damage. For example, an erroneous or disproportionate supervisory decision which led to the damage may be the result of a previous unlawful conduct of the supervised undertaking.[455] In light of this, it is imperative that the courts examine carefully the causal link condition and in particular consider the chain of events that led to damage comprise only of actions of the financial authority or instead involve external events which either exclude the causal link between the damage and the financial authority's behaviour, or lead to the financial authority and the supervised undertaking being jointly liable for the damage arisen. In case of joint liability, the court will allocate a percentage of liability to the financial authority thereby determining the amount of compensation which the financial authority must grant to the claimant (e.g., if the court finds that the financial authority is liable by 60%, then the ensuing compensation would amount to 60% of the losses).

4. *Locus standi*

Establishing *locus standi* is the key to open the door to the judicial review of the Union's bodies decisions. The case-law of CJEU has provided ample of evidence regarding when a

[453] Gortsos & Anastopoulou (2022).

[454] *Ibid.*

[455] Dijkstra (2009), pp. 269-284.

person has the legal capacity to bring proceedings against the Union bodies,[456] both in actions for annulment and in actions for damages.

In principle, standing before the CJEU is determined based on the *Plaumann* test[457] pursuant to which the person who can bring proceedings against an EU act or equally an action for damages in relation to an act which allegedly caused damage to said person, must be the addressee of that act or the act must individually affect said person.

The judgment on *Trasta Komercbanka*[458]which concerned the withdrawal of a banking license included the assessment of the right to bring proceedings of the shareholders of Trasta Komercbanka which authorisation was withdrawn. Although the judgment refers to an action for annulment, it can provide solid ground for assessing the standing in cases of actions for damages and thus ascertain the admissibility of such action.

As per settled case-law, a natural or legal person can bring proceedings before the CJEU only against a decision which is directly addressed to said person or alternative if the decision is addressed to another person but at the same time is of direct and individual concern to the applicant.[459] A decision will be of direct and individual concern provided that two criteria are cumulatively met; first, "*the decision directly affects the legal situation of the individual and, secondly, it leaves no discretion to the addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules*".[460]

Against this background, the General Court provided an radical interpretation of the standing criteria and accepted that the shareholders of Trasta Komercbanka enjoy locus standi to bring the action for annulment against the banking license withdrawal. The General Court held that the legal situation of the shareholders is directly affected given the 'intensity' of the effects of the contested decision, in the sense that the withdrawal of the banking license and the seizure of the operation of the bank 'necessarily affects the substance and extent' of the rights of the shareholders of the bank. In particular, the General Curt based this assessment on two facts, namely (a) that the shareholders would be deprived of the right to receive dividends from the bank 'which is no longer authorised to carry on its business

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[456] Judgment of the Court of First Instance (Sixth Chamber) of 9 September 2009, *Brink's Security Luxembourg SA v Commission of the European Communities*, T-437/05, EU:T:2009:318, para. 232.

[457] Judgment of the Court of 15 July 1963, *Plaumann & Co. v Commission of the European Economic Community*, Case 25-62, ECLI:EU:C:1963:17.

[458] Judgment of the Court (Grand Chamber) of 5 November 2019, *Trasta Komercbanka and Others v ECB*, Joined Cases C-663/17 P, C-665/17 P, C-669/17 P, ECLI:EU:C:2019:923 ("*Trasta Komercbanka* judgment").

[459] *Trasta Komercbanka* judgment, para. 102.

[460] *Trasta Komercbanka* para. 103. See also, Judgment of the Court (Fifth Chamber) of 22 March 2007, *Regione Siciliana v Commission,* C-15/06 P, ECLI:EU:C:2007:183, para. 31; Judgment of the Court (Third Chamber) of 13 October 2011, *Deutsche Post and Germany v Commission*, Joined cases C-463/10 P and C-475/10 P, ECLI:EU:C:2011:656, para. 66; Judgment of the Court (Grand Chamber) of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, Joined Cases C-622/16 P to C-624/16 P, ECLI:EU:C:2018:873, para. 42.

activities', and (b) that the shareholders would not be able to exercise their voting rights and participate in the management of the bank as a direct consequence of the contested decision.

The CJEU dismissed the 're-interpretation' of the 'direct concern' criterion based on the intense economic consequences that the contested decision entailed and overruled the General Court's decision on the ground that since the banking authorisation had been issued to Trasta Komercbanka itself and not to its shareholders *ad personam*, it was clear that the contested decision directly affected the legal situation of Trasta Komercbanka and not that of the shareholders of the bank.[461] The CJEU emphasised *inter alia* that the General Court erred in law when it took into account of the non-legal, economic effects of the contested decision on the (rather economic) situation of the shareholders of Trasta Komercbanka.[462] It also rebutted the argument regarding the legal situation of the shareholders being affected since the latter could not exercise their voting and management rights on the ground that these effects were not a direct consequence of the contested decision. Instead, the contested decision produced only a negative economic effect. Furthermore, although the legal situation of the shareholders was affected by the liquidation proceedings initiated following the license withdrawal as such proceedings resulted in stripping the shareholders from the management of the bank, the CJEU held that this consequence was not the immediate and direct effect of the contested decision, but rather of the decision of a Latvian court, on the basis of Latvian law, to initiate the liquidation proceedings.[463]

An interesting argument put forward from the applicants was that the case-law of CJEU, in the field of competition and state aid cases, recognises an economic dimension in the 'direct concern' criterion and thus accepts that competitors enjoy *locus standi* to bring proceedings. The CJEU rejected this argument by expressly stating that it grants *locus standi* to competitors not on the basis of the economic effects of a contested decision, but instead on the basis of their right under EU law to be protected against competition distortion.

The conclusion deriving from *Trasta Komercbank* case which is relevant to the action for damages is that shareholders would not be given standing to claim damages against the EU authorities for banking license withdrawal. As regards the argument inspired by the competition and state aid cases, it is true that one could extend the court's reasoning in these cases to cases involving banking supervision by arguing that a bank's shareholders have the right under EU law to be protected against an unlawful liquidation procedure which would result in stripping them off their rights as shareholders.[464] However, the strict interpretation of the 'direct concern' criterion that the CJEU reinstated in *Trasta Komercbank* correctly serves as a barrier to any potential expansion of the circle of persons entitled to bring an action for annulment and accordingly an action for damages.

[461] *Trasta Komercbanka* judgment, para. 104.

[462] see, to that effect, Judgment of the Court (Third Chamber) of 28 February 2019, *Council v Growth Energy and Renewable Fuels Association*, C-465/16 P, ECLI:EU:C:2019:155, para. 81 and the case-law cited.

[463] *Trasta Komercbanka* judgment, para. 113-114.

[464] Sarmiento (2019a).

5. Allocation of tasks between the ECB and NCAs. Source of supervisory powers through the lenses of the *L-Bank v ECB* case

The landscape of banking prudential supervision changed completely in 2014 with the establishment of the SSM. The ECB took over certain tasks conferred to it under the SSMR, however it did not fully replace the national competent authorities (NCAs) which remain a key ingredient in the SSM amalgam. It is noted that in the participating Member States, the designated NCAs are either the national central bank[465] or an independent national administrative authority.[466] The allocation of tasks between the ECB and the NCAs is instrumental for the determination of the allocation of accountability between them which, in turn, is crucial for deciding which authority should be subject to liability claims in case of damage arising from supervisory failure.

5.1. Principle of conferral and *ratio* behind the SSM 'shared system'

The exercise of banking prudential supervision was transferred to the ECB on the basis of the *principle of conferral* which is enshrined in Article 5 of the TEU. Within the sphere of European constitutional law, this fundamental principle of EU law indicates that the Union bodies act only within the limits of the competences (exclusive or shared) that EU Member States have conferred upon them in the Treaties.[467] In other words, the EU has the 'prerogative' (exclusive or shared) to make or unmake laws governing issues falling under the remit of its conferred competences. Thus, competences that are not conferred upon the EU by the Treaties remain with the EU Member States.[468]

The competence to exercise prudential banking supervision was conferred upon the EU by means of Article 127(6) of the TFEU. The Council Regulation (EU) 1024/2013 ('SSM Regulation' or 'SSMR') specified that these tasks are to be exercised by the SSM.[469] SSMR grants to the ECB *tasks* (Article 4) and the respective necessary supervisory *powers* to exercise these tasks (Article 9 ff.). Although the wording of Article 127 of the TFEU

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[465] As is the case in Belgium (Nationale Bank van België/Banque Nationale de Belgique), Cyprus (Central Bank of Cyprus), Greece (Bank of Greece), Ireland (Bank Ceannais na hĖireann/Central Bank of Ireland), Italy (Banca d'Italia), Latvia (Lietuvos bankas), The Netherlands (De Nederlandsche Bank), Portugal (Banco de Portugal), Slovakia (Náradná banka Slovenska), Slovenia (Banka Slovenije) and Spain (Banco de España).

[466] Austria (Österreichische Finanzmarktaufsicht (FMA)), Estonia (Finantsinspektsioon), Finland (Finanssivalvonta), France (Autorité de contrôle prudentiel et de résolution (ACPR)), Germany (Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)), Latvia (Finanšu un kapitāla tirgus komisija), Luxembourg (Commission de Surveillance du Secteur Financier (CSSF)) and Malta (Malta Financial Services Authority (MFSA)).

[467] These competences are defined in Articles 2–6 of the Treaty on the Functioning of the EU.

[468] It should be noted that while the principle of conferral governs the limits to the EU competences, the use of those competences is governed by the principles of subsidiarity and proportionality.

[469] Duijkersloot, Karagianni, & Kraaijeveld (2017); Scholten, Magetti, & Versluis (2017).

mentions only *tasks,* it is reasonable to interpret it as also encompassing *powers* which should be deemed instrumental for the performance of the supervisory tasks.[470]

Although this 'shared system' of supervision is well-known, little light has been shed so far on the complex arrangements under the SSMR regarding the exact division of competences between the ECB and the NCAs. Having a clear map on which powers lie with which authority (i.e. the ECB or the NCAs) is decisive also for determining the allocation of accountability between the authorities on European and national level. Equally, transparency with regard to the allocation of accountability determines the terms of the judicial protection which is essential for ensuring adherence to the principles of the *état de droit*, including the principle of rule of law.[471] Yet, in certain areas the divisions of competences for exercising the respective powers between the ECB and the NCAs within the SSM is blurred, as it will be discussed below.

Despite the complexity of the 'shared system' of supervision, the choice to divide competences between the ECB and the NCAs should not be seen as been mindless of the ensuing difficulties and obscurities in relation to the allocation of accountability. In light of Articles 3 and 4 of the TFEU, the Union does not enjoy exclusive competence (under the principle of conferral) regarding banking supervision but rather shared competence. Hence, from a constitutional point of view, banking supervision could not be exercised exclusively by a Union Institution. Indeed, the wording of Article 127(6) of the TFEU recognises these constitutional barriers and provides that "specific tasks" can be conferred upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions. In this vein, some supervisory tasks remain with the NCAs, even though, by virtu of Article 6 SSMR, the ultimate responsibility for the effective and consistent functioning of the SSM lies with the ECB.[472] In the absence of an amendment to the TFEU, a different allocation of tasks within the SSM which would

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[470] D'Ambrosio (2020), p. 28.

[471] Widdershoven & Craig (2017).

[472] The rule of the ultimate responsibility provided for in Article 6 of the SSMR is also reflected in the fact that the ECB oversights the NCAs in their direct responsibility of supervising less significant credit institutions as it will be discussed further below.

lead to greater involvement of the ECB cannot be deemed compatible with the current legal framework. [473] [474]

Taking a closer look at the SSMR, we can infer that the relationship between the ECB and the NCAs is a hierarchical one. In particular, according to Article 6(1) of the SSMR *"[t]he ECB shall be responsible for the effective and consistent functioning of the SSM*". The hierarchical relationship is also implied in Article 6(5)(a) of the SSMR which provides that "*the ECB shall issue regulations, guidelines or general instructions to national competent authorities* (…)". Equally, the hierarchical relationship is evident in Article 9 of the SSMR which provides (with regard to the supervisory and investigatory powers) that the ECB may require by way of instructions – to the extent necessary to carry out the tasks conferred on it by the SSMR – the NCAs to make use of their powers, under and in accordance with the conditions set out in national law, where the SSMR does not confer such powers on the ECB.

Except for conferring certain tasks on the ECB, the new institutional legal framework of banking supervision in the EBU also laid down the *ratione personae* scope of the supervisory competences of the ECB, i.e. it specified the financial institutions to be supervised by the ECB, whereas it also established 'Chinese walls' within the ECB to ensure that the micro-prudential supervisory tasks of the ECB will not interfere with its primary objective, that of price stability, and generally its monetary policy tasks. It is worth noting that the SSM's tasks do not overlap with those of the European Banking Authority (EBA),[475] and thus it operates in harmony with EBA and the other agencies of the European System of Financial Supervision ('EFSF').[476]

[473] Interestingly enough, Recital No 85 SSMR calls for an amendment of Article 127(6) TFEU stating that "the Commission has stated in its Communication of 28 November 2012 on a Blueprint for a deep and genuine economic and monetary union that Article 127(6) TFEU could be amended to make the ordinary legislative procedure applicable and to eliminate some of the legal constraints it currently places on the design of the SSM (e.g. enshrine a direct and irrevocable opt-in by Member States whose currency is not the euro to the SSM, beyond the model of 'close cooperation', grant Member States whose currency is not the euro participating in the SSM fully equal rights in the ECB's decision-making, and go even further in the internal separation of decision-making on monetary policy and on supervision). It has also stated that a specific point to be addressed would be to strengthen democratic accountability over the ECB insofar as it acts as a banking supervisor. It is recalled that TEU provides that proposals for treaty change may be submitted by the Government of any Member State, the European Parliament, or the Commission, and may relate to any aspect of the Treaties".

[474] On this issue see D'Ambrosio (2015), p. 71.

[475] For reasons of completeness, it is noted that the primary task of the EBA is to contribute, through the adoption of binding Technical Standards and Guidelines, to the creation of the European Single Rulebook in banking. EBA also plays a significant role in the promotion of convergence of supervisory practices with the view to ensuring a harmonised application of banking prudential rules. EBA's mandate further includes the assessment of risks and vulnerabilities in the EU banking sector. Such assessment is conducted mainly through regular risk assessment reports and pan-European stress tests.

[476] Gortsos (2015b), p. 403.

5.2. Source of supervisory tasks and powers/responsibilities through the lenses of the L-Bank case

The source of supervisory powers and the distribution of powers/responsibilities between the ECB and the NCAs is a complex exercise in practice. This was evidenced in the judgment of the General Court of the EU on the *L-Bank v ECB* case, which is the first judgement of the Court relating to the operation of the SSM.[477] The genesis of the case finds its roots in the decision of the ECB to classify *Landeskreditbank Baden-Württemberg* bank ('L-Bank') as a SI in 2014.[478] Following invitation from the ECB, the L-Bank submitted observations on its classification as SI and invoked *inter alia* Articles 70 and 71 of the SSMFR to argue that there are particular circumstances which justify its classification as an LSI. Eventually, though, the ECB adopted a decision confirming the classification of the L-Bank as SI.

L-Bank sought review from the Administrative Board of Appeal ('ABoR'). The ABoR endorsed the ECB's decision and adopted a new decision replacing and confirming the initial one. As a result, the identification of L-Bank as an SI remained unaffected. L-Bank contested the ECB's decision and brought an action for annulment before the General Court ('GC') in 2015. The GC dismissed the action but L-Bank appealed against this decision. In May 2019, the Court of Justice upheld in full the GC's judgment and dismissed L-Bank's appeal. The importance of the L-Bank judgments is twofold. On the one hand they clarified the source and scope of the supervisory powers vested in the ECB and the NCAs, whereas on the other hand they highlighted the "role of the opinion of the ECB's Administrative Board of Review in observing the obligation to state reasons".[479] Given their importance it is worth examining the judgments closely.

L-Bank brough five pleas in law in its action for annulment before GC. The two first of them will be examined as they are relevant for the purposes of the present section.

In its first plea, the applicant put forward three complaints, namely (a) that the ECB interpreted incorrectly the condition under which a bank's classification as significant is 'inappropriate' under Article 70(1) SSMR; (b) that the ECB was wrong in classifying the bank as significant because it did not take into account the objectives and principles of the SSMR; (c) that the ECB erred in law in its interpretation of the concept of 'particular

[477] Judgment of the General Court (Fourth Chamber, Extended Composition) of 16 May 2017, *Landeskreditbank Baden-Württemberg v ECB*, T-122/15, ECLI:EU:T:2017:337 ("*L-bank* judgment"); Judgment of the Court (First Chamber) of 8 May 2019, *Landeskreditbank Baden-Württemberg v ECB*, C-450/17 P, ECLI:EU:C:2019:372 ("*L-bank* appeal judgment").

[478] Distinguishing between 'significant' and 'less significant' credit institutions, financial holding companies and mixed financial holding companies is governed by Article 6 of the SSMR and the detailed provisions of Articles 39–72 of the SSMFR. A supervised entity is classified as significant upon notification of a reasoned ECB decision to this effect, according to Articles 43–49 of the ECB Framework Regulation, and ceases to be classified as significant if the ECB determines, also in a reasoned decision notified to the entity, that it is either a less significant supervised entity or no longer a supervised entity (ECB Framework Regulation, Article 39, paragraphs 1 and 2, respectively).

[479] Karagianni & Scholten (2018), p. 187.

circumstances' in Article 70(1) of the SSMFR.[480] L-Bank submitted that the reference to the inappropriateness of the classification of a supervised entity as 'significant', laid down in Article 70(1) of the SSMFR, is an indeterminate legal concept that must be interpreted in light of the principle of proportionality enshrined in Article 5(4) TEU, which governs the manner in which the EU institutions are to exercise their competences. Further, in the applicant's view, it derives from Articles 4(1) and 6(4) SSMR that in conformity with the principle of subsidiarity, the transfer of competence was made only in respect of significant entities, with the direct prudential supervision of less significant entities remaining within the remit of the national authorities.[481] The ECB's view on the latter point was that the exclusive competence was transferred to it so that it could carry out all of the prudential tasks referred to in Article 4(1) of the SSMR, and only the implementation of the tasks referred to in Article 4(1)(b) and (d) to (i) of the SSMR in respect of less significant entities being delegated to the NCAs under the supervision of the ECB. The CG agreed in principle with the ECB but on the basis of a different rational.

To respond to the first plea, the GC examined the scope of competences transferred to the ECB and the interpretation of Article 70(1) of the SSMFR mindful of the principles of subsidiarity and proportionality. Critically, the GC concluded that the SSMR does not allocate competences between the ECB and the NCAs in the exercise of the tasks referred to in Article 4(1), but rather it delegates to the ECB exclusive competence for the tasks referred to therein[482] and mandates the NCAs to assist the ECB in the implementation of some of these tasks, thereby establishing a decentralised implementation framework.[483] [484] In other words, the ECB is conferred with exclusive competence over the tasks referred to in the SSMR. For some of these tasks the ECB is exclusively vested with the corresponding *powers/responsibilities* necessary to perform them, whereas for other tasks (falling within the ECB's exclusive competence) the respective *powers/responsibilities* are assigned to the NCAs which assist the ECB in carrying them out (decentralised implementation of those tasks[485]). The GC also added that, "*the ECB retains important prerogatives even when the national authorities perform the supervisory tasks laid down in Article 4(1)(b) and (d) to (i) of the Basic Regulation, [...] the existence of such prerogatives is indicative of the*

[480] *L-bank* judgment, para. 19.

[481] *L-bank* judgment, para. 35.

[482] SSMR Art.4(1).

[483] *L-bank* judgment, para. 54, upheld by *L-bank* appeal, paras. 38–41.

[484] See Blanck (2021), p. 498 and Riso & Zagouras (2015) where the following statement is made: "The ECB competences under the SSM Regulation are not all-encompassing competences which exclude the possible coexistence of concurrent competences of Member States, but rather executive competences precluding the possible inclusion of powers attributed to the ECB (for the purpose of carrying out its exclusive tasks) in the competence of another authority, that is, besides the possible use of these powers by NCAs, following the internal allocation of responsibilities within the SSM".

[485] Which relate to the less significant credit institutions within the meaning of Article 6(4) of the SSMR.

subordinate nature of the intervention by the national authorities in the performance of those tasks".[486]

It is submitted in the legal literature that the decentralised implementation could be seen as a "*sui generis*" delegation of the power to perform certain tasks.[487] The ECB is entitled to give instructions to the NCAs on the performance of supervisory tasks of Article 4 of the SSMR (with the exception of the tasks of Article 4(1)(a) and (b)) and the adoption of supervisory decisions, whilst the NCAs are required to follow the instructions. This relationship features typical characteristics of a fiduciary relationship between a principal and an agent "*where the latter has a certain degree of autonomy in the implementation of the powers received by the principal, like in delegation*".[488]

In the context of the first plea in law, the GC also added that Article 6(4) of the SSMR grants to the ECB exclusive competence to determine the 'particular circumstances' in which direct supervision of an entity which should fall solely under its supervision might instead be under the supervision of a national authority.

At the same time the L-Bank case was debated before the CJEU, the German Constitutional Court ('GCC') was called to adjudicate whether the establishment of the SSM was an *ultra vires* act. Its decision came only two months after the CJEU's appeal judgment and remarkably held that the SSMR should not be considered *ultra vires* because it did *not* transfer exclusive competences to the ECB for *all* credit institutions, but only for the significant ones, whereas the NCAs remain competent in relation to the LSIs under their primary prerogatives afforded to them on the basis of national law.[489] The GCC pointed that the NCAs carry out these tasks based on Member State competences and not as a result of a re-delegation of competences that had been conferred on the ECB back to the NCAs.[490] According to the GCC, a re-delegation of EU administrative tasks would require that all supervisory tasks had fully been conferred on the ECB, which is specifically not what the SSM Regulation provides. The opposite interpretation would mean that the SSMR is an *ultra vires* act since it would neither be compatible with the primary law basis nor with the systematic concept of the SSM Regulation.[491] The GCC noted that its findings do not contradict the CJEU's decision on L-Bank case because the CJEU simply held that the

[486] *L-bank* judgment, para. 59.

[487] Blanck (2021), p. 498.

[488] *Ibid.*

[489] German Constitutional Court, Judgment of 30 July 2019 2 BvR 1685/14, 2 BvR 2631/14, paras. 172, 179, 187, 191, 192

[490] See German Constitutional Court Judgment of 30 July 2019 2 BvR 1685/14, 2 BvR 2631/14, para. 183 (English translation available at: https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2019/07/rs20190730_2bvr168514en.pdf;jsessionid=A1BBBA4DEBF5897FB9305E510B1F3E2E.2_cid386?__blob=publicationFile&v=1

[491] See German Constitutional Court Judgment of 30 July 2019 2 BvR 1685/14, 2 BvR 2631/14, para. 187

ECB's exclusive competence was limited to determine the definition of "particular circumstances" within the meaning of Article 6(4) of the SSMR.[492]

However, the GCC's conclusion with regards the allocation of competence between the ECB and the NCAs does not seem to be compatible with the wording and spirit of the SSMR as interpreted by the CJEU's decision on L-Bank case. It is evident from the wording of the SSMR that it does not confer tasks on the basis of the significance of a credit institution but rather transfers *en bloc* specific tasks to the ECB as explained by CJEU in L-Bank judgment. This interpretation is supported by the systematic reading of SSMR and in particular the provision that grants the ECB the possibility to classify an LSI as a SI and thus take the credit institution in question under its direct supervision. Re-classifying a bank from LSI to SI (or *vice versa*) does not modify the scope of competences of the ECB but simply affects the responsibilities of the ECB and the NCAs within the SSM system with regards to the exercise of powers.[493] The compatibility of the SSMR with Article 127(6) of the TFEU is comprehensively ensured not on the basis of conferring to the ECB supervisory tasks with regard only to the SIs, but rather on the basis that the tasks transferred to the ECB do *not* cover the *entire spectrum of banking supervision*, but instead *only specific prudential supervisory tasks*.

In addition, should the GCC's interpretation be adopted, this means that the GCC's conclusion that the SSMR is not an *ultra vires* act, can change. What if the ECB decided to bring under its direct supervision a great number of LSIs by classifying them as SIs – being the criteria of SSMR and SSMFR fulfilled? Could broadening the group of the entities directly supervised by the ECB cast doubts on the compatibility of SSMR with the TFEU as it could be deemed to interfere with pre-existing competences of the NCAs and the principles of subsidiarity and proportionality? In view of these challenges, it should be understood that the compatibility of the SSMR with the TFEU is on solid grounds provided that the conferral of tasks to the ECB is premised on the specificity of the tasks instead of on the distinction between SIs and LSIs.[494]

By its second plea, L-Bank argued that the contested decision is vitiated by manifest errors of assessment. The core arguments of L-Bank were that direct supervision by the ECB of L-Bank was necessary neither to attain the objectives of the SSMR, including to ensure the safety and stability of financial markets, nor to safeguard the objective of consistent application of supervisory standards or other objectives of the SSMR. Finally, L-bank contended that supervision by the German NCA was in compliance with the principles of the SSMR.[495] The GC dismissed the second plea as well, first on the grounds that the applicant did not establish that national supervision would be better able to attain the

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[492] See *L-bank* appeal judgment, para.49.

[493] Blanck (2021), p. 499.

[494] For some further criticism on the German Constitutional Court's interpretation see D'Ambrosio (2020), pp. 35-37.

[495] *L-bank* judgment, para. 102.

objectives of the SSMR than direct supervision by the ECB,[496] and second because L-Bank did not highlight any arrangement or collaboration between it and the relevant German NCAs that could make cooperation with these authorities easier than cooperation with the ECB.[497]

5.3. Tasks transferred to the ECB and those that remain with the NCAs

In view of the L-Bank case we are no longer sailing in uncharted waters as regards the allocation of tasks between the ECB and the NCAs. The SSMR, under Article 4, vests the ECB with "specific prudential tasks" of banking supervision as regards *all* credit institutions (both significant and less significant) and other financial institutions (save insurance undertakings) established in the participating Member States.[498] These tasks include:

(a) authorising and withdrawing the authorisation of credit institutions;

(b) for credit institutions established in a participating Member State, which wish to establish a branch or provide cross-border services in a non-participating Member State, carrying out the tasks which the competent authority of the home Member State shall have under the relevant Union law

(c) assessing notifications of the acquisition and disposal of qualifying holdings in credit institutions with the exception of a bank resolution case;

(d) ensuring compliance with all relevant Union law, which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;

(e) ensuring compliance with the Union law which imposes requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models;

(f) carrying out supervisory reviews, including where appropriate in coordination with EBA, stress tests;

[496] *L-bank* judgment, para. 108.

[497] *L-bank* judgment, para. 111.

[498] According to Article 2(1) of the SSMR 'participating Member State' means a Member State whose currency is the euro (the so-called euro area participating Member States) or a Member State whose currency is not the euro which has established a close cooperation in accordance with Article 7 (Member States with a derogation).

(g) to carry out supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States;

(h) to participate in supplementary supervision of a financial conglomerate in relation to the credit institutions included in it and to assume the tasks of a coordinator where the ECB is appointed as the coordinator for a financial conglomerate; and finally

(i) to carry out supervisory tasks in relation to recovery plans, and early intervention.

(j) for credit institutions established in a non-participating Member State, which establish a branch or provide cross- border services in a participating Member State, the ECB shall carry out, within the scope of paragraph 1, the tasks for which the national competent authorities are competent in accordance with relevant Union law.

The relevant Union law includes the CRR,[499] CRD IV,[500] and BRRD[501] as regards recovery planning and early intervention measures.

In light of Article 6 of the SSMR, which lays down the distribution of powers for the exercise of micro-prudential tasks between the ECB and the NCAs, the former has the *power* to exercise the tasks *conferred* on it and referred to under (a) to (j) above regarding the significant credit institutions, whereas the latter have the *power* to exercise said tasks (*conferred* on the ECB) in relation to the less significant institutions. However, it should be highlighted that the above allocation of *powers* is subject to the exception of the so-called common procedures (the licensing of banks, withdrawal of banking licences and authorisation of acquisitions of qualifying holdings in banks) which are exclusively carried out by the ECB irrespective of the classification of a credit institution as significant or less significant.

If follows from the foregoing that the distribution of *powers* between the ECB and the NCAs (to exercise the tasks under points (a) to (j) above) found in the SSMR, is based on the significance of the credit institutions. The *power* to exercise prudential supervision of

[499] 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, OJ L 176, 27.6.2013, pp 1–337.

[500] 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, OJ L 176, 27.6.2013, p. 338–436.

[501] 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, OJ L 173, 12.6.2014, p. 190–348.

significant credit institutions (SIs)[502] is assigned to the ECB, whereas the NCAs have the *power* to exercise prudential supervision of the less significant credit institutions (LSIs). It is legally possible though, in light of Article 6(5)(b) of the SSMR, that the ECB decides to exercise directly itself all the relevant *powers* for one or more LSIs on its own initiative after consulting with the NCAs or upon request by a NCA if this is deemed necessary in order to ensure consistent application of high supervisory standards. Such a case could be materialised where financial assistance has been requested or received indirectly from the EFSF or the ESM.

The criteria to classify a credit institution as SI or LSI are to be found in two legal acts. First, under Article 6(4) of the SSMR and second under the SSM Framework Regulation ('SSMFR').[503] The latter establishes the framework for cooperation within the SSM between the ECB and the NCAs designated under national law. It was adopted by the ECB, on 16 April 2014, on the premise of Articles 6(7) and 33(2) of the SSMR. Article 6(7) of the SSMR provides 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. Further, Article 33(2) of the SSMR states that the ECB must publish by means of regulations and decisions the detailed operational arrangements for the implementation of the tasks conferred upon it by the SSMR.

The SSM Framework Regulation sets out the specific methodology for the assessment of the significance of the credit institutions and further develops and specifies the cooperation procedures established in the SSMR between the ECB and the NCAs within the SSM as well as, where appropriate, with the national designated authorities, and thereby ensures the effective and consistent functioning of the SSM.[504] Articles 70 and 71 of the SSMFR provide that if particular circumstances so justify, a credit institution which could otherwise be classified as a SI, may be classified as a LSI, thereby falling under the supervision of the competent NCA. According to Article 70(1) such particular circumstances exist where there are specific and factual circumstances that make inappropriate the classification of a supervised entity as significant in view of the objectives of the SSMR. However, pursuant to Article 70(2), the term "particular circumstances" must be interpreted in a strict manner, whereas the assessment of whether such circumstances exist is made on a case-by-case basis according to Article 71(1). Hence it is inferred that the ECB generally enjoys discretion in carrying out the assessment about the significance of the credit institution.[505]

[502] According to Article 6(4) of the SSMR significance is primarily assessed on the basis of a bank's size, its importance for the economy of the EU or a participating Member State, the significance of its cross-border activities, and the total value of its assets.

[503] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) OJ L 141, 14.5.2014, p. 1–50.

[504] Recitals 7-9 of SSMFR.

[505] On the criteria for the classification of supervised entities as significant or less significant, see Wymeersch (2014), pp. 28-32, and Gortsos (2015g), pp. 101-119.

The day-to-day supervision of SIs is entrusted to the joint supervisory teams (JSTs) which are composed of the ECB and national staff members.[506] The JSTs in combination with the on-site inspection teams fulfil the close cooperation obligation between the ECB and the NCAs under the SSMR.

Given that the ECB is assigned with "specific tasks" concerning policies relating to the prudential supervision of credit institutions, the tasks not explicitly conferred on the ECB *remain* with the national authorities.[507] These tasks are summarised by D'Ambrosio as follows:[508]

(a) supervisory tasks concerning financial intermediaries not supervised by the ECB (Recital 28 SSMR), including the central counterparties (Article 1 SSMR);

(b) supervisory tasks concerning credit institutions not transferred to the ECB, including the supervision of non-EU branches of credit institutions (Recital 28 SSMR) and the day-to-day verifications of credit institutions (Recitals 28 and 37, Article 6(3) SSMR);

(c) non-supervisory tasks, including the functions of competent authorities over credit institutions in relation to markets in financial instruments as well as money laundering and consumer protection (Recitals 28 and 29 SSMR);

(d) in conjunction with the ECB, supervisory tasks concerning the supervision of less significant credit institutions, with the only exception of the licensing and the assessment of qualifying holders which are exclusively ECB's tasks.

The NCAs also retain their competence for consumer protection and the fight against money laundering.[509]

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[506] Article 4 Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L 141 (SSMFR). According to Article 3 of the SSMFR, the tasks of the JSTs include *inter alia* the performance of SREP and the coordination of on-site inspection teams.

[507] Pursuant to Recital 28 of the SSMR the tasks not conferred to the ECB should include the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services, to supervise bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law, to supervise credit institutions from third countries establishing a branch or providing cross-border services in the Union, to supervise payments services, to carry out day-to-day verifications of credit institutions, to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments, the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection.

[508] D'Ambrosio (2020), p. 44

[509] D'Ambrosio (2020), p. 49, argues that it is not clear what is the scope of these tasks related to consumer protection and AML: "[I]n some national legal frameworks, such as the Italian one, consumer protection and the fight against money laundering extend to the relevant organisational agreements and internal control mechanisms (see Article 127(01) of the Italian Banking Law). These latter fall within the scope of the ECB's supervisory tasks. In light of the principle of conferral and the strict interpretation of the rules on the allocation

D'Ambrosio argues that in cases where there is doubt as to whether the ECB or the NCA is the competent authority to exercise the tasks, the conflict should be solved in favour of the NCA.[510] This view is in line with the principle of conferral as described above.

5.4. Allocation of tasks between the ECB and the NCAs regarding LSIs

The SSMR *expressis verbis* refers to the *ratio* of assigning the ECB with responsibilities in relation to the supervision of LSIs. In particular, Recital 16 stipulates that LSIs may also be the source of financial instability and for this reason the ECB should be able to exercise supervision over such LSIs:

> *the safety and soundness of large credit institutions is essential to ensure the stability of the financial system… recent experience shows that smaller credit institutions can also pose a threat to financial stability… Therefore, the ECB should be able to exercise supervisory tasks in relation to all credit institutions authorised in, and branches established in, participating Member States.*

Assigning the ECB with supervisory tasks regarding the LSIs is a natural component of the SSM construction given that by virtue of Article 6(1) of the SSMR the ECB is responsible for the effective and consistent functioning of the SSM in its entirety. Should the supervision of LSIs fall under the exclusive competence of the NCAs, the ECB would not be able to ensure that the SSM is functioning in an effective and consistent way in its entirety as it would lack the necessary powers to do so by intervening in situations in which it deemed so necessary. The allocation of powers between the ECB and the NCAs with regard to the LSIs is specified in Article 6(5) SSMR and is described in the following sections.

Before closely examining this allocation, it should be noted that the practical arrangements for the cooperation between the ECB and the NCAs regarding supervision over the LSIs is

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of competences to the EU institutions, a possible criterion for the allocation of responsibilities in these fields could be the following: (i) the ECB would be responsible for ensuring that credit institutions have organisational agreements and internal control mechanisms in place, compliant with the relevant EU prudential banking law, whilst (ii) the NCAs would be responsible for ensuring that credit institutions' organisational agreements and internal control mechanisms are such as to ensure a high level of consumer protection and an effective fight against money laundering. Given the links between the NCAs' consumer protection tasks and the ECB's supervisory ones (breaches of consumer protection rules can be symptoms of unsound governance and internal control mechanisms; while *vice versa* unsound governance and internal control mechanisms may affect the credit institutions' compliance with the consumer protection rules), the duties of sincere cooperation between the SSM authorities become of outmost importance. Not surprisingly, Recital 29 SSMR provides for a duty of the ECB to fully cooperate with the NCAs".

[510] D'Ambrosio (2015), p. 71.

governed by the SSMFR.[511,512] Further principles[513] for the exercise by NCAs of some options and discretions available in Union law in relation to LSIs are found in the Recommendation of the ECB of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions,[514] whereas Guideline (EU) 2017/697 of the ECB[515] specifies certain of the options and discretions of general application conferred on competent authorities under Union law concerning prudential requirements.[516]

The cooperation between the ECB and NCAs regarding supervision on LSIs is further enhanced in the sphere of fintech on which the ECB has published, in March 2018, a Guide to assessments of fintech credit institution licence applications.[517] The growing number of common procedures related to fintech credit institutions, most of which are classified as LSIs, led to the adoption of said Guide. Its purpose is to promote transparency for potential fintech bank applicants and facilitate the application process. According to the Guide "*[t]he ECB's role is to ensure that fintech banks are properly authorised and have in place risk control frameworks for anticipating, understanding and responding to the risks arising in their field of operations. Equally, fintech banks must be held to the same standards as other banks and be subject to a comparable regime*".[518]

In the same vein, in order to promote convergence in the way NCAs conduct the SREP, to support a minimum level of harmonisation and a continuum in the assessment of LSIs the

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[511] See article 6(5) SSMR which stipulates that: "with regard to the credit institutions referred to in paragraph 4, and within the framework defined in paragraph 7 […]", and article 6(7) which states that: "[t]he ECB shall, in consultation with national competent authorities, and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to organise the practical arrangements for the implementation of this Article".

[512] It is recalled that the SSMFR lays down the criteria based on which a credit institution is classified as significant or less significant.

[513] Related to prudential requirements, capital requirements, institutional protection schemes, liquidity, prudential supervision etc.

[514] Recommendation of the European Central Bank of 4 April 2017 on common specifications for the exercise of some options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/10) OJ C 120, 13.4.2017, p. 2–9.

[515] Guideline (EU) 2017/697 of the European Central Bank of 4 April 2017 on the exercise of options and discretions available in Union law by national competent authorities in relation to less significant institutions (ECB/2017/9).

[516] The exercise of such options and by the NCAs in relation to the less significant institutions shall be fully aligned to the ECB's exercise of the relevant options and discretions in Regulation (EU) 2016/445 of the European Central Bank of 14 March 2016 on the exercise of options and discretions available in Union law (ECB/2016/4) OJ L 78, 24.3.2016, p. 60–73.

[517] ECB, Guide to assessments of fintech credit institution licence applications, 2018 edition, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.201803_guide_assessment_fintech_credit_inst_licensing.en.pdf

[518] *Ibid.*

ECB published its SSM LSI SREP Methodology[519] on 4 July 2018 incorporating therein the key elements of the SREP methodology.

In addition, the ECB in cooperation with the NCAs has developed Joint Supervisory Standards ('JSSs'), which are non-legally binding policy documents, to foster best practices and guarantee the application of high supervisory standards over the LSIs.[520]

5.5. Responsibilities of the ECB with regard to exercise of powers

The ECB has the power to issue regulations, guidelines or general instructions to the NCAs thereby giving guidance to the latter on how they should carry out the tasks defined in Article 4 SSMR[521] and adopt supervisory decisions.[522]

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[519] ECB, SSM LSI SREP Methodology, 2020 edition, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.srep_methodology_booklet_lsi_2020.en.pdf

[520] According to the ECB, Banking Supervision, LSI supervision within the SSM, November 2017 https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.reportlsisupervision2017.en.pdf, some main examples of JSS and common supervisory approaches, as described (*verbatim*) by D'Ambrosio (2020), are the following: (i) JSS on conduct of on-site inspections at LSIs which covers the definition and objectives of on-site inspections as well as the main principles to be followed in their conduct, and the minimum level of engagement in terms of frequency, duration and resources, (ii) JSS on the supervision of car financing institutions which aims at promoting common approaches to the supervision of risks arising from the specific business model of those credit institutions whose main business activity is granting loans or leasing contracts to finance the purchase of motor vehicles, (iii) JSS on supervisory planning through which the NCAs prioritise, plan and monitor the execution of key on-site and off-site supervisory activities for less significant institutions (iv) JSS on LSI recovery planning taking into account the provisions of the BRRD which grant to competent authorities the discretion to apply simplified obligations for recovery planning to non-systemic institutions under certain conditions. More precisely, the ECB recommends that NCAs apply simplified obligations only for non-high-priority LSIs, while high-priority LSIs should be subject to the full recovery planning requirements. Institutional Protection Schemes ('IPS') should provide a single full scope recovery plan for all the institutions that have individually been waived from the requirement, (v) Guidance on national options and discretions in CRD IV/CRR for LSIs, (vi) Guide on the prudential recognition of IPS on how to (a) monitor IPSs (including adherence to legal requirements) and (b) coordinate the activities of the ECB and the NCAs in order to ensure that new IPS applications are assessed in a harmonised way, (vii) Policy stance on licencing of fintech credit institutions, (viii) Common policies and framework on NCA crisis management, (ix) Guidance on Notification requirements regarding LSIs, (x) JSS on the LSI crisis management cooperation framework with the purpose of assisting the tasks of the NCA as the responsible authority for LSI crisis management and of the ECB as the responsible authority for deciding on common procedures. In particular, three JSS for LSI crisis management have been developed. In addition, in 2018 another three JSSs on the LSIs crisis management were finalised and are now operational: (i) JSS on NCAs' supervisory practices for LSI crisis management and cooperation with resolution authorities: ensures that LSI crisis management practices are applied consistently at the national level, (ii) JSS on NCAs' supervisory procedures for LSIs breaching minimum capital requirements: promotes a joint understanding of the administrative practices used in addressing the financial deterioration of LSIs, (iii) JSS on LSIs' FOLTF determination: promotes a joint understanding of FOLTF determinations for LSIs, focusing on applying proportionality in the expert judgement, to ensure that the intended measure is appropriate and necessary to achieve the objectives pursued by the supervisor. In this regard see also Foreword by Mario Draghi, President of the ECB, available at: https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2018~927cb99de4.en.html.

[521] excluding points (a) and (c) of Article 4(1) SSMR.

[522] Such instructions may refer to the specific powers in Article 16(2) for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM.

As mentioned previously, the ECB is entitled to intervene and exercise by itself the supervisory tasks of Article 4 SSMR and adopt the supervisory decisions in relation to LSIs, thereby stripping the NCAs of their relevant powers and tasks, in order to ensure that high supervisory standards are applied across the SSM, including the LSIs. The practical arrangements for assuming supervision over LSIs by the ECB are specified in the SSMFR. It is important to note, though, that in light of the underlying philosophy of the SSM construction regarding the allocation of tasks and powers between the ECB and the NCAs, assuming direct supervision of LSIs is a measure of last resort to be triggered when all other supervisory measures have been exhausted and be proven unsuccessful,[523] and cannot be extended to all LSIs subject to the NCAs' supervision.[524] Hence, any departure from the default rule that the NCAs are the primary responsible for the supervision of LSIs, should be properly and sufficiently justified.[525] However, the last-resort nature of the ECB's power to intervene should not be interpreted in an overly restrictive way. The ECB should be free from unnecessary constraints and enjoy adequate flexibility in order to ensure that it can intervene effectively and on time when the conditions so warrant.[526]

In addition, the ECB may request, either on an *ad hoc* or continuous basis, information from the national competent authorities on the performance of the tasks carried out by them in relation to LSIs.

The ECB is also vested with the task to exercise oversight over the functioning of the SSM. In this context, the NCAs must (i) notify the ECB of any material supervisory procedure; (ii) further assess, on the request of the ECB, specific aspects of the procedure; and (iii) transmit to the ECB material draft supervisory decisions on which the ECB may express its views.

The ECB is also entitled to make use, at any time, of the investigatory powers referred to in Articles 10 to 13 SSMR. In particular, under Article 10 SSMR, in order to perform its tasks under the SSMR, the ECB may request information from: (a) credit institutions established in the participating Member States; (b) financial holding companies established in the participating Member States; (c) mixed financial holding companies established in the participating Member States; (d) mixed-activity holding companies established in the participating Member States; (e) persons belonging to the entities referred to in points (a) to (d); (f) third parties to whom the entities referred to in points (a) to (d) have outsourced functions or activities.

By virtue of Article 11 SSMR, the ECB enjoys general investigatory powers which allow it to require the submission of documents; examine the books and records of the above

[523] See the replay by Daniele Nouy of 2 May 2016 to a MEP's written question (QZ042).

[524] D'Ambrosio (2020), p. 210.

[525] Report from the Commission to the European Parliament and the Council on the SSM established pursuant to Regulation (EU) No 1024/2013, COM(2017) 591 final, available at: https://ec.europa.eu/info/sites/default/files/171011-ssm-review-report_en.pdf

[526] See *L-bank* judgment, para. 24.

natural or legal persons referred to in Article 10 SSMR and take copies or extracts from such books and records; obtain written or oral explanations from any of the above natural or legal persons of Article 10 or their representatives or staff; interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.

Furthermore, under Article 12, the ECB may decide to perform on-site inspections at the business premises of the legal persons referred to in Article 10 SSMR and any other undertaking included in supervision on a consolidated basis where the ECB is the consolidating supervisor. These on-site inspections are subject to prior notification to the relevant NCA. In the same context, should the officials of the ECB and other accompanying persons authorised or appointed by the ECB to carry out the on-site inspection, find that a person subject to the on-site inspection opposes the inspection, the NCA of the participating Member State concerned shall afford the above officials or accompanying persons the necessary assistance in accordance with national law.[527]

Pursuant to Article 13 SSMR, if an on-site inspection or the assistance provided for in Article 12 requires authorisation by a judicial authority according to national rules, the ECB must apply for such authorisation. In this case, the competent national judicial authority is entitled to control that the decision of the ECB is authentic and that, in view of the subject matter of the inspection, it is proportionate, i.e., that the coercive measures envisaged to be adopted by the ECB are neither arbitrary nor excessive. To establish that the action of the ECB is in compliance with the principle of proportionality, Article 13(2) SSMR are specifies that the national judicial authority may ask the ECB for detailed explanations, in particular relating to (a) the grounds the ECB has for suspecting that an infringement of the relevant Union or national law has taken place, (b) the seriousness of the suspected infringement and (c) the nature of the involvement of the person subject to the coercive measures. Article 13(2) explicitly clarifies two aspects. First, that the national judicial authority cannot review the necessity for the inspection or demand to be provided with the information on the ECB's file. Second, the lawfulness of the ECB's decision is subject to review only by the CJEU.

In the realm of its responsibilities, the ECB must apply all relevant Union law including any national law transposing EU Directives. In case where the relevant Union law comprises of Regulations which explicitly grant options to the Member States, the ECB must apply the national law by which the Members States have exercised the above options.

This may prove to be a delicate exercise for the ECB as it should take into account the interpretation (if any) provided for by the national courts with respect to the national law in question. At the same time, though, when applying national law, the ECB should pay

[527] To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records. Where that power is not available to the national competent authority concerned, it shall use its powers to request the necessary assistance of other national authorities.

due regard to the primacy of Union law.[528] In case liability arises from the application of national law, the ECB will be subject to an action for damages before the CJEU.

It should be pointed that by virtue of the SSMR, the ECB is under an obligation to apply substantive rules of national law, rather than procedural rules. This can be deduced from the combined reading of Recital 34 SSMR and Article 22 SSMR. The former provides that "[w]here the *material rules* relating to the prudential supervision of credit institutions are laid down in Directives, the ECB should apply the national legislation transposing those Directives". The term "material rules" in Recital 36 can be contrasted with the term "due process" used in Article 22, thereby showing a clear intention of the legislature to distinguish between material rules as encompassing substantive rules, and due process rules as encompassing procedural rules (e.g., right to be heard).

5.6. Responsibilities of the NCAs with regard to exercise of powers

As regards the NCAs, Article 6(6) SSMR lays down the responsibilities assigned to them in the SSM construction. For the performance of these responsibilities, the NCAs The national competent authorities shall report to the ECB on a regular basis on the performance of the activities performed under this Article.

Without prejudice to the ECB's responsibilities, NCAs shall carry out and be responsible for the tasks referred to in points (b), (d) to (g) and (i) of Article 4(1) SSMR[529] and adopting

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[528] See Recital 34 SSMR which provides "[i]t follows that the ECB should, when adopting guidelines or recommendations or when taking decisions, base itself on, and act in accordance with, the relevant binding Union law"

[529] Article 4 Tasks conferred on the ECB: "1. Within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States:

[…]

(b) for credit institutions established in a participating Member State, which wish to establish a branch or provide cross-border services in a non participating Member State, to carry out the tasks which the competent authority of the home Member State shall have under the relevant Union law;

[…]

(d) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;

(e) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models;

(f) to carry out supervisory reviews, including where appropriate in coordination with EBA, stress tests and their possible publication, in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by these institutions ensure a sound management and coverage of their risks, and on the basis of that supervisory review to impose on credit institutions specific

all relevant supervisory decisions with regard to LSIs, within the framework and subject to the procedures referred to in paragraph 7 of this Article.

Article 6(6) SSMR further provides that, again, without prejudice to the ECB's responsibilities in relation to investigatory powers and on-site inspections under Articles 10 to 13 SSMR, the NCAs maintain the powers, pursuant to national law, to obtain information from credit institutions, holding companies, mixed holding companies and undertakings and to perform on-site inspections at those entities. The NCAs are required to inform the ECB regarding the measures they take to perform these responsibilities and closely coordinate those measures with the ECB.

5.7. Accountability gaps – Absence of fully-fledged accountability mechanism between the ECB and the NCAs

Having illustrated the allocation of tasks and powers between the ECB and the NCAs in the SSM universe, it is now time to critically assess the accountability mechanisms within the SSM structure and identify any potential gaps in the accountability relationship between the ECB and the NCAs.

As a way of introduction, it is recalled that it clearly emerges from the L-Bank judgment that *all* prudential supervisory *tasks* are vested exclusively in the ECB and not to both the ECB and to the NCAs. Some commentators have pointed that in the SSMR ecosystem, there seems to be "a 'reverse' delegation doctrine in the EU, i.e., the delegation of EU powers (supervision over LSIs) by an EU institution (the ECB) to the ECB's counterparts at the national level".[530] The ECB acts as the delegating authority, whereas the NCAs as the delegees. In light of this 'delegation structure', ensuring comprehensive accountability arrangements in the context of the SSM requires an effective vertical accountability chain between the ECB and the NCAs. It has been argued that such a chain is missing and thus gaps in the accountability of the ECB arise thereof.[531]

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additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law;

(g) to carry out supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States, including over financial holding companies and mixed financial holding companies, and to participate in supervision on a consolidated basis, including in colleges of supervisors without prejudice to the participation of national competent authorities in those colleges as observers, in relation to parents not established in one of the participating Member State;

[…]

(i) to carry out supervisory tasks in relation to recovery plans, and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements, and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers."

[530] Karagianni & Scholten (2018), p. 186.

[531] Karagianni & Scholten (2018).

Bovens[532] identifies three elements upon which the relationship between the delegating authority (forum of accountability) and the delegee (actor) is premised, i.e., *information* provided by the delegee, *discussion* between the delegee and the delegating authority, and *judging* by the delegating authority. Judging is based on the information received and the discussion that follows, which can lead to consequences should the delegee fail to carry out its duties under the delegation relationship (the "rectification stage"[533]). The interplay between these elements has been eloquently described as follows:

> *Without information, discussion is futile; having information without a possibility of discussion can prevent the rectification of mistakes; accountability without sanctions is incomplete as the presence of a possibility to sanction makes the difference between noncommittal provision of information and being held to account*[534]

The accountability chain linking the NCAs, as delegees, to the ECB, as delegating authority, lacks the third and most critical element, the rectification stage.[535] Article 6(3) SSMR only establishes an obligation for the NCAs to follow the instructions given by the ECB when performing their tasks. However, the SSMR does not provide the ECB with sanctioning powers[536] against the NCAs in case the latter do not follow its instructions or fail to adequately perform their tasks. Such sanctioning powers are available, in the context of national administrative law, to public administrative authorities in their relationship with other administrative bodies finding themselves lower in the chain of public administration bodies.[537]

Article 271(d) TFEU only allows the ECB to bring proceedings against an NCB for not performing its obligations under the EU Treaties before the CJEU. Should the CJEU find that an NCB failed to fulfil its obligations, that NCB shall be required to take the necessary measures to comply with the judgment of the Court. However, this accountability mechanism does not seem to be a sufficient accountability link between the ECB and the NCAs given the complexity of the decision-making processes in the context of the SSM. Consequently, it appears that although the ECB enjoys extensive powers, it is lame in respect of possessing proper tools to ensure that its instructions are executed.

National administrative laws put great emphasis on establishing comprehensive and effective accountability links between the administrative bodies from the bottom to the top

[532] Bovens (2007).

[533] Karagianni & Scholten (2018), p. 191.

[534] Scholten (2011).

[535] Karagianni & Scholten (2018), p. 192.

[536] e.g. possibility to review the NCAs decisions, impose fines or step in and exercise the task delegated to the NCA (e.g. issue a decision instead of the NCA), or even appoint an internal watchdog checking NCAs' compliance with the ECB's instructions (in this regards see Karagianni & Scholten (2018) and Scholten (2014).

[537] e.g., administrative hierarchical appeal.

of the administrative hierarchy chain. Effectively, there are no gaps in the accountability of the public administration bodies, which, in turn, lays down a clear contour of their liability. Drawing lessons from the national administrative law and in order to ensure clear accountability and liability structures in the SSM ecosystem, it would be essential to enhance the vertical accountability links between the ECB and the NCAs. It has been correctly pointed out that currently the ECB is given exclusive powers and renders account for the functioning of the SSM to the European Parliament and the Council, yet it may not be able to fully control the exercise of the delegated tasks by the NCAs.[538]

Should there not be a fully-fledged accountability relationship between the ECB and the NCAs, it is hardly understood how and why the ECB should render account for the entire SSM function.

6. Allocation of tasks and powers in the SRM ecosystem

6.1.SRB's institutional set-up and constitutional considerations

The second pillar of the Banking Union, that is SRM,[539] was established to offer a credible mechanism in dealing with ailing banks which need to exit the market. Before taking a closer look at the allocation of tasks within the SRM, it is worth to explore first its institutional set-up.

As mentioned earlier, in the context of the SRM, significant credit institutions that are supervised by the ECB fall within the resolution competence of the SRB,[540] whereas national resolution authorities are responsible for the "less significant" ones.[541] In case resolution takes place at Union level, a number of EU bodies is responsible for deciding on the resolution measures whilst the NRAs are only responsible for the implementation of such measures. Hence, in case of resolving significant credit institutions, the exercise of resolution powers is allocated both *horizontally* between the EU bodies and *vertically* between the EU bodies and the NRAs.

The SRM itself does not have a legal personality, but it is the SRB as an EU agency which enjoys legal personality. Pursuant to Article 43 SRMR, the SRB is composed of its Chair, four further full-time members,[542] members appointed by the NRAs, and finally two

[538] Karagianni & Scholten (2018), pp. 192-193.

[539] See Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 OJ L 225, 30.7.2014, p. 1–90 (SRMR). On banking resolution, see, among others, Martucci (2016), p. 279; Binder & Singh (2016); Kern (2015), pp. 154-187.

[540] Article 18 SRMR.

[541] Except from cases where a resolution scheme provides for the use of the Single Resolution Fund.

[542] They are appointed upon a Council's decision, on a proposal from the Commission after consulting the SRB in its plenary session. Finally, the decision requires the approval of the European Parliament.

representatives each designated by the Commission and the ECB respectively as observers in the executive and plenary sessions of the SRB. The SRB's administrative and management structure comprises of the Chair, a plenary and executive session, and a Secretariat.

The Chair, four fulltime members and one national representative from each NRA convene for the plenary session which is responsible for administrative tasks (internal matters).[543] On the other hand, the executive session brings together the Chair and the four fulltime members and is entrusted with the tasks provided for in Article 54 SRMR. In particular, it prepares all of the decisions to be adopted by the SRB in its plenary session and takes all of the decisions to implement the SRMR. These tasks include (a) preparing, assessing and approving resolution plans; (b) applying simplified obligations to certain entities and groups; (c) determining the MREL; (d) provide the Commission, as early as possible, with a resolution scheme; and (e) decide upon the budget of the SRB. In cases of urgency, the SRB in its executive session may take certain provisional decisions on behalf of the SRB in its plenary session.[544]

From a constitutional point of view, there are two points that deserve attention.

(a) Monetary financing prohibition: The first point relates to the monetary financing prohibition established under Article 123 TFEU and the possible interference with this prohibition given that many NCBs are designated as NRAs under the respective national legislation. Some earlier ECB Opinions had highlighted that resolution in the financial markets is neither a Eurosystem related task, nor a traditional central banking task, but rather a government task. Consequently, if an NCB were to be entrusted with resolution tasks it would need to be "adequately remunerated in advance, to ensure compliance with the monetary financing prohibition".[545] [546] Nevertheless, in light of the latest ECB's

[543] Pursuant to Article 50 SRMR the plenary session *inter alia* adopts the SRB's annual work programme, the annual budget, rules of procedure, cooperation with the NRAs etc. D'Ambrosio (2020), p. 324, notes that the adoption of the general instructions and guidelines to NCRs should be encompassed within the plenary session's remit albeit this is not explicitly referred to in Article 50 SRMR.

[544] in particular on administrative management matters, including budgetary matters according to Article 5(3) SRMR.

[545] Opinion of the European Central Bank of 21 January 2015 on the Resolution College (CON/2015/2), para. 3.3: "*... Resolution in the financial market is neither a Eurosystem related task, nor a traditional central banking task. Rather, it is a Government task and, as such, it is performed in the interest of the [...] State. Therefore, if the [NCB] is to be entrusted with such a task, it needs to be adequately remunerated in advance, to ensure compliance with the monetary financing prohibition*".

[546] Opinion of the European Central Bank of 21 January 2015 on the role of Národná banka Slovenska in the resolution in the financial market (CON/2015/3), para. 2.3: "*... the ECB underlines the importance of safeguarding compliance with the prohibition on monetary financing laid down in Article 123(1) of the Treaty. The new task entrusted to NBS under the draft law is neither an ESCB-related task, nor a traditional central banking task. Rather, the new task is linked to a task for government, i.e. resolution in the financial market. Therefore, if NBS is to be entrusted with such a task, it needs to be adequately remunerated in advance, to ensure compliance with the monetary financing prohibition*."

pertinent Opinions,[547] it seems that such designation does not raise concerns as to the compliance with the prohibition of Article 123 TFEU subject to the condition that the central bank is not required under the law to finance resolution funds or will be encumbered with other resolution financial arrangements as these are government tasks.[548] The provision of such financing to a resolution fund "would constitute a government task, and any such loan or financing by the [NCB] would therefore breach the prohibition of monetary financing under the Treaty".[549]

(b) *Meroni* aspects: The second point that attracts attention is the tasks endowed to the SRB which could said to represent a "*qualitative leap in agencification*".[550] The SRB is part of drastic redistribution of competences between Union and national bodies that stemmed from the creation of the EBU. In this context, the SRB constitutes a prime example of pushing further the agencification process in the EU and poses the question of whether it has bended or it has even broken the constitutional fence surrounding the operation of EU agencies[551] to which rulemaking power is 'outsourced'.[552]

A principal issue stands at the centre of these concerns, that of the 'supervision' of the SRB in the exercise of its powers by the EU Institutions. While in the resolution phase the SRB operates within a "dense network of actors"[553] including the EU Commission and the Council, in the preventive phase (that of resolution planning, resolvability assessment and the ensuing proposal of correcting measures,[554] determining MREL and the resolution binding policies) the EU Commission and the Council are not involved. Moreover, should the SRB assess that the public interest requirement is not met pursuant to Article 18(5) SRMR, then it is the SRB on its own that will decide not to trigger resolution notably without the involvement of the EU Commission and the Council.[555] The German

[547] Opinion of the European Central Bank of 1 July 2015 on recovery and resolution in the financial market (CON/2015/22), para. 2.3.2, Opinion of the European Central Bank of 20 July 2015 on recovery and resolution of credit institutions and investment firms (CON/2015/25), para. 2.5; Opinion of the European Central Bank of 22 September 2015 on the designation of Lietuvos bankas as a resolution authority (CON/2015/33), para. 2.2.2;

[548] Opinion of the European Central Bank of 1 July 2015 on recovery and resolution in the financial market (CON/2015/22), para. 2.3.2.

[549] Opinion of the European Central Bank of 20 July 2015 on recovery and resolution of credit institutions and investment firms (CON/2015/25), para. 2.6.

[550] Busuioc (2013), p. 15; Bozina Beros (2018), pp. 22, 71; on the conditions circumscribing the powers entrusted to the SRB under the SRMR (see Vlachou (2018)).

[551] Asimakopoulos (2019), p. 1.

[552] In this regard see Jenart (2022).

[553] Asimakopoulos (2019), p. 6.

[554] Art 8(9)(e) and (f), and 10 SRMR.

[555] Timmermans (2019), p. 161, notes that *"[j]ust before the SRMR was adopted, the Court in Short-selling refined the Meroni-doctrine by only allowing delegations to agencies insofar as the agency (i) acts on predefined*

Constitutional Court seemed to be aware of this fact[556] in its relevant judgment[557] adjudicating on the SSM and SRM legality in view of the EU Treaties.

Before assessing the compliance of the SRB structure with the *Meroni* doctrine, it is appropriate to examine the content said doctrine and the rational underpinning the case-law rules based on which EU constitutional bodies may abdicate their powers and delegate them to other EU bodies.

The CJEU developed the rules governing such delegation in its infamous judgment in the case of *Meroni v High Authority*[558] dating back to 1958. At the centre of the *Meroni* doctrine lies the principle of institutional balance (Article 3 TFEU) which requires that the public powers are distributed in a balanced way among the EU bodies where there is no substantive shift of responsibilities from one EU body to another body.

Although the EU Treaties do not provide *expressis verbis* for the establishment of EU agencies, they cannot be read as forbidding the creation of such agencies. Considering this and in light of the institutional balance, the EU bodies are entitled to delegate the powers, which have been conferred to them by virtue of the EU Treaties,[559] to EU agencies provided that such delegation refers to executive powers which are clearly defined and the use of which is under the strict review of the delegating body based on objective criteria. The CJEU clarified that a delegation of powers which entails a wide margin of discretion and thus allows the delegee to make actual policy, cannot be tolerated in view of the principle of the institutional balance of powers since it may well lead to the delegator substituting for the delegee in the policy choices, resulting in an actual transfer of responsibility.[560] Such a result could not be supported under the current texts of the EU Treaties and it could only be effectuated subject to a Treaty amendment.[561]

The CJEU further noted that "a delegation of power cannot be presumed",[562] but instead it must be explicitly stated.[563] Literature suggests that the *Meroni* doctrine reflects the

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criteria, (ii) cannot take autonomous decisions and (iii) is only exceptionally empowered". For a discussion of this case see Scholten & van Rijsbergen (2014), pp. 389-405; Scholten & van Rijsbergen (2014), pp. 1223-1256; Denys (2014), pp. 14-15; Clément-Wilz (2015).

[556] D'Ambrosio (2020), p. 319.

[557] BVerG of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14

[558] Judgment of the Court of 13 June 1958, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, Case 9-56, ECLI:EU:C:1958:7 (*"Meroni* judgment") .

[559] Kozina, Martinić, & Mihalić (2017).

[560] *Meroni* judgment, p. 152.

[561] Lenaerts (1993), pp. 23-49, which accepts that agencies are useful but regards them as "internal bodies" in the institutional architecture (p. 40).

[562] *Meroni* judgment, p. 143.

[563] Annunziata (2021), p. 49.

CJEU's aim to ensure that "no substantive exercise of power could escape"[564] its judicial review. The underlying reason for the court's stance was that in the time before the Lisbon Treaty, the EU Treaties only provided for the judicial review of the acts of EU institutions. Hence, the addressees of actions adopted on the basis of delated powers could well be deprived of judicial protection for such acts.[565] In view of the current Articles 263 and 267 TFEU, this concern is no longer valid as these Articles explicitly provide for the judicial review of all actions coming from EU bodies irrespective of whether such bodies are EU Institutions or mere EU agencies. In light of this, the *Meroni* doctrine has been described as a "half-dead"[566] doctrine. Yet, the CJEU has not explicitly renounce it yet.[567]

The application of the *Meroni* doctrine seems to be anachronistic and thus contentious in view of the growing delegation of regulatory powers to EU agencies. Nonetheless, the CJEU seems to uphold *Meroni* in its renowned ruling in the ESMA Short-Selling case.[568] The words to AG Jääskinen in its Opinion in the Short-Selling case are illustrative of the CJEU's stance that *Meroni* is not just a relic of the past case-law, but instead it has an active role to play:[569]

> *Thus, as is pointed out in the written observations of the Commission, the Meroni case law remains pertinent in the context of delegation of implementing powers to an agency. More specifically, Meroni remains relevant in that (i) powers cannot be delegated to an agency that are different from the implementing powers the EU legislature has conferred on the delegating authority, be it the Commission or the Council, and (ii) the powers delegated must be sufficiently well defined so as to preclude arbitrary exercise of power. In other words, the delegating act must supply sufficiently clear criteria so that the implementing power is amenable to judicial review. The delegating authority 'must take an*

[564] *Ibid.*

[565] *Ibid.*

[566] *Ibid.* See also de Arriba Sellier (2021).

[567] Schneider (2009), p. 29.

[568] Judgement of the Court (Grand Chamber) of 22 January 2014, *United Kingdom v the European Parliament and the Council*, C-270/12, ECLI:EU:C:2014:18 ("*Short-selling* judgment"). The case deals with the United Kingdom questioning the legality of Art. 28 of Regulation 236/2012 on short selling (Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24, which empowers ESMA to adopt *ad hoc* measures to limit short selling and other equivalent practices where necessary in order to protect the financial stability of the Union. In the *Meroni* case the question under review was the excessive discretion that ESMA enjoys in relation to evaluation of triggering events, the measures to adopt, and the scope of application regarding short-selling actions. In the same vein, in *Romano* case, the UK challenged the nature of the measures, arguing that the conditions set by ESMA to limit the acquisition of net short positions may have the force of law to the extent that they are addressed to a wide set of market participants and concern an equally wide array of financial instruments. The CJEU dismissed the action in its entirety. For a comprehensive analysis of the ruling in the Short Selling case, see Gargantini & Di Noia.

[569] See Chiti (2009), p. 1395.

> *express decision transferring them and the delegation can relate only to clearly defined executive powers'.*[570]

Even if the ruling on the *Short-Selling* case could be seen as providing stimulus to the *Meroni* triggering a re-definition of the doctrine in order to 'keep up' with the establishment of EU agencies under EU secondary legislation,[571] it seems that the CJEU's efforts to keep the doctrine alive are superseded by the evolution of the EU law. In reality, it appears that the *Meroni* doctrine finds itself amid a twilight zone when it comes to EU legislation on financial supervision and resolution which threatens to condemn the doctrine to "fad[ing] into oblivion".[572] The CJEU, however, in resisting to forgo the doctrine in the *Short-Selling* case, essentially, narrowed down *Meroni's* scope to one main requirement of prohibiting the 'outflow' of power discretionary powers "unless they were adequately delineated and thus, amenable to judicial review".[573]

An argument launched against the *Meroni* doctrine employed the conceptual distinction between 'conferred powers' and 'delegated powers'.[574] The underlying basis of the argument is that powers endowed to EU agencies were not conferred by the Treaty on an EU institution *ab ovum*, and then delegated by that competent institution to the relevant EU agency. Rather, such powers were created for the first time by Union secondary legislation and were directly conferred on the EU agencies. The argument concludes that in the absence of a delegation, institutional balance concerns do not arise accordingly.[575] Yet, the last limb of the argument does not seem to be entirely compelling, since the conferral or delegation of powers must always achieve institutional balance[576] as the latter constitutes an integral piece in the backbone of the EU construction serving as the fundamental democratic principle of separation of powers found in national jurisdictions.[577]

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[570] Opinion of Mr Advocate General Jääskinen delivered on 12 September 2013, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, C-270/12, ECLI:EU:C:2013:562, para. 88. It should be noted that the AG opined that ESMA's powers in relation to short selling to "make legally binding decisions directed at individual legal entities in substitution for either a decision, or the inaction, of a competent national authority which may well disagree with a decision taken by ESMA". were beyond the constitutional redlines of Article 114 TFEU.

[571] Annunziata (2021), pp. 52-53.

[572] *Ibid,* p. 57.

[573] Asimakopoulos (2019), p. 10.

[574] Yataganas (2001).

[575] *Ibid.*

[576] In this regard see also Asimakopoulos (2019), p. 10.

[577] Vos & Everson (2014), p. 13; Jacqué (2004), p. 348; Conway (2011), p. 210; Prechal (1998).

The principle of institutional balance is a constitutional rule of EU law,[578] described by the CJEU in its early case-law as '*a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community*'.[579] The institutional balance could be understood as requiring that the powers allocated to the EU Institutions under the Treaties cannot be delegated to an EU agency, and the types of legislative acts such bodies are entitled to issue.

In light of this, the compliance of the SRB's establishment with the principle of institutional balance could be questioned. It is true that despite the current institutional setup within which the SRB operates under the eye of the Commission and the latter's veto power, one cannot ignore the policy making powers afforded to the SRB, especially during the resolution planning phase. In light of this, it has been argued that the SRB's powers extend "beyond technical assessment" which "disturbs the […] institutional" balance.[580]

One could attempt to solve the SRB puzzle based on the judgment in the *Short-Selling* case. Article 17 TEU provides that the Commission "*shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them* […] *It shall exercise coordinating, executive and management functions, as laid down in the Treaties*."). ESMA in relation to the supervision of credit rating agencies enjoys executive powers[581] which allows it to 'adopt executive decisions in a specific factual context'.[582] The CJEU noted that ESMA was conferred with well-determined executive powers to be exercised subject to certain conditions provided for by the pertinent legal provisions.[583] Furthermore, in the *Short-Selling* case, the UK pleaded *inter alia* that ESMA had been empowered to adopt implementing acts, whereas Article 291 TFEU reserves this power for the EU Commission. Although the institutional balance lies at the core of this argument, the CJEU dismissed the argument by holding that the powers conferred to ESMA, in the regulatory context within which ESMA operates, cannot be regarded as undermining the rules governing the delegation of powers laid down in Articles 290 and 291 TFEU,[584] without even mentioning the institutional balance and the special powers reserved for the Commission. Effectively,

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[578] In *Meroni* judgment the CJEU described this principle as "*the balance of powers which is characteristic of the institutional structure of the community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies*". See also Platon (2019), Chamon (2015), Jacque (2004), Lenaerts & Verhoeven (2002).

[579] Judgment of the Court of 22 May 1990. *European Parliament v Council of the European Communities. Capacity of the European Parliament to bring an action for annulment*, C-70/88, ECLI:EU:C:1990:217.

[580] Asimakopoulos (2019), p. 17.

[581] Equally, the SRB enjoys such powers in the preventive phase. As mentioned above: resolution planning, resolvability assessment and the ensuing proposal of correcting measures, determining MREL and the resolution binding policies.

[582] *Short-selling* judgment, para. 38.

[583] *Short-selling* judgment, para. 41-55.

[584] *Short-selling* judgment, para. 86.

the CJEU avoided addressing the issue why vesting an EU agency with powers which the Treaties seem to have conferred on the Commission does not disturb the institutional balance.

The *Short-Selling* ruling seems to recognise – not inadvertently – an informal[585] "constitutional transformation"[586] and accordingly an evolution in the content of the institutional balance.[587] Such transformation has affected the relationship between the EU Institutions and EU agencies, and thus has altered the map of power allocation between EU bodies. It is in this very context of the constitutional transformation that the role of the SRB should be understood and examined.[588] Since the SRB possesses powers which resemble – from a qualitative point of view – with the powers conferred and exercised by ESMA and is empowered to adopt executive decisions in a similar vein as ESMA, it could be inferred that the SRB would successfully pass the scrutiny of the CJEU in relation to its compliance with the institutional balance. Therefore, it could be accepted that the SRB indeed represents a "*qualitative leap in agencification*" process which, however, is aligned with the 'modern' concept of the institutional balance principle fed by a re-delineating of the constitutional fence surrounding the operation of EU agencies.

6.2. Horizontal allocation of tasks between the SRB and the EU Institutions

Triggering the resolution framework requires the collaboration of SRB and the EU Institutions in the context of a horizontal allocation system laid down in Article 18 SRMR. In particular, the SRB, in its executive session, is responsible to adopt a resolution scheme following its assessment that (i) the entity under consideration in FOLTF, (ii) there is not a reasonable prospect that alternative private sector measures are available, (iii) a resolution action is necessary in the public interest. Once the SRB has adopted the resolution scheme it transmits it to the Commission.[589]

Once the latter receives the resolution scheme, the has 24 hours to act based on three possible scenarios. The first scenario is that the Commission endorses the resolution scheme which then enters into force. The second scenario is that the Commission objects to discretionary elements of the scheme. Following this objection, the SRB needs to modify

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[585] Informal in the sense that there is no Treaty amendment.

[586] On the constitutional transformation see Weiler (1991); Ioannidis (2016); Mendes & Venzke (2018); Fabbrini (2016); Dawson & De Witte (2013); De Witte (2015).

[587] Asimakopoulos (2019), p. 14.

[588] See Asimakopoulos (2019), p. 15, who notes: '*Applying the theory of constitutional transformation in the case of the SRB would allow as to recognise that within Eurozone the governance of banking and financial markets industry needs to be elevated at the EU level due to financial stability risks that one Member State's malpractice might generate for the entire Eurozone, but also due to the need to have harmonized rules and enforcement in order to allow for the much needed cross-border consolidation within the banking and financial markets sector. Endorsing this transformation would allow for a fully functional Banking Union and Capital Markets Union to arise without the political impediments that the current constitutional framework imposes. The Veneto banks case illustrates the controversy to which the current framework can lead to*'.

[589] Article 18(7) SRMR.

the scheme which is then approved and enters into force. The third scenario is that the Commission either (i) objects to the resolution scheme for the reason that the criterion of public interest is not met or (ii) approves or objects to a material modification of the amount of the SRF envisaged under the resolution scheme of the SRB. In said third scenario the Council is involved within 12 hours from the time the resolution scheme was transmitted to the Commission. Again, three outcomes are possible: (i) if the Council adopts the objection of the Commission relating to the non-fulfilment of the public interest criterion, then the credit institution concerned enters normal insolvency proceedings pursuant to national law; (ii) the Council refuses the Commission's objection and the resolution scheme enters into force; (iii) the Council adopts the Commission's objection regarding the use of SRF and the SRB modifies the resolutions scheme which is then approved and enters into force.[590]

In view of the *Meroni* doctrine which requires the involvement of the Commission and the Council in the decision-making process, it is said that the SRM ecosystem comprises of the SRB as a *de facto* actor and the Commission and the Council as *de jure* actors.[591]

6.3.Vertical allocation of tasks between the SRB and the NRAs

The SRMR sets out the framework for the division of tasks and powers withing the SRM which closely follows the example of the SSM universe. According to Article 7(1) SRMR, the effective and consistent functioning of the SRM is the ultimate responsibility of the SRB,[592] whereas the SRB is under an obligation to perform its tasks in close cooperation with the NRAs.[593] To this end, Article 31 SRMR vests the SRB with the powers to issue guidelines and general instructions to the NRAs, to exercise investigatory powers regarding banks, to request (on an *ad hoc* or continuous basis) information from the NRAs on the performance of their tasks, receive from the NRAs draft decisions on which it may express its views. In addition, pursuant to Article 7(4) SRMR, the SRB is entitled to issue warnings to the NRAs in case the latter's decisions do not comply with the SRMR or with the SRB's general instructions, as well as to exercise directly all the relevant powers of the NRA under the SRMR, if the latter does not appropriately address and comply with the SRB's

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[590] The Single Resolution Mechanism, Introduction to Resolution Planning, 2016, p. 16 available at https://www.srb.europa.eu/system/files/media/document/intro_resplanning.pdf.pdf.

[591] Timmermans (2019), p. 161.

[592] Pursuant to Article 31 SRMR, the SRB may (i) issue guidelines and general instructions to the NRAs; (ii) exercise investigatory powers on credit institutions; (iii) request, on an *ad hoc* or continuous basis, information from the NRAs on the performance of their tasks; (iv) receive from the NRAs draft decisions on which it may express its views on the draft decisions.

[593] To this end, the SRB adopted on 28 June 2016 a decision which established the framework for such cooperation. This decision was then replaced in 2018 by Decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15) available at: https://www.srb.europa.eu/system/files/media/document/decision_of_the_srb_on_cofra.pdf.

warning.[594] Further, the SRMR provides for the possibility that the SRB exercises all relevant powers and responsibilities conferred on it by the SRMR on the request of the participating Member State.[595]

It is important to note that pursuant to Article 18(9) SRMR, the SRB together with the other competent EU authorities is competent to draw up resolution plans for significant credit institutions or for those over which the ECB has decided to exercise direct supervision, and for cross border groups regardless of whether they are significant under the SSMR.[596] In drawing up the resolution plans, the SRB consults the ECB and the NRAs. Resolution plans (or alternatively the 'living wills' of credit institutions as could articulately be phrased) aims to ensure that the credit institutions will be prepared for their resolution, if so required. Moreover, the SRB is competent to adopt the resolution scheme (when the recourse to the SRF is necessary[597]) which is then addressed to the relevant NRA. The latter is responsible to take all necessary measures for the implementation of the resolution scheme. However, the SRB is entrusted with closely monitoring the execution of the resolution scheme by the NRAs, whereas the latter must submit to the SRB a final report on the execution of the resolution scheme.[598] Therefore, by virtue of the SRMR, the NRAs are under a duty of cooperation with SRB[599] and implement all SRB's decisions addressed to them.[600] The SRB might be called upon to exercise its powers also in relation to LSIs.[601]

For the credit institutions not falling within the perimeter of the SRB's competence, the NRAs are responsible to (i) adopt resolution plans and carry out an assessment of resolvability;[602] (ii) adopt measures during early intervention;[603] (iii) apply simplified obligations or waiving the obligation to draft a resolution plan;[604] (iv) set the level of minimum requirement for own funds and eligible liabilities;[605] (v) adopt resolution

[594] Article 7(4) SRMR.

[595] Article 7(5) SRMR.

[596] Article 7(2) SRMR.

[597] Article 7(3), sub-paragraph 2, SRMR.

[598] Article 28 SRMR.

[599] Timmermans (2019), p. 162.

[600] Article 29 SRMR.

[601] Article 7(5) SRMR.

[602] in accordance with Articles 8, 9 and 10 SRMR.

[603] in accordance with Article 13(3) SRMR.

[604] in accordance with Article 11 SRMR.

[605] in accordance with Article 12 SRMR.

decisions and apply resolution tool, provided that the resolution action does not require any use of the Fund; and (vi) write down or convert relevant capital instruments.[606]

This architecture of the allocation of powers becomes complex as far as the implementation of the resolution scheme is concerned which deserves further attention for the purposes of determining the allocation of liability between the SRB and the NRAs. To this end, Article 29 SRMR may provide useful guidance. According to Article 29 SRMR, the NRAs, by exercising the powers conferred on them under the BRRD, must implement decisions taken in the SRMR context. When exercising these powers, the NRAs must fully inform the SRB, whereas any action taken by the NRAs must be in full compliance with the SRB's decisions. In this vein, when the SRB and the EU Commission and EU Council adopt the resolution scheme, this is addressed to the NRAs which bear the ultimate responsibility, under the close monitoring of the SRB, to implement it.[607] Once the NRAs has executed the resolution scheme shall submit to the SRB a final report. [608] Article 29 SRMR stipulates that when the NRAs exercise their resolution powers, they are required to use the powers conferred to them under the national legislation transposing the BRRD and accordingly fully inform the SRB about the use of such powers.

Importantly, Article 29(1) SRMR requires that any action the NRAs take shall comply with the SRB's decisions pursuant to SRMR. Effectively, this entails that when implementing the resolution scheme, the NRAs have no leeway at all or a very limited degree of leeway and accordingly that the relationship between the SRB and the NRAs is of a hierarchical nature.[609] Should the NRAs not implement the SRB's decision or comply with it, then the SRB is entitled[610] to intervene and directly order the entity under resolution to undertake actions.[611] The above architecture describes the composite procedure of decision-making under Article 18 SRMR and the implementation of the adopted decisions. This rather complex[612] architecture in which the SRB takes *de facto* decisions with the EU Commission and EU Council being the *de jure* authors of these decisions[613] is significant as it determines the allocation of liability between the EU bodies and the NRAs.

Therefore, in light of Article 29, it transpires that the NRAs do not enjoy discretion in the exercise of their powers, but instead they must comply with the SRB's decisions when

[606] pursuant to Article 21, in accordance with the procedure laid down in Article 31.

[607] SRMR, art 18(19)

[608] Article 28(1) in fine, SRMR.

[609] Timmermans (2019), p. 162.

[610] Article 29(2) SRMR.

[611] Pursuant to Article 29(2) SRMR, before the SRB decides to impose any such measure it has to notify the Commission and the NRA of the measure it intends to take, the reasons for those measures and details of when the measures are intended to take effect.

[612] Busch (2015), p. 332.

[613] Timmermans (2019), p. 163.

implementing a resolution scheme. As a result, the relationship between the SRB and the NRAs is a hierarchical one.[614] This hierarchical nature is further supported in view of the fact that Article 29 SRMR expressly provides a 'sanction' for the NRAs in case where the latter has not applied or has not complied with a SRB's decision or has applied such decision in a way which poses a threat to any of the resolution objectives under Article 14 of the SRMR or to the efficient implementation of the resolution scheme. Such 'sanction' effectively strips the NRAs of their powers and allows the SRB to take direct action in relation to an institution under resolution. More specifically, the SRB may order such an institution to take specific actions in the context of the resolution process. It is noted that should the SRB decide to impose such 'sanction' to an NRA, it must notify the NRA concerned as well as the Commission of its decision. The SRB must accompany such notification with the reasons that led it to adopt such decision.[615]

7. It takes two to tango – Composite Procedures

Before turning to examining further traces of the non-contractual liability of EU authorities, it is necessary to first take a grasp of the concept of composite procedures in the context of EU administrative law and in particular of the EBU. Composite procedures entail a dense labyrinth of decision-making steps which warrants attention in relation to the judicial protection granted in such cases. One could describe composite procedures as:

> *multiple-step procedures with input from administrative actors from different jurisdictions, cooperating either vertically (between EU authorities and those of a Member State), horizontally (between authorities in two or more Member States), or in triangular relations (involving authorities of different Member States and of the EU). Final measures or decisions, whether issued by a Member State or an EU authority, are based on procedures involving more or less formalized input of the participants from the different levels.*[616]

The composite procedures pose a series of legal questions relevant to the non-contractual liability in the realm of the EBU pertaining to the allocation of jurisdiction to judicially review the decision adopted during composite procedures between the Union and national courts, the *locus standi* of aggrieved parties seeking compensation, the effect of an invalid national preparatory act on the final decision outcome of the composite procedure, the case of acts adopted by the incompetent authority etc.[617]

Composite procedures hold a central place in the EBU, yet a paradox lies at their heart creating tension. This paradox emerges from the fact that the decision-making process in

[614] Timmermans (2019), p. 162.

[615] Article 29(2) SRMR.

[616] Hofmann, Rowe, & Turk (2011), pp. 405-406; Mendes & Eckes (2011), pp. 651-652.

[617] See by way of mere indication: Hofmann (2009), pp. 136-167; Turk (2009); Jansen & Schöndorf-Haubold (2011); Eliantonio (2014), pp. 77-93; Alonso de León (2017); Widdershoven & Craig (2017); Brito Bastos (2018); Craig (2006), pp. 329-332.

the EU involves "a networked and multi-level system" but at the same time "the supervision and accountability are still linked in a two-level system, with separate national and EU levels".[618] The difficulties in allocating court jurisdiction is also evident by the SRMR which in its Recital 120 provides that:[619]

> *The Court of Justice has jurisdiction to review the legality of decisions adopted by the Board, the Council and the Commission, in accordance with Article 263 TFEU, as well as for determining their non-contractual liability. Furthermore, the Court of Justice has, in accordance with Article 267 TFEU, competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of the institutions, bodies or agencies of the Union. National judicial authorities should be competent, in accordance with their national law, to review the legality of decisions adopted by the resolution authorities of the participating Member States in the exercise of the powers conferred on them by this Regulation, as well as to determine their non-contractual liability.*

Within the framework of composite procedures, it is of paramount importance to ensure that there will not be gaps in the judicial protection of individuals which would undermine the right to access to justice. The CJEU has provided valuable guidance regarding the judicial review of acts in the context of composite procedures with the primitive one being its 1992 ruling in *Borelli* case[620] which paved the way of the division of jurisdiction between the CJEU and the national courts in composite procedures[621] and which still constitutes good law.

The factual background of the *Borelli* case is the following:[622] Borelli, an Italian national, sought funding from the European Agricultural Guidance and Guarantee Fund ("EAGGF") to construct an oil mill. His application was approved by the region of Liguria, but did not qualify for aid from the EAGGF in 1989. Pursuant to the salient EU rules[623] the application for aid was carried forward by the Italian administration to the financial year of 1990. However, in 1990, the Regional Council of Liguria issued a negative opinion regarding the funding of Borelli's project. Following said negative opinion, the EU Commission informed the applicant that its project could not be admitted to the procedure for the grant

[618] Eliantonio (2014), pp. 77-93.

[619] See also Markakis (2016), pp. 547-552.

[620] Judgment of the Court (Fifth Chamber) of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, EU:C:1992:491 ("*Borelli* judgment").

[621] Dermine (2019).

[622] *Borelli* judgment, paras. 2-4.

[623] Article 21 of Council Regulation (EEC) No 355/77 of 15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed OJ L 51, 23.2.1977, p. 1–6.

of aid on the ground that, in view of the above-mentioned negative opinion, the conditions laid down in the relevant EU law rules were not fulfilled.[624]

The Italian applicant sought (i) the annulment of the EU Commission's decision whereby the Commission informed the applicant that the latter's application for aid from the European Agricultural Guidance and Guarantee Fund ("EAGGF"), and (ii) the annulment of all the procedural measures leading to said decision or, (iii) in the alternative, compensation for the damage caused to the applicant by the Commission and/or the region of Liguria.

The CJEU rejected the action for annulment to the extent it was launched against the opinion of the Regional Council of Liguria by holding that it is not competent to adjudicate on the legality of this opinion given that it was adopted by a national authority. The fact that the national decision formed part of and determined the Commission's decision could not affect (by way of expansion) the jurisdiction of the CJEU. The validity of the Commission's decision could not be questioned since the Commission was bound by the decision of the national authority and could neither review such decision, nor examine the application by circumventing the decision of the national authority.[625]

The CJEU held that the applicant should have challenged the negative opinion before the Italian courts and notably pointed that the principle of effective judicial protection requires the Member State concerned should ensure that "an action brought for that purpose" is considered to be admissible "even if the domestic rules of procedure do not provide for this in such a case".[626]

The conclusion stemming from *Borelli* is that adjudicating on the lawfulness of a national measure rests with the jurisdiction of the relevant national courts rather than with the CJEU's jurisdiction. Further, the validity of an EU authority's decision is not affected even if such decision is 'contaminated' by an unlawful national measure, where said EU authority has no discretion as to whether to comply with the national measure and thus no responsibility for upholding or endorsing the unlawful national measure.[627]

Borelli laid down some fundamental principles in the allocation of court jurisdiction as well as the allocation of liability between EU and national authorities. The CJEU was afforded the opportunity to further elaborate on these issues for the composite procedures taking place within the EBU construction in *Berlusconi* and *Iccrea Banca* cases.

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[624] *Ibid,* Article 13(3).

[625] *Borelli* judgment, para.11.

[626] *Borelli* judgment, paras 11-13.

[627] Dermine (2019); Eliantonio (2014).

Although a strict classification of composite procedures would be difficult, one could classify them based on the authority adopting the final decision,[628] the level at which the composite procedure is triggered,[629] or the steps involved (preparatory acts and final decision).[630] Since the competent court and the act amenable to judicial review depend on the final author of such act, in light of *Borelli, Berlusconi* and *Iccrea Banca* cases, it would be appropriate to follow the basic classification already suggested in the literature[631] which distinguishes between (a) 'bottom-up procedures' whereby the final decision is adopted by the EU body whereas the national authority provides input through preparatory acts which partially or wholly feeds the final decision, and (b) 'top-down procedures' whereby the national authority adopts the final decision which is fed into partially or wholly by preparatory acts of the EU body.

Since the immediate question that emerges from the foregoing analysis (and which will be the subject to the assessment later in this Chapter) is the judicial protection in the context of composite procedures, one should first lay down the perimeter of decisions in a composite procedure which are amenable to judicial review. This is important in order to also determine the sphere of acts that can trigger the non-contractual liability of the EU authorities.

In principle, an individual can challenge an act which is "binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position".[632] Intermediate steps and preparatory acts leading to the final decision are in principle not separately reviewable, and instead are incorporated into the final decision and their legality will be assessed in the context of a court ruling on the legality of the final decision.[633] Nonetheless, it is not excluded that the preparatory acts produce legal effects

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

[629] Alonso de León (2017).

[630] Wissink (2021).

[631] *Ibid.*

[632] Judgment of the Court of 11 November 1981, *IBM v Commission*, C-60/81, ECLI:EU:C:1981:264, para. 9; Judgment of the Court (Grand Chamber) of 12 September 2006, *Reynolds Tobacco and Others v Commission*, C-131/03 P, ECLI:EU:C:2006:541, para. 54; Judgment of the Court (Grand Chamber) of 26 January 2010, *Internationaler Hilfsfonds v Commission*, C-362/08 P, ECLI:EU:C:2010:40, para. 51; Judgment of the Court (Fourth Chamber) of 17 July 2008, *Athinaïki Techniki v Commission*, C-521/06 P, ECLI:EU:C:2008:422, para. 29; Judgment of the Court (Third Chamber) of 18 November 2010, *NDSHT v Commission,* C-322/09 P, ECLI:EU:C:2010:701, para. 45; Judgment of the Court (Third Chamber) of 13 October 2011; *Deutsche Post and Germany v Commission*, C-463/10 P, ECLI:EU:C:2011:656, para. 37; Order of the General Court (Eighth Chamber) of 6 May 2019, *ABLV Bank v ECB*, T-281/18, ECLI:EU:T:2019:296, para. 29; Order of the General Court (Eighth Chamber) of 6 May 2019, *Bernis and Others v ECB*, T-283/18, ECLI:EU:T:2019:295, para. 29; The CJEU has emphasised in the *Reynolds Tobacco* case that, although these conditions must be interpreted in light of the principle of effective judicial protection, such an interpretation cannot have the effect of setting aside these conditions without going beyond the jurisdiction that the Treaty confers on the CJEU (para. 81).

[633] Judgment of the Court of 11 November 1981, *IBM v Commission*, C-60/81, ECLI:EU:C:1981:264, para. 12; Order of the Court of First Instance (Fourth Chamber) of 2 June 2004, *Pfizer v Commission,* T-123/03,

and can be separately reviewed. In this case the form of the reparatory act is immaterial in order to affirm that the act is separately subject to judicial review. Rather, the CJEU examines whether "a preparatory measure is an actionable decision under Article 263 TFEU, the [CEJU] looks at the effect the measure creates, whether sufficient judicial protection is provided, the procedural rules that are applicable (the legislator's intention), and whether there is a possible risk of confusing the procedural stages".[634]

8. Allocation of liability between EU and national authorities and respective allocation of jurisdiction between the CJEU and national courts

Having taken a flavour of the composite procedures and the tensions they create, it is time to closer examine the prim

eval challenges, namely the allocation of liability between EU and national authorities and consequently the allocation of jurisdiction between the CJEU and national courts. The complex architecture of the allocation of tasks affects the allocation of liability between European and national actors in the SSM and SRM and accordingly the allocation of jurisdiction between the CJEU and the national courts.[635] Arguably, the EBU has laid down the foundations for a *de facto* (and possibly in the future a *de iure)* transformation of the relationship between the CJEU and the national courts and the lifting of the watertight barriers separating each's jurisdiction.[636]

The traditional vertical division of jurisdiction between European and national courts is premised on Articles 263 and 265 TFEU which set forth the rule that the CJEU is competent to adjudicate on actions or omissions of Union bodies.[637] There is one clear exception from this rule, namely the CJEU is competent to adjudicate on the removal of an NCB Governor from office, albeit this being a measure effectuated by a national authority by virtue of a national law decision.[638]

The sub-sections that follow examine the cases in which both the Union and national authorities are involved in the decision-making process in the realm of the SSM and SRM

ECLI:EU:T:2004:167, para. 24; Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 15 March 2000, *Cimenteries CBR v Commission*, T-25/95, ECLI:EU:T:1992:123, para. 31; Judgment of the Court of 18 March 1997, *Guérin automobiles v Commission¸* C-282/95 P, ECLI:EU:C:1997:159, para. 36; Order of the General Court (Second Chamber) of 10 July 2019, *Pilatus Bank v ECB*, T-687/18, T-687/18, ECLI:EU:T:2019:542, paras 20 and 27.

[634] Wissink (2021), p. 117.

[635] Brescia Morra (2016), pp. 7, 26.

[636] Lehmann (2021), p. 78.

[637] A rule that was flagrantly disregarded by the German Constitutional Court in its judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, margin no 89, related to the PSSP.

[638] Art. 14.2 subpara 2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank. See also Rectification order of 10 April 2019, *Rimšēvičs v Latvia*, Joined Cases C-202/18 and C-238/18, ECLI:EU:C:2019:139.

and enter into a detailed analysis of the allocation of liability between such authorities and the respective court jurisdiction.

8.1. SSM

In the realm of the SSM, the decision-making process gives rise to decisions in which both the ECB and the NCAs are involved posing the question which authority's decision is subject to judicial review before which court. In this universe, there are decision-making processes which either result into one decision amendable to judicial review irrespective of any preparatory acts taken within the context of this decision-making process or involve decisions separately subject to judicial review.

8.1.1. On-site inspections

A characteristic example of a case where the actions of the ECB and the NCAs can be separately reviewed by the CJEU, and the national courts respectively is the case of on-site inspections. In this case, the national courts can review the actions of the NCAs when assisting the ECB to perform the inspection, whereas the legality of the inspection *per se* is subject to the CJEU's review. Further, the on-site inspections create a crevice in the vertical barriers between the CJEU and national courts' jurisdiction as described at the beginning of this section. In particular, if an on-site inspection requires authorisation by a national court under national rules, the national court by virtue of Article 13 SSMR must:

> *"control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) [of the SSMR] has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on the ECB's file. The lawfulness of the ECB's decision shall be subject to review only by the CJEU".*

8.1.2. Composite procedures

In the context of composite administrative procedures, the author of the final decision adopted is the decisive element to determine whether the European or the national judicial forum has jurisdiction. Despite the involvement of various actors in the composite procedures and the preparatory actions included therein, only the final decision is amenable to judicial review. This has two consequences.

First, should the ECB adopt a decision although it lacks competence to do so, it is this decision that will be subject to the CJEU's review. Equally, national courts have jurisdiction to provide remedy when a NCA has adopted a decision which falls within the remit of the ECB's competence.

Second, according to the CJEU case-law, in the case the EU organs have adopted the final decision, the CJEU establishes jurisdiction to adjudicate on the legality of their decision but also to adjudicate on the legality of any preparatory actions that took place even if they were performed by the NCAs. The same holds true also *vice versa*, namely where the author of the final decision is an NCA and the ECB undertook preparatory actions, the national court is competent to adjudicate on the legality of the final as well as any preparatory decisions. This allocation mechanism aims to ensure that there are no gaps in the judicial review. However, it has been pointed out that the allocation of liability is blurred in cases where the NCA took the final decision based on instructions from the Union bodies. Such a situation could arise under the opening of sanctions proceedings pursuant to Article 18(5) SSMR. [639]

Composite procedures are going beyond the simple cooperation between Union and national bodies, whereas such simple cooperation cannot *per se* establish a composite procedure.[640] For instance the mere transmission of information[641] from the NCAs to the ECB does not constitute a composite procedure.[642]

In the realm of the SSM, composite administrative procedures could be classified in the following categories:[643] (a) the so-called *common procedures*[644] (licensing of banks, withdrawal of banking licenses and assessment of qualifying holdings) which result in an ECB final decision but include “formalized national intermediate steps”,[645] (b) *bottom-up procedures* (e.g. SREP decisions) which are partly based on preparatory measures taken by national authorities leading to a final decision adopted by the ECB, (c) *top-down procedures* which are the opposite of bottom-down procedures as they end in a final decision taken by a national authority which is partially based on the preparatory measures

[639] Gortsos (2015f).

[640] e.g., The same holds true with regard to the cooperation between the SSM and the SRM authorities and the cooperation between the JSTs and the IRTs**.**

[641] For example, the information provided by virtue of Article 11(1) SSMFR which stipulates that “Any significant supervised entity wishing to establish a branch within the territory of another participating Member State shall notify the NCA of the participating Member State where the significant supervised entity has its head office, of its intention. Information shall be provided in accordance with the requirements laid down in Article 35(2) of Directive 2013/36/EU. The NCA shall immediately inform the ECB on the receipt of this notification”. Equally, for the cases of SSMFR Articles 12(1) “Exercise of the freedom to provide services by credit institutions within the SSM”, Article 17(1) “Right of establishment and exercise of the freedom to provide services in relation to non-participating Member States”, and Article 79 “Procedure for the lapsing of the authorisation”.

[642] However, the information provided by an NCA to the ECB under Article 58 SSMFR with regards to whether an entity must be classified as significant for the domestic economy.

[643] The classification follows the one laid down by Wissink (2021).

[644] Lehmann (2021), p. 82.

[645] Wissink (2021).

of the ECB, and finally (d) administrative procedures, either of the form of bottom-up or top-down procedures, which comprise of investigations and sanctions of a criminal nature.

Given their primary role in the SSM world, it is appropriate to further elaborate on the *common procedures.* The allocation of powers between the ECB and the NCAs with regard to LSIs is subject to one notable exception of the so-called common procedures.[646] The term 'common procedures' is used to describe the decision-making process which culminates in one unified act (the final decision) affecting the rights and obligations of the party to which the final decision is addressed, but involves independent measures adopted by both Union and national authorities towards a final decision ('compound decisions').[647] The final decision is decided upon the ECB irrespective of whether the credit institution is significant or less significant. The common procedures include the authorisation of credit institutions, the withdrawal of banking licenses and the authorisation of the acquisition of qualifying holdings or further increases of qualifying holdings in credit institutions.[648]

8.1.2.1. Granting of banking license

Article (1)(a)4 SSMR provides that the ECB is the sole competent authority to decide on the granting and withdrawal of banking licenses in the SSM for both SIs and LSIs. The *ratio* underpinning this exclusive competence of the ECB is to ensure that the rules for authorizing the operation of banks and respectively withdrawing such authorisation are applied in a uniform and integral manner among the SSM-supervised banks. Article 14 SSMR lays down in detail the process of the authorization application and the withdrawal process and specifies the role of the NCAs in both processes.[649]

The authorization procedure commences on national level.[650] The entity that wishes to acquire a banking license submits an application for an authorisation to take up the business of a credit institution to the NCA of the Member State where the credit institution is to be

[646] It is recalled that specific tasks relating to micro-prudential supervision have been conferred on the ECB, but the ECB enjoys the relevant power to exercise such tasks only with regard to SIs, while the power to exercise said tasks regarding LSIs rests with the NCAs based on a 'reverse delegation' structure which was analysed under Chapter 2. This general rule governing the allocation of powers with regard to LSIs is not applicable in the case of common procedures for which the ECB is exclusively competent to exercise the relevant powers for all credit institutions in the SSM realm, irrespective of the classification of a credit institution as significant or less significant.

[647] Lehmann (2021), p. 82.

[648] Articles 4(1) and 14(5)-(6) SSMR, Article 18, 20 and 45 CRD, Article 73 and Part V SSMFR.

[649] See also Recital 20 SSMR which refers to the involvement of the NCAs in the authorisation process: "*Prior authorisation for taking up the business of credit institutions is a key prudential technique to ensure that only operators with a sound economic basis, an organisation capable of dealing with the specific risks inherent to deposit taking and credit provision, and suitable directors carry out those activities. The ECB should therefore have the task of authorising credit institutions that are to be established in a participating Member State and should be responsible for the withdrawal of authorisations, subject to specific arrangements reflecting the role of national authorities*".

[650] Article 14(1) SSMR

established. The NCA will reject the application if the entity does not meet the authorisation requirements and the procedure will close at national level without triggering a composite procedure.[651] On the other hand, if the entity meets the authorisation requirements, the NCA will prepare a draft decision proposing to the ECB to grant the authorisation. If the ECB does not object to the draft decision within 10 working days, the draft decision is deemed to have been adopted by the ECB. This process constitutes a composite procedure. Although the decision of the NCA is a *draft* decision, it has specific legal effects. i.e., if positive it opens the procedure before the ECB, but if negative it opens the door to judicial review on national level.

The ECB's involvement in the authorisation process has three main dimensions. First, the ECB verifies that the legal entity applying for an authorization is engaged in activities which are of such nature allowing the classification of this entity as a credit institution as defined under the CRR. Second, the ECB is considered to be the author of the authorisation decision, in the sense that the decision to grant a credit institution with the license is attributed to the ECB. Equally, the ECB has the power to amend existing licenses (e.g., in terms of the scope of the permissible banking activities). Third, the ECB authorises all banking activities which are regulated under EU or national law "as long as they underpin a prudential supervisory function".[652]

In light of the above it emerges that the scope of the ECB's competence with regard to the authorisation extends to activities which are not listed in CRD, but instead are only found on national law level. As long as national law requires an entity to obtain a license in order to perform a certain activity under the hat of a credit institution, then the ECB will be involved in the authorisation of said entity.[653] Effectively, the scope of the ECB's competence should be understood as broad enough as to cover activities underpinning a

[651] Article 14(2) SSMR and Art.74 SSMFR.

[652] ECB, Guide to assessments of licence applications. Licence applications in general, 2nd revised version, January 2019, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.201901_guide_assessment_credit_inst_licensing_appl.en.pdf, p.13

[653] According to the ECB Guide to assessments of license applications dated January 2019, the involvement of the ECB in such cases is subject to *"the exception for the time being of the authorisation of covered bond activities carried out by credit institutions where such dedicated authorisation is required by national law pending further assessment"*.

supervisory function under EU law as the latter is delineated by virtue of Recital 28[654] SSMR read in conjunction with Article 78(3)[655] SSMFR.[656]

8.1.2.2. Withdrawal of banking license

Equally, a composite procedure is triggered in the case of withdrawing a banking authorisation either on the initiative of the ECB or following an NCA's proposal.[657] The ECB adopts the final decision in this regard.[658] The withdrawal works in a similar way to the authorisation, but with reverse effects. Two cases must be distinguished: First the authorisation can be withdrawn on grounds foreseen under the EU law.[659] The initiative may originate in this case either from the ECB or the NCA. The ECB is not bound by the NCA's interpretation of EU law; consequently, the latter's proposal is not subject to review before national courts. Second, the authorisation may also be withdrawn in accordance with the relevant national law.[660] In this case, the initiative if the withdrawal is within the exclusive remit of the NCA and cannot be substituted by the ECB's own initiative. Thus, the decision of the NCA is not a mere preparatory act but it's binding upon the ECB.

It should be noted that in cases in which the withdrawal of a banking license would prejudice the resolution process of that bank, the relevant NCA should state its objection to the ECB in relation to the license withdrawal.[661]

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[654] Recital 28 SSMR: "*Supervisory tasks not conferred on the ECB should remain with the national authorities. Those tasks should include the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services, to supervise bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law, to supervise credit institutions from third countries establishing a branch or providing cross-border services in the Union, to supervise payments services, to carry out day-to-day verifications of credit institutions, to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments, the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection*".

[655] Article 78(3) SSMFR: "*The decision granting authorisation shall cover the applicant's activities as a credit institution as provided for in the relevant national law, without prejudice to any additional requirements for authorisation under the relevant national law for activities other than the business of taking deposits or other repayable funds from the public and granting credits for its own account*".

[656](D'Ambrosio (2020), p. 166, suggests that the scope of 'banking business' should be interpreted in a restrictive manner so as it includes the traditional banking activity.

[657] Article 14(5) SSMR and Article 82 SSMFR.

[658] Article 14(5) SSMR.

[659] Article14(5) subpara 1 SSMR

[660] Article14(5) subpara 2 SSMR

[661] Article 14(6) SSMR: "*As long as national authorities remain competent to resolve credit institutions, in cases where they consider that the withdrawal of the authorisation would prejudice the adequate implementation of or actions necessary for resolution or to maintain financial stability, they shall duly notify their objection to the ECB explaining in detail the prejudice that a withdrawal would cause. In those cases, the ECB shall abstain from proceeding to the withdrawal for a period mutually agreed with the national authorities. The ECB may*

8.1.2.3. Authorisation of qualifying holdings

In the same vein, the assessment for the acquisition or disposal of qualifying holdings rests with the ECB while the NCAs are competent to make the prior assessment communicated thereafter to the ECB.[662] It should be noted that if the NCA's assessment is a negative one for the fitness and propriety of the qualifying shareholder, the process does not close on the national level, as is the case with the banking authorisation. This is evident from Articles 15(2) and 15(3) SSMR which stipulate respectively that:

> "*the national competent authority shall assess the proposed acquisition, and shall forward the notification and a proposal for a decision to oppose or not to oppose the acquisition […] to the ECB, at least ten working days before the expiry of the relevant assessment period as defined by relevant Union law, and shall assist the ECB in accordance with Article 6*"

> *"the ECB shall decide whether to oppose the acquisition on the basis of the assessment criteria set out in relevant Union law and in accordance with the procedure and within the assessment periods set out therein"*.

Article 4(1)(c) read in combination with Recital 22 SSMR explicitly exclude from the scope of the ECB's competence the authorisation of new significant shareholders in the context of a bank's resolution.[663]

8.1.2.4. Imposition of penalties

Another example of common procedure is the imposition of penalties in case of violation of national law or the sanctioning of individuals under national law. In this case, the common procedure begins on the EU level and is concluded on the national level.[664] The ECB may request the NCA to commence proceedings for the imposition of the penalty, but it is not competent to determine the outcome of such proceedings. The competence to impose a sanction rests with the NCAs. Hence, the decision to impose or not a penalty is amenable to the exclusive judicial review before the national courts as it is not a compound decision in the context of a common procedure in which the ECB and the NCAs have contributed. Given that an affected party can bring judicial proceedings only before the national courts, and in order to ensure that there are not gaps in the judicial protection, the

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extend that period if it is of the opinion that sufficient progress has been made. If, however, the ECB determines in a reasoned decision that proper actions necessary to maintain financial stability have not been implemented by the national authorities, the withdrawal of the authorisations shall apply immediately".

[662] In this regard see Recital 22, Article 4(1)(c) read in conjunction with Article 6 and Article 15 SSMR.

[663] D'Ambrosio (2020), p. 169.

[664] Art.18(5) subpara 2 SSMR.

national courts are also competent to examine whether the opening of the sanctioning procedure requested by the ECB was necessary. [665]

8.1.2.5. Conclusions

Despite the extensive involvement of the NCAs in the common procedures, ultimately the decisions to grant or withdraw a banking license is attributed to the ECB, with the exception of the cases in which an NCA rejects at national level an application for banking authorisation because it does not fulfil the conditions for authorization. In the same vein, the decision on the assessment of acquisition of qualifying holdings is attributed to the ECB. The entry point for the application is the relevant NCA which is involved in the assessment process and closely cooperates with the ECB which is the author of the qualifying holding assessment decision.

In the common procedures, the general rule is that identity of the final decision-maker is the decisive element to allocate jurisdiction between the CJEU and the national courts.[666]

The reviewability of decisions taken in the context of the afore-mentioned procedures should be examined through the lenses of *Berlusconi and Fininvest* which constitutes the landmark ruling governing composite administrative procedures in the SSM cosmos. The analysis and evaluation of the *Berlusconi* case follows in the sub-next section below.

8.1.3. Berlusconi and Fininvest case

Composite procedures in the SSM realm constitute the core of the CJEU's judgment in the request for a preliminary ruling in *Berlusconi and Fininvest* case[667] whereby the court provided useful guidance on how to treat common procedures from the perspective of establishing court jurisdiction. It is noted that the case concerns the acquisition of qualifying holdings, but it is expected to be *mutatis mitandis* applicable to the other common procedures (licensing of banks and withdrawal of banking licenses) as well. For reasons of completeness, it is mentioned that the CJEU upheld the ECB's decision in this case.

The facts that gave rise to the *Berlusconi* case are the following. Fininvest s.p.a. (Fininvest), a holding company for one of the world's largest communication groups, which is controlled by Silvio Berlusconi, request an approval for the acquisition of a qualifying holding in the Italian bank, Banca Mediolanum. The ECB objected to said acquisition on the ground that Silvio Berlusconi, the ultimate beneficial owner of Fininvest was convicted for tax fraud in 2013 and consequently failed to attain the reputation requirement established under EU law. Following the ECB's objection, Fininvest and Berlusconi jointly brought proceedings both (a) before the Italian administrative court against the preparatory acts adopted by Bank of Italy, namely the draft decision sent to the ECB in relation to the acquisition of the qualifying holding, and (b) before the EU General Court (the '**GC**') requesting the

[665] Lehmann (2021), p. 84.

[666] *Ibid*, p. 82.

[667] *Berlusconi* judgment.

annulment of the ECB's final decision which agreed with the proposal of the Bank of Italy following a hearing of Berlusconi and Fininvest.[668]

One of the arguments, Fininvest and Berlusconi put forward, was that the proposal of Bank of Italy to reject the acquisition of the qualifying holding, which the ECB took into account, was issued in violation of *res judicata* as the Italian Council of State had annulled, in 2016, a decision of the Bank of Italy whereby the latter had determined that Berlusconi did no longer meet the reputational requirements. This ruling was issued before the Bank of Italy sent its draft proposal in relation to the qualifying holding of Fininvest to the ECB, and thus allegedly it should have taken this ruling into account. [669]

In its request for a preliminary ruling, the Italian Council of State made a twofold inquiry to the CJEU: (a) first whether Article 263 TFEU is to be interpreted as precluding national courts from reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by NCAs in the common procedures at issue, and (b) second, whether it is relevant to the answer on the previous question that a national court has been asked to rule on a specific action brought before it to declare invalidity on the ground of the alleged disregard of the force of *res judicata* attached to a national judicial decision.[670]

By referring to the *Borelli* judgment, the CJEU first underlined that it is material to examine whether the relevant piece of Union legislation purports to establish a division of powers between Union and national authorities or not. In answering this question, the CJEU held that the rules governing the assessment of qualifying holdings does not lay down a division of powers, but instead provides for the exclusive decision-making power of the ECB. Effectively, the CJEU has exclusive jurisdiction to adjudicate on a decision when this decision was adopted by a Union body by virtue of an exclusive decision-making power conferred to it by the Union legislation. This proposition should be supplemented, though, by the clarification that the identity of the final decision-maker is crucial to establish the jurisdiction of the courts. The involvement of an NCA in the course of the procedure leading to the adoption of an act by a Union body is not decisive in order to grand jurisdiction to national courts for the respective acts of the NCAs as long as these acts are not binding upon the Union bodies.[671] To ensure effective judicial protection, when reviewing the legality of the final decision of the EU authority, the CJEU can review the legality of the preparatory acts of the national authorities hinging upon the legality of the final act.

In light of the above, the CJEU concluded that the preparatory acts of Bank of Italy were not separately amenable to judicial review as they did not intend to create legal effects towards Fininvest and Berlusconi. The CJEU complemented its thoughts by holding that a

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[668] *Ibid*, paras 32-33.

[669] It is noted that the annulment in that ruling was based on the ground that the applicable law in that case was the one preceding the amendment and introduction of the reputational requirements.

[670] *Berlusconi* judgment, para. 40.

[671] *Ibid,* para. 41.

separate review of a national measure before national courts is possible where the measure by the national authority is *per se* a result of a special procedure or is necessary for adopting an EU act in respect of which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution.[672] Had the opposite been accepted, it would have led to an impermissible mixing of the administrative process resulting in distinguishing the national stage from the final ECB decision running contrary to the very purpose of the SSMR. This distinction could well also lead to contradictory judgments stemming from the national and Union courts for the same administrative process.

It is worth quoting the relevant parts from the *Berlusconi* judgment below:

> *"41 It is necessary, first of all, to explain the effects on the division of jurisdiction between EU Courts and courts of the Member States that result from the involvement of national authorities in the course of a procedure, such as that at issue in the main proceedings, which leads to the adoption of an EU act.*
>
> *42 Article 263 TFEU confers upon the Court of Justice of the European Union exclusive jurisdiction to review the legality of acts adopted by the EU institutions, one of which is the ECB.*
>
> *43 Any involvement of the national authorities in the course of the procedure leading to the adoption of such acts cannot affect their classification as EU acts where the acts of the national authorities constitute a stage of a procedure in which an EU institution exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities (see, to that effect, judgment of 18 December 2007, Sweden v Commission, C-64/05 P, EU:C:2007:802, paragraphs 93 and 94).*
>
> *44 In such a situation, where EU law does not aim to establish a division between two powers — one national and the other of the European Union — with separate purposes, but, on the contrary, lays down that an EU institution is to have an exclusive decision-making power, it falls to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU (see, by analogy, judgment of 22 October 1987, Foto-Frost, 314/85, EU:C:1987:452, paragraph 17), 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.*
>
> *45 Nonetheless, an act of a national authority that is part of a decision-making process of the European Union does not fall within the exclusive jurisdiction of the EU Courts where it is apparent from the division of powers in the field in question between the national authorities and the EU institutions that the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act in which the EU institutions have only a limited or no discretion, so that the national act is binding on*

[672] *Ibid,* para. 45.

the EU institution (see, to that effect, judgment of 3 December 1992, Oleificio Borelli v Commission, C-97/91, EU:C:1992:491, paragraphs 9 and 10).

46 It then falls to the national courts to rule on any irregularities that may vitiate such a national act — making a reference to the Court for a preliminary ruling where appropriate — on the same terms as those on which they review any definitive act adopted by the same national authority which is capable of adversely affecting third parties and moreover, in the light of the principle of effective judicial protection, to regard an action brought for that purpose as admissible even if the national rules of procedure do not so provide (see, to that effect, judgments of 3 December 1992, Oleificio Borelli v Commission, C-97/91, EU:C:1992:491, paragraphs 11 to 13; of 6 December 2001, Carl Kühne and Others, C-269/99, EU:C:2001:659, paragraph 58; and of 2 July 2009, Bavaria and Bavaria Italia, C-343/07, EU:C:2009:415, paragraph 57).

47 That point having been explained, it must be stated that it is apparent from reading Article 263 TFEU in the light of the principle of sincere cooperation between the European Union and the Member States enshrined in Article 4(3) TEU that acts adopted by national authorities in a procedure such as that referred to in paragraphs 43 and 44 of the present judgment cannot be subject to review by the courts of the Member States.

48 Where the EU legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between the EU institution and the national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of the EU institution.

49 In order for such a decision-making process to be effective, there must necessarily be a single judicial review, which is conducted, by the EU Courts alone, only once the decision of the EU institution bringing the administrative procedure to an end has been adopted, a decision which is, alone, capable of producing binding legal effects such as to affect the applicant's interests by bringing about a distinct change in his legal position.

50 If national remedies against preparatory acts or proposals of Member State authorities in this type of procedure were to exist alongside the action provided for in Article 263 TFEU against the decision of the EU institution bringing the administrative procedure established by the EU legislature to an end, the risk of divergent assessments in one and the same procedure would not be ruled out and, therefore, the Court's exclusive jurisdiction to rule on the legality of that final decision could be compromised, in particular where the EU institution's decision follows the analysis and the proposal of those authorities.

51 Given that need for a single judicial review, both the type of national legal procedure employed in order to subject preparatory acts adopted by the national authorities to review by a court of a Member State and the nature of the heads of claim or pleas in law put forward for that purpose are immaterial.

52 It is in the light of those considerations that the Court should examine the nature of the procedure in the course of which the acts of the Bank of Italy that are before the Consiglio di Stato (Council of State) in the main proceedings were adopted.

53 That procedure is laid down in the context of the banking union's single supervisory mechanism, for the effective and consistent functioning of which the ECB is responsible, pursuant to Article 6(1) of the SSM Regulation. The procedure is intended to implement Article 22 of CRD IV, which, in the interests of the proper operation of the banking union, provides for prior authorisation of any acquisition of, or increase in, a qualifying holding in a credit institution, on the basis of harmonised assessment criteria listed in Article 23 of that directive.

54 Under Article 4(1)(c) of the SSM Regulation, read in conjunction with Article 15(3) thereof and Article 87 of the SSM Framework Regulation, the ECB has exclusive competence to decide whether or not to authorise the proposed acquisition, at the end of the procedure laid down, in particular, in Article 15 of the SSM Regulation and Articles 85 and 86 of the SSM Framework Regulation.

55 Within the framework of relations governed by the principle of sincere cooperation by virtue of Article 6(2) of the SSM Regulation, the national authorities' role, as is apparent from that provision, Article 15(1) and (2) of the SSM Regulation and Articles 85 and 86 of the SSM Framework Regulation, consists in registering applications for authorisation and in assisting the ECB, which alone has the decision-making power, in particular by providing it with all the information necessary for carrying out its tasks, by examining such applications and then by forwarding to the ECB a proposal for a decision, which is not binding on the ECB and which, moreover, EU law does not require to be notified to the applicant.

56 Thus, the procedure to which the acts challenged before the referring court belong is among those to which the considerations set out in paragraphs 43 and 44 of the present judgment relate.

57 Consequently, it must be held that the EU Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision of 25 October 2016 is affected by any defects rendering unlawful the acts preparatory to that decision that were adopted by the Bank of Italy. That jurisdiction excludes any jurisdiction of national courts in respect of those acts, and it is irrelevant in that regard that an action such as the azione di ottemperanza has been brought before a national court."

8.1.4. Judicial scrutiny of preparatory acts adopted on national level

When reviewing the ECB's final decision, the CJEU is entitled to review both questions of facts and of law. This leads to an interconnected question regarding the intensity of the CJEU's judicial review over the NCAs' draft decisions. This question sparks particular interest in view of the fact that the CJEU lacks a tool whereby, in the context of reviewing

the legality of a final decision adopted by an EU authority, it could request a national court to adjudicate on the legality of the preparatory act adopted by the relevant NCA.[673]

In *Berlusconi* case, the CJEU did not reveal the intensity of judicial scrutiny of preparatory acts adopted on national level. However, the case-law[674] of CJEU points to the direction that such scrutiny is not very intense and in any case is less intense that the scrutiny of the act of the EU authority.[675] The CJEU appears to examine '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'.

Although this test may well lead to the conclusion that the CJEU performs a 'light' review of national preparatory acts (also considering the case-law mentioned above), it seems that such light review is applied for substantive rights, whereas the scrutiny of procedural rights, such the right to access documents or the right to be heard, appears to be, and in any case, must be, more stringent. For instance, it appears that an EU authority's decision would pass the CJEU's test if said authority has relied on facts for which the individual concerned had the chance to express its views on.[676]

8.2. SRM

In the same direction as the SSM, the SRM greatly involves decision-making processes where both the SRB and the NRAs are engaged, posing the same question of which authority's decision is amenable to judicial review before which court. Again, this multi-level decision-making process constitute the so-called composite procedures which play an important role in the EU resolution framework.

Composite procedures could be described as the 'main dish' in the SRB, as all SRB decisions are not directly addressed to the SIs concerned but are implemented by the relevant NRA which adopt measures to this end.[677] To better grasp the composite procedures present in the SRM realm, it is briefly recalled that the pertinent EU legislation confers the SRB with the power to:[678] (a) adopt resolution plans, (b) identify material

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[673] Wissink (2021), p. 150.

[674] Judgment of the Court (Grand Chamber) of 18 December 2007, *Sweden v Commission*, C-64/05 P, ECLI:EU:C:2007:802, paras. 88 and 98-99; Judgment of the Court (Third Chamber), 21 June 2012, *IFAW Internationaler Tierschutz-Fonds v Commission*, C-135/11 P, ECLI:EU:C:2012:376, para. 61; Judgment of the General Court (Eighth Chamber), 25 September 2014, *Spirlea v Commission*, T-669/11, ECLU:EU:T:2014:814, paras. 54-55.

[675] Wissink (2021), p. 153.

[676] Wissink (2021), p. 160, who also notes that in cases in which the EU authority has taken into account (even if only partially) the facts underlying the national authority's decision, the assessment of such facts is imputed in the EU authority.

[677] Eckes & D'Ambrosio (2020), p. 30.

[678] *Ibid*, p. 30-31.

impediments to resolvability and determine the relevant actions to confront such impediments,[679] (c) determine the MREL,[680] (d) assess whether conditions for the write-down and conversion of capital instruments are met,[681] (e) adopt the resolution scheme and determine the resolution tools to be applied,[682] and (f) calculate *ex ante* and *ex post* contributions to the SRF.[683] NRAs are responsible to adopt measures to implement the SRB's decisions in relation to the above powers.[684] The following sub-section provides an analysis of some of these composite procedures.

8.2.1. Composite procedures

A characteristic example of a top-down composite procedure in the resolution framework is the adoption of a resolution scheme.[685] The national authorities must take all necessary measures to implement the scheme by exercising their resolution powers conferred on them under national law.[686] It clearly emerges from the wording of Article 18(9) SRMR, that the NRAs are obliged to follow the instructions of the SRB and enjoy no margin of discretion when implementing the resolution scheme. The absence of any such discretion afforded to the NRAs entails that the resolution scheme and its implementation (save where the NRAs did not follow the SRB's instructions) is imputable to the SRB and thus the latter's decision will be subject to judicial review or capable of causing damage to the persons concerned.[687] At the same time, the way the decision is implemented by the national authority can be challenged before national courts.[688]

Furthermore, in cases in which the SRB decides to exercise direct powers in relation to an institution pursuant Article 29(2) SRMR, it substitutes for the NRA and thus the acts the SRB adopts in this context are attributable to it and consequently are subject to the judicial review of the CJEU.

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[679] Articles 8 and 10 of the SRMR.

[680] Article 12 of the SRMR.

[681] Article 21 of the SRMR.

[682] Articles 18 and 23 to 27 of the SRMR.

[683] Articles 70 and 71 of the SRMR.

[684] See Articles 10(10), (11), 12(14), 21(8) to (11), 29, 18(9), 23, 29, and 67(4) of the SRMR.

[685] Article 8(3) SRMR.

[686] See Article18(9) SRMR read in conjunction with Article 29(1) SRMR which provide that the SRB shall ensure that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities. The resolution scheme shall be addressed to the relevant national resolution authorities and shall instruct those authorities by exercising resolution powers. Where State aid or Fund aid is present, the SRB shall act in conformity with a decision on that aid taken by the Commission.

[687] See recital 120 SRMR. See also Arons (2020), p. 125.

[688] See Recital 120 SRMR.

Another example of a composite procedure commencing at national level is the *ex-ante* contributions to the SRF. The procedure is initiated by the NRAs which collect the information necessary to calculate the annual contribution of credit institutions. The information is then made available to the SRB which calculates the contribution and subsequently sends the final decision to the NRA, so the latter notifies the credit institution concerned of the amount is called to contribute to the SRF.[689] As it will be discussed in the section immediately following, the CJEU held in *Iccrea Banca* case that the Union courts have exclusive competence to review the decision on the calculation of the contribution amount.

An interesting situation arises with regard to the sanctions. In accordance with Article 38(2) SRMR, the SRB is entitled to address recommendations to the NRAs regarding sanctions to be imposed on financial institutions. Such recommendation cannot on its own be amenable to judicial review as it is not binding upon the NRAs. However, it has been suggested that when the NRA follows the recommendation of the SRB and indeed imposes a sanction on a financial institution this should be classified as a composite procedure[690] where the sanctioning is imputed to the SRB and thus is amenable to judicial review before the CJEU.

8.2.2. Iccrea Banca

The allocation of powers and tasks in the SRM ecosystem and the respective composite procedures have triggered a number of challenging questions[691] requiring clarification from the CJEU. Amid the rich case-law[692] of CJEU emerging from such questions, the CJEU's ruling in *Iccrea Banca* case[693] deserves particular attention as it could be deemed to constitute a Bible for EU administrative law and in particular for the judicial protection granted in the context of composite procedures in the SRM. *Iccrea Banca* judgment responds to some of the important 'questions marks hanging over the Banking Union',[694] leaving some other questions open. In any case, in *Iccrea Banca* judgment, the CJEU extends the *ratio decidendi* of *Berlusconi* case also to the SRM function and the relevant composite procedures adopted therewithin.

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[689] Article70(2) SRMR and Article 4 Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund OJ L 15, 22.1.2015, p. 1–7.

[690] Eckes & D'Ambrosio (2020), p. 32.

[691] Wissink, Duijkersloot, & Widdershoven (2014); Ter Kuile, Wissink, & Bovenschen (2015), pp. 180-187; Duijkersloot, Karagianni, & Kraaijeveld (2017); Timmermans (2019); Budinska (2019); Xanthoulis & Türk (2019); Arons (2020); Lamandini, Muñoz, & Álvarez (2015), pp. 23-27; Zilioli & Wojcik (2021).

[692] See the excellent overview provided by Della Negra & Smits (2022).

[693] Judgment of the Court (Grand Chamber) of 3 December 2019, *Iccrea Banca SpA Istituto Centrale del Credito Cooperativo v Banca d'Italia*, C-414/18, EU:C:2019:1036 ("*Iccrea Banca* judgment").

[694] Markakis (2020).

To better grasp the ruling on *Iccrea Banca,* one should understand the context within which the case arose. In the SRM sphere, the resolution of credit institutions may require injection of capital from the SRF.[695] The funds of the SRF are collected through mandatory contributions from credit institutions on national level which are then transferred at EU level. It is noted that such transfer is an obligation imposed on participating Member States by virtue of an Intergovernmental Agreement[696] entered into between 26 EU Member States,[697] and not by virtue of EU law. In order to ensure a fair calculation of contributions and to provide incentives for banks to operate under a model which presents less risk, contributions to the SRF take account of the degree of risk incurred by the bank, in accordance with the BRRD and with the delegated acts adopted pursuant to it.[698]

Inccrea Banca case was triggered in the context of a preliminary ruling to the CJEU by an Italian court which was confronted with an action for annulment against the communication by *Banca d' Italia* in its capacity as a national resolution authority. The communication related to the amount of the *ex-ante* contribution to be paid to the SRF. The CJEU summarised the factual background of *Iccrea Banca* case as follows:

Iccrea Banca is a bank which heads a network of credit institutions and whose object is to support the operations, *inter alia*, of cooperative credit banks in Italy.[699] To that end, Iccrea Banca provides those banks with payment services, automated payment services, securities settlement and safekeeping as well as services of a financial nature, and acts as a central funder for the cooperative credit system. In that latter capacity, Iccrea Banca supplies, in particular, to those banks a range of services for structured access to collateralised funding available from the ECB and on the market. Against that background, Iccrea Banca formed a group to which around 190 cooperative credit banks became members, with the sole aim of participating in targeted long-term refinancing operations, established by the ECB.[700]

By decisions adopted between 2015 and 2017, the Bank of Italy sought from Iccrea Banca the payment of ordinary, extraordinary and additional contributions to the Italian national resolution fund. Further, by a communication of 3 May 2016, the Bank of Italy sought from Iccrea Banca, for the year 2016, payment to the SRF of an *ex-ante* contribution determined by a decision of the [SRB] of 15 April 2016. By a communication of 27 May 2016, the Bank of Italy corrected the amount of the latter contribution, following a decision of the [SRB] of 20 May 2016.[701]

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[695] SRMR Recital 1.

[696] Council of the European Union, Intergovernmental Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund [2014] EU SRF.

[697] With the exception of Sweden and the UK, then being an EU Member State.

[698] SRMR Recital 109.

[699] *Iccrea Banca* judgment, para. 19.

[700] *Ibid*, para. 20.

[701] *Ibid*, para. 21.

The questions that immediately come up in relation to the above composite procedure pertain to the judicial protection against the decision of SRB imposing contribution duty. Which decision is amenable to judicial review and before which courts should an action (for annulment or equally for damages) be brought? The purpose of this section is to focus on the administrative law aspects and the allocation of court jurisdiction in the context of this composite procedure. For reasons of completeness, it is underlined that the CJEU ruled against Iccrea Banca on the merits of the case.

Iccrea Banca brought an action against those decisions and those communications of the Bank of Italy before the [CJEU]. In that action Iccrea Banca also [sought] a determination of the appropriate means of calculating the sums actually payable by Iccrea Banca and repayment of sums which it considers having been wrongly paid.[702] In support of that action, Iccrea Banca [claimed], in essence, that the Bank of Italy misinterpreted Article 5(1) of Delegated Regulation 2015/63. It [claimed] that the Bank of Italy took into account, in order to calculate the contributions at issue in the main proceedings, the liabilities linked to the relationships between Iccrea Banca and the cooperative credit banks, although those liabilities ought to have been excluded from that calculation by an application, by analogy, of the provisions of that same regulation on intragroup liabilities or on institutions which operate promotional loans. Iccrea Banca [claimed] that that misinterpretation also led the Bank of Italy to fail, in the communication of data to the [SRB], to identify the particular features of the integrated system in which Iccrea Banca operated and thus led to an error in the calculation of the *ex-ante* contribution to the SRF for the year 2016. [703]

Against this background, the Italian court inquired the CJEU on the interpretation of the EU law provisions governing how the Bank of Italy should have calculated Iccrea Banca's contributions. The Italian court purported to assess two actions of the Bank of Italy in two stages, namely in the stage of the procedure preceding the adoption of the decisions of the [SRB] on the calculation of those contributions, by determining, *inter alia*, which information ought to have been sent to the [SRB] by the Bank of Italy, and in the stage of the procedure, following the adoption of those decisions of the [SRB], when the raising of those contributions was to take place.[704]

The reference for a preliminary ruling triggered two admissibility issues, namely the (a) admissibility of the request for a preliminary ruling itself, and (b) the acts that are admissible to be challenged through the path of a preliminary ruling.

(a) Admissibility of the preliminary ruling: As regards the stage of the procedure preceding the adoption of the decisions of the SRB relating to the calculation of the contributions, the CJEU first examined the admissibility of the request for a preliminary ruling by underlining the general principle that a request for a preliminary ruling referred by a national court which seeks interpretation of EU law provisions, cannot be held to be admissible when it is plain that the sole purpose of that request is to enable the referring

[702] *Ibid*, para. 22.

[703] *Ibid*, para. 23

[704] *Ibid*, para. 36.

court to give a ruling on an issue which, under EU law, falls outside the jurisdiction of the national courts.[705]

In this vein and by reiterating the judgment in *Berlusconi* case,[706] the CJEU noted that in cases where the author of the final decision is an EU body, the fact that a national authority has been involved in the course of the process that led to the final decision, cannot affect the classification of said decision as EU act where the EU body is not bound by the preparatory acts or the proposals of the national authority.[707] In such cases, jurisdiction to adjudicate on the legality of the final act rests with the CJEU. The court underlined the need for an effective judicial protection which can be achieved if 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, will be examined in the context of a single judicial review[708] of the final decision by the CJEU,[709] whereas the national courts will have no jurisdiction to review such preparatory acts.[710] Effectively, this precludes a national court to issue to the national resolution authority any order as to how the latter is to act prior to the adoption of a decision by the SRB on the calculation of the *ex-ante* contributions to the SRF.

Turning to the second limb of the preliminary ruling whereby the Bank of Italy inquired the CJEU about the stage of the composite procedure *following* the adoption of the SRB's decisions regarding the *ex-ante* contributions when the raising of those contributions was to take place,[711] the CJEU noted that if the Italian court were to be able to annul the notification of Bank of Italy of the SRB's decision on the calculation of the *ex-ante* contribution of a bank to the SRF, on the ground of an error in the evaluation of that bank's exposure to risk on which that calculation was based, that would call into question a finding made by the SRB and would ultimately impede the execution of that SRB's decision in Italy.[712] Hence, the Italian court cannot refer a question to the CJEU which would enable the former to rule on an issue in a way which could potentially conflict with the SRB's decision, as the latter is amendable to judicial review exclusively before the CJEU.[713] However, where the outcome of proceedings pending before a national court depends on the validity of a decision

[705] *Ibid*, para 33.

[706] *Berlusconi* judgment, para. 43.

[707] *Iccrea Banca* judgment, para. 33.

[708] *Berlusconi* judgment, para. 49.

[709] *Iccrea Banca* judgment, para 39.

[710] *Berlusconi* judgment para. 47.

[711] *Iccrea Banca* judgment, para. 36.

[712] *Ibid*, para. 59.

[713] See, by analogy, Judgment of the Court of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, para. 57, and Judgment of the Court (Second Chamber) of 20 November 2008, *Heuschen & Schrouff Oriëntal Foods Trading*, C-375/07, EU:C:2008:645, para. 68

of the Board, that court may, as a general rule, refer to the Court a question for a preliminary ruling on the validity of that decision.[714]

(b) Acts to be admissibly challenged through the path of a preliminary ruling: According to settled case-law[715] of the CJEU, a claimant can bring an action for annulment or an action for damages against an act of an EU authority if this act is of direct concern to the claimant. This principle also governs the relationship between the action for annulment under Article 263 TFEU and the reference for a preliminary ruling under Article 267 TFEU in the sense that a preliminary ruling will be admissible as long as an action for annulment would be admissible.[716] In this context, the Commission argued that the request for a preliminary ruling of the Italian court is inadmissible insofar it was referring to the SRB's decisions on the calculation of the *ex-ante* contribution of Iccrea Banca to the SRF, since Iccrea Banca failed to bring, in good time, an action for annulment against this decision before the CJEU.[717] In other words, while the national court would not be competent to adjudicate on the legality of the SRB's decision the CJEU underscored that Iccrea Banca would have enjoyed *locus standi* to claim before the Italian court that the SRB's decision was illegal in the case it had brought, within the prescribed time limit, an action for annulment before the CJEU against this decision.

CJEU's conclusion: Against this background, the CJEU concluded that part of the request for preliminary ruling which related to the calculation of the *ex-ante* contributions to the SRF must be held to be inadmissible since it clearly emerged from the pertinent EU law provisions that in relation to the calculation of the *ex-ante* contributions to the SRF, the SRB exclusively exercises the final decision-making power and that the role of the national resolution authorities is confined to providing operational support to the SRB and notifying the decision to the banks concerned, and by no means such operational support is binding on the SRB, whereas at the same time Iccrea Banca had not brought in good time an action for annulment before the CJEU against the SRB's decision. On the other hand, the part of the request which related to the calculation of contributions to the Italian national resolution fund was held to be admissible.

8.3. Asymmetries in the liability standard of SRB compared to the one of (a) the ECB and (b) of the NRAs

Although the SRB operates in a similar environment as the ECB, the liability standard applicable to the former seems to be different from the one applicable to the latter. At the same time, it appears that there is also an asymmetry in the liability standard applicable to the SRB compared to the one applicable to the NCAs. This section provides some

[714] *Iccrea Banca* judgment, para 61.

[715] Judgment of the Court of 9 March 1994, *TWD v Bundesrepublik Deutschland*, C-188/92, ECLI:EU:C:1994:90.

[716] Although this principle was established in the context of an action for annulment, it provides the guide for actions for damages as well.

[717] *Iccrea Banca* judgment, para. 36.

The liability standard applicable to the SRB and the ECB: Particular attention deserves to be drawn to the liability standard of the SRB which, based on the wording of the SRMR, seems to be different from the one applicable to the actions of the ECB. According to Article 87(3) SRMR:

> *In the case of non-contractual liability, the Board shall, in accordance with the general principles common to the laws concerning the liability of public authorities of the Member States, make good any damage caused by it or by its staff in the performance of their duties, in particular their resolution functions, including acts and omissions in support of foreign resolution proceedings.*

Article 87(3) seems to suggest a different standard, the one of *general principles common to the law concerning the liability of public authorities of the Member States,* as opposed to the standard of *general principles common to the laws of the Member States* under Article 340 TFEU. In view of this (intended?) difference and in the absence of relevant case-law of the CJEU clarifying the matter, the liability standard of the SRB is unclear. The more elaborated wording of Article 87(3) may be seen as introducing a different and more strict liability standard as opposed to the one of the ECB under Article 340 TFEU. On the other hand, it could be interpreted as a mere acknowledgment of the fact that that there is a clear tendency in the Member States to limit the financial authorities' liability compared to other public authorities' liability.[718] This author will advocate the second option in Chapter 5.

The liability standard applicable to the SRB and the NRAs: Article 3(12) BRRD provides that '(…) Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive'. This provision clearly recognises the possibility of the Member States to limit the liability of the NRAs.

The rules governing the liability of the NRAs are laid down in national law,[719] but need to pay due regard to the pertinent case-law of the CJEU regarding liability. In particular, any limitation of the NRAs' liability under national law must not go beyond what constitutes a sufficiently serious breach according to the recent *Kantarev* case.

Bearing this in mind, the possibility to limit the NRAs' liability under national law may lead to questions on whether it introduces a different liability standard for the NRAs compared to the one applicable to the SRB, that is normal EU liability rules, i.e., the so-called Francovich-liability as developed through the case-law, and hence whether the BRRD provision is compatible with the case-law of the CJEU.

The first observation that could pertinently provide guidance in answering the questions above is that BRRD provisions should ensure a level playing field in the judicial protection of individuals in the context of bank resolution on both national and European level, as well

[718] See also Moloney (2021).

[719] In accordance with recital (120), third sentence SRMR, national judicial authorities should be competent, in accordance with their national law, to review the legality of decisions adopted by participating Member States' NRAs in the exercise of the powers conferred upon them by the SRMR, as well as to determine their non-contractual liability.

as across the euro-area. In light of this, Article 3(12) BRRD should be interpreted as entailing that any limitation of the NRAs' liability should neither be stricter nor more lenient compared to the limitation applied to the SRB's liability. In other words, a level playing field can be ensured under the condition that the liability standard for the SRB and all the NRAs across the euro-area was identical following in practice the criterion of the *sufficiently serious breach* established by the CJEU in the context of the Francovich-liability regime. CJEU confirmed in its judgment in *Kantarev* case[720] that national financial supervisors in breach of EU law are amenable to the Francovich-liability rules. In theory, therefore, the same liability standard applies to the SRB and NRAs. In reality, though, a great divergence in the liability standards of financial authorities in the Member States' legal orders is observed, many of which seem to fall sort of the Francovich liability rules.[721]

Inevitably, level playing field considerations are present in the resolution of banks in EU or national level. Reflections on this issue will be presented in Chapter 5.

[720] *Kantarev* judgment.

[721] See also Moloney (2021).

Chapter 3: The liability of the ECB and SRB in light of the fundamental right to property – an ambivalent battle

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1. Introductory remarks

As already mentioned, the violation of fundamental rights may trigger the non-contractual liability of the ECB and SRB. Judicial protection against the acts of the ECB and SRB stems from the fundamental principle of rule of law as expressly recognised by the CJEU[722] and the ECtHR in *Klass* case:[723]

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

The interplay between fundamental rights and banking supervision and resolution attracted much attention following the global financial crisis era which brought to the spotlight the unavoidable clash between the objective of preserving financial stability and the protection of the right to property in times when banking crisis management are called into application.[724]

In this matrix, the right to property and the liability of the financial authorities are intertwined in two ways. On the one hand, the actions of the financial authorities may violate the right to property and thus give rise to their non-contractual liability. On the other hand, the adequate protection of the right to property is also challenged by the limitation of the compensatory liability of the financial authorities in the context of an action for damages. The review of the actions of the ECB and SRB regarding their compliance with fundamental rights is a powerful constitutional tool[725] for ensuring their legitimation.[726]

The Charter plays a very prominent role also for another reason. It might often be hard for the claimant to prove the criterion of illegality and the test of a sufficiently serious breach

[722] Judgment of the Court of 23 April 1986, *Les Verts v European Parliament*, C-294/83, ECLI:EU:C:1986:166, para. 23; Judgment of the Court of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, ECLI:EU:C:2002:462, para. 38; Judgment of the Court (Grand Chamber), 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:625, para. 91; Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117, para. 30; Judgment of the Court (Grand Chamber) of 24 June 2019, *European Commission v Republic of Poland*, C-619/18, ECLI:EU:C:2019:531, para. 42; Judgment of the Court (Grand Chamber) of 5 November 2019, *ECB v Trasta Komercbanka and Others*, C-663/17 P, para. 54.

[723] Case of *Klass and others v Germany*, Application no. 5029/71, Judgment of 6 September 1978, para. 55.

[724] According to the established case law of the CJEU, the right to property is a rule of law intended for the protection of individuals, breach of which may give rise to liability on the part of the EU. See e.g. Judgment of the Court (Grand Chamber) of 9 September 2008, *FIAMM and Others v Council and Commission*, Joined cases C-120/06 P and C-121/06 P, ECLI:EU:C:2008:476, para. 184; Judgment of the Court of 6 December 1984, *Biovilac v EEC*, Case 59/83, EU:C:1984:380; Judgment of the Court of First Instance (Fifth Chamber) of 15 April 1997, *Aloys Schröder v Commission*, T-390/94, EU:T:1997:51.

[725] Fundamental rights enshrined in the Charter of the Fundamental Rights of the EU enjoy a constitutional status within the EU since the entry into force of the Treaty of Lisbon in 2009.

[726] See, e.g., Ferran & Babis (2013); Moloney (2021), pp. 211-212.

of EU law. It appears that the CJEU will not find there to be a sufficiently serious breach in cases in which the EU rule grants discretion to the European or national authorities. In such cases, resort to the Charter would be the only means available to the claimant so he/she satisfies the CJEU that there is illegality.[727] In light of this, it is important to explore the possibility of invoking a violation of the fundamental rights under the Charter as a way of establishing their liability and seeking compensation for the wrong doings of the European and national financial authorities.

Before turning to examine the relationship between the right to property and supervisory and resolution decisions, it is very important to clarify that the scope of application of the Charter. The Charter extends only to the actions that the Union bodies have taken based on the competences they have been afforded under the Union law. Equally, it is binding upon the Member States only when they implement Union law. Thus, the Charter is not applicable in cases of a purely domestic nature. Effectively, the Charter is applicable when the ECB and SRB on the one hand, and the national competent authorities implement supervisory and resolution measures.[728, 729]

Relatedly, though, an interesting question arises. Is the Charter applicable to NCAs or NRAs when they implement themselves supervisory and resolution measures? In other words, should the NCAs and NRAs be considered Union bodies when they exercise the powers entrusted to them by virtue of Article 6(4) SSMR in relation to micro-prudential tasks on LSIs? The question becomes even more perplexed if the following parameter is added to the equation. What if the Member States have enacted national legislation exercising choices available to them under the CRR and CRD pack (e.g., liquidity ratio)?

To answer this question, the CJEU has laid down a basic rule which serves as guidance to determine in which situations the Charter is applicable. This rule provides that "[t]he application of the Charter requires that a(n other) rule of EU law is applicable to the situation at issue".[730] In other words, the application of the Charter is triggered only where there is an EU law rule, either primary or secondary, which is violated, and such violation leads to an infringement of a fundamental right protected under the Charter.[731] This means that the Charter itself is not sufficient to establish the jurisdiction of the CJEU, but instead the violation of another EU law rule is required. The CJEU has clarified in this regard that

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[727] See more on this aspect in Chapter 5.

[728] Wojcik (2016).

[729]Instead, when Member States act outside the scope of EU law protection of fundamental rights is examined through the lenses of national constitutional law and the ECHR e.g., when transposing Directives but lay down requirements in the national law that go beyond the requirements laid down in EU legislation, or when acting in a field in which the EU holds a competence but has not yet legislated on (Judgment of the Court (Fifth Chamber), 10 July 2014, *Julian Hernández and Others*, C-198/13, ECLI:EU:C:2014:2055; Judgment of the Court (First Chamber) of 18 December 1997, *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio*, C-309/96, ECLI:EU:C:1997:631).

[730] Casarosa, Moraru, & Lazzerini (2016), p. 9.

[731] Ibid, p. 8.

"[where] a legal situation does not fall within the scope of Union law, the Court has no jurisdiction to rule on it and any Charter provisions relied upon cannot, of themselves, form the basis for such jurisdiction".[732]

In the same vein, the CJEU's Judge Allan Rosas explained, in an academic text, the scope of Article 51(1) of the Charter, in light of *Åkeberg Fransson* case,[733] by pointing the following:

> "The Charter is only applicable if the case concerns not only a Charter provision but also another norm of Union law. There must be a provision or a principle of Union primary or secondary law that is directly relevant to the case. This, in fact, is the first conclusion to draw: the problem does not primarily concern the applicability of the Charter in its own right but rather the relevance of other Union law norms".[734]

Shortly after the judgment on *Åkeberg Fransson* case, the CJEU delivered its judgment on *Siragusa* case.[735, 736] In this case, the Italian court made a reference for preliminary ruling to the CJEU enquiring whether the Charter, and in particular Article 17 on the right to property is applicable in relation to a measure adopted by the Italian authorities. The Italian court invoked various provisions of the EU law on environmental issues to establish the application of the Charter. However, none of these provisions addressed the matter under judicial scrutiny, thus the CJEU concluded that the case did not involve the application of Union law thereby rendering the Charter inapplicable:

> "*24. [I]t should be borne in mind that the concept of 'implementing Union law', as referred to in Article 51 of the Charter, requires a certain degree of connection*

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[732] e.g., Order of the Court (Third Chamber), 12 July 2012, *Currà and Others*, C-466/11, ECLI:EU:C:2012:465, para. 26.

[733] Judgment of the Court (Grand Chamber), 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105 ("*Åkerberg Fransson* judgment").

[734] See Rosas (2012).

[735] Judgment of the Court (Tenth Chamber), 6 March 2014, *Cruciano Siragusa v Regione Sicilia — Soprintendenza Beni Culturali e Ambientali di Palermo. Request for a preliminary ruling from the Tribunale amministrativo regionale per la Sicilia*, C-206/13, ECLI:EU:C:2014:126.

[736] Summary of the background of the case as provided for in paragraphs 7-8 of the CJEU's judgment: "Mr Siragusa owns property in a landscape conservation area. He made alterations to that property without first obtaining landscape compatibility clearance and then applied to the Comune di Trabia (Municipality of Trabia) for retrospective planning permission for those alterations, subject to a declaration of no impediment from the Soprintendenza. On 4 April 2011, the Soprintendenza adopted an order (*ordinanza-ingiunzione*) requiring Mr Siragusa to restore the site to its former state by dismantling, within 120 days of receipt of that order, all work which had been carried out illegally. The order was made on the grounds that the work in question is not eligible for certification as compatible with the landscape conservation rules for the purposes of Articles 167 and 181 of Legislative Decree No 42/04 since that work has resulted in an increase in volume. Mr Siragusa brought an action contesting that order before the referring court".

above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.[737]

25. In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.[738]

26. In particular, the Court has found that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings.[739]"

In view of the above, two important conclusions can be drawn. First, the application of the Charter requires that another EU law rule is applicable to a given situation. Second, and most important, even if another EU law rule is applicable, said rule must specifically regulate the case at hand so it can trigger the application of the Charter. Therefore, in light of these conclusions, it could be inferred that the cases in which the Charter can be invoked are rather limited. Nevertheless, it remains an open window, so the claimants establish the illegality of the actions of the EU authorities. It is recalled that in cases the EU authorities enjoy discretion, the CJEU will be very cautious, if not negative at all, to find that there is a sufficiently serious breach of an EU rule.

Having examined the basic rational which underpins the approach of the CJEU, it is now time to turn again to the main question of the application of the Charter in cases the NCAs or NRAs implement supervisory and resolution measures in the context of Article 6(4) and further when they implement national law enacted by the Member States in exercising choices available to them under the CRR and CRD pack.

Generally, the CJEU in its case-law has held that the application of the Charter is triggered where there is a substantive connection between EU law and national law applied by the national authorities. For instance, such a connection could exist where the provisions of EU and national law serve a similar purpose and the "national interests at stake are less

[737] see, to that effect, Judgment of the Court (Fifth Chamber) of 29 May 1997, *Friedrich Kremzow v Republik Österreich*, C-299/95, ECLI:EU:C:1997:254, para. 16.

[738] see Judgment of the Court (First Chamber) of 18 December 1997, *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio*, C-309/96, ECLI:EU:C:1997:631, paras. 21-23; Judgment of the Court (Third Chamber), 8 November 2012, *Iida*, C-40/11, ECLI:EU:C:2012:691, para. 79; Judgment of the Court (Second Chamber), 8 May 2013, *Ymeraga and Ymeraga-Tafarshiku*, C-87/12, ECLI:EU:C:2013:291, para. 41.

[739] see Judgment of the Court (Third Chamber) of 13 June 1996, *Maurin*, C-144/95, ECLI:EU:C:1996:235, paras. 11 and 12.

obvious".[740] In *Åkeberg Fransson* case, the CJEU pointed that "every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion" and concluded that "that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of […] European Union law, for the purposes of Article 51(1) of the Charter".[741] Hence, the Charter is applicable in cases in which Member States "when apply domestic law that has the purpose to enforce EU provisions".[742]

This provides highly relevant guidance also for the questions at hand regarding the NCAs and NRAs. With regard to the case where the NCAs and/or NRAs implement supervisory and resolution measures in the context of Article 6(4), the application of the Charter could not be denied as the national authorities would adopt these measures in order to comply with their obligations deriving from EU law. In other words, such national measures would be the means of implementing Union law.

The same conclusion should be reached in the case where the NCAs and/or NRAs implement national law enacted in the exercise of discretions provided for under the Union law. EU law which contains discretionary choices is binding upon the Member States only as regards the result to be achieved, whereas the means to achieve such results rest with the discretion of the Member States. The exercise of discretion and the choice of a policy option form an integral part of the relevant Union law, whereas such discretion must be exercised within the boundaries of said Union law.[743] Therefore, national provisions adopted in this context are targeted in giving effect to Union law, and effectively they should be deemed as implementing Union law. Therefore, there is a substantive connection between the EU and national law both of which regulate the same subject matter.[744]

In its ruling of 'totemic importance'[745] in the infamous *Pringle* case of 2012,[746] the CJEU offered a characteristic example of the application of the Charter, only on Union level though. In this much-debated case, the court reviewed the conditionality imposed on Member States when receiving financial support from the European Stability Mechanism ('ESM'). Since the ESM is not a Union body, but merely a mechanism agreed by the

[740] Lamandini, Muñoz, & Álvarez (2015), p. 48.

[741] *Åkerberg Fransson* judgment, paras. 25-27.

[742] Lamandini, Muñoz, & Álvarez (2015), pp. 48-49.

[743] Judgment of the Court (Grand Chamber) of 21 December 2011, *N. S. and Others*, Joined cases C-411/10 and C-493/10, ECLI:EU:C:2011:865.

[744] Lamandini, Muñoz, & Álvarez (2015), p. 49.

[745] Moloney (2021), p. 211.

[746] Judgment of the Court (Full Court), 27 November 2012, *Thomas Pringle v Government of Ireland and Others*, C-370/12, ECLI:EU:C:2012:756.

Member States outside the EU legal order, the CJEU held that the ESM cannot be checked against the Charter, as the latter is not applicable. The *Pringle* ruling faced contention by the literature,[747] but it seems to be in line with the well-established scope of application of the Charter. It is true, nonetheless, that creating a mechanism outside the legal order of the Union, might be a way to circumvent the application of the Charter thereby leaving gaps in the effective protection of the fundamental rights.

It is worth noting that the ECtHR in its judgment in the *Bosphorus Airways v Ireland* case[748] highlighted that there is a presumption that the system of protection of the Charter rights in the EU is equivalent in terms of protection with the system of protection of the ECHR.[749] [750]

This section will shed some light on the right to property and the rules based on which it can be limited, whereas potential gaps in the adequate protection of the right to property will be highlighted. This Section does not contain an exhaustive presentation of all aspects of the right to property. Rather, its aim is to focus on the principal nuances of the protection of the property right in relation to the financial authorities' actions and the limitation of their compensatory liability. In Chapter 5, section 1, some critical reflections from a constitutional standpoint on the optimum equilibrium to be achieved between limiting the financial authorities' liability and protecting the right to property will follow.

2. Right to property

Having established the scope of application of the Charter, it is now time to examine closer the right to property. The right to property is a qualified fundamental right under Article 1 of Protocol 1 ('P1-A1') of the European Convention of Human Rights (the "ECHR")[751] and Article 17 of the Charter of the Fundamental Rights of the EU (the "Charter"). Whereas, the ECHR is not binding upon the Union, the Charter, by virtue of its Article 51, is binding upon all the Union bodies, including the ECB and the SRB. Therefore, all actions of the Union bodies must pay due regard to the fundamental rights,[752] whilst a violation of

[747] e.g., see Salomon (2015).

[748] Case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgment of 20 June 2015, paras. 143-148.

[749] *ibid* 159-165.

[750] The case which concerned the interference with the right to property where national authorities implementing EU law did not enjoy discretion, has been criticised on the ground that the ECtHR did not undertake the proportionality assessment despite its standard stance to assess the proportionality of a measure which interferers with the right to property, even if such interference is justified in view of the public interest.

[751] For a general overview of P1-A1 see Grgiæ, Mataga, Longar, & Vilfan (2007).

[752] For an overview of fundamental rights protection under the Greek Constitution see *inter alia* Vlachopoulos (2022).

such rights, including the right to property, can give rise to the non-contractual liability of the former.[753]

Before the Charter[754] came into force, the protection of the fundamental rights was based on general principles of EU law invoked by the CJEU. In this context, the ECHR was serving as a "source of inspiration".[755] This is also reflected in Article 6(3) TEU which stipulates that "*[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*". The important role of the ECHR is depicted in the words of Advocate-General Sir Francis Jacobs,[756] who illustratively stated that: "*The ECJ has also treated what is perhaps the most fundamental treaty in Europe, the European Convention on Human Rights, as if it were binding upon the Community and has followed scrupulously the case-law of the European Court of Human Rights, even though the European Union itself is not a party to the Convention*".[757]

The Charter, in Article 52(3), explicitly recognizes that in so far as the Charter contains rights[758] which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Consequently, the ECHR serves as a minimum standard with regard to the level of protection of fundamental rights. Therefore, should a fundamental right be an absolute one under the ECHR, it must enjoy the same status under the Charter as well. On the other hand, though, the Union law may afford higher protection to the fundamental rights compared to the level of protection afforded to these rights under the ECHR.

As the CJEU has pointed in the *Melloni* case "*Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, 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*

[753] In this regard, see Judgment of the General Court (Third Chamber) 23 May 2019, *Steinhoff and others v. ECB*, T-107/17, ECLI:EU:T:2019:353 ("*Steinhoff* judgment"), para. 97 in which the court stated that: "[i]t follows that, in principle, a sufficiently serious breach of Article 17(1) of the Charter by the ECB is capable of giving rise to its non-contractual liability under the third paragraph of Article 340 TFEU".

[754] The Charter has been described as a 'partial and provisional codification of the fundamental rights acquis of the EU' in The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework. Study for the European Parliament AFCO Committee (2016), p. 7.

[755] Lock (2016).

[756] Formerly Advocate General, Court of Justice of the European Communities (1988-2006).

[757] Jacobs (2007), pp. 54-55.

[758] Including also socio-economic rights. For an in-depth discussion of the rights see Peers, Hervey, Kenner, & Ward (2014).

*Court, and the primacy, unity and effectiveness of EU law are not thereby compromise*d".[759]

When adjudicating on cases involving the clash between the public interest and the protection of the right to property, the CJEU has repeatedly recognised the 'qualified' character of this right by its eloquent passage that the "right of ownership cannot be understood as an absolute prerogative, but must be seen with reference to the function it plays in society".[760] Thus, the scope of protection of the right to property is either expanded or limited depending on the social function that the specific type of property plays.[761] In other words, the qualified nature of the right to property can, in principle, be limited depending on the public interest at stake subject to the conditions laid down in the applicable laws as supplemented by the case-law of the European Court of Human Rights (the "ECtHR") and the case-law of the CJEU, which as stated above closely follows the case-law of the ECtHR.[762]

Remarkably, the core concept of "property" protected under P1-A1 is not defined as such. P1-A1 refers to the term "possessions" instead, to describe the right to property. The term "possessions", according to the ECtHR case-law,[763] must be interpreted broadly in order to capture under its scope all possible forms and nuances a possession may take under national laws, so as the effective protection of the right to property is ensured.[764]

[759] Judgment of the Court (Grand Chamber), 26 February 2013, *Stefano Melloni v Ministerio Fiscal,* C-399/11, ECLI:EU:C:2013:107.

[760] Judgment of the Court of 14 May 1974, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, Case 4-73, ECLI:EU:C:1974:51; Judgment of the Court (Fifth Chamber) of 11 July 1989, *Schräder v Hauptzollamt Gronau*, C-265/87, ECLI:EU:C:1989:303; Judgment of the Court (Third Chamber) of 13 July 1989, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88, ECLI:EU:C:1989:321; Judgment of the Court of 30 July 1996, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, C-84/95, ECLI:EU:C:1996:312; Judgment of the Court of 10 July 2003, *Booker Aquaculture and Hydro Seafood*, Joined cases C-20/00 and C-64/00, ECLI:EU:C:2003:397;Judgment of the Court (Second Chamber) of 30 June 2005, *Alessandrini Srl and Others v Commission of the European Communities*, C-295/03 P, ECLI:EU:C:2005:413; Judgment of the Court of First Instance (Fifth Chamber) of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, ECLI:EU:T:2003:281; Judgment of the Court (Grand Chamber) of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04, ECLI:EU:C:2005:449;Judgment of the General Court (Eighth Chamber) of 13 July 2011, *Schindler Holding and Others v Commission*, T-138/07, ECLI:EU:T:2011:362; Judgment of the General Court (Third Chamber) of 28 May 2013, *Trabelsi and Others v Council*, T-187/11, ECLI:EU:T:2013:273.

[761] Lamandini, Muñoz, & Álvarez (2015), p. 56.

[762] Case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgment of 25 June 2005, para. 156; Case of *N.D. and N.T. v. Spain*, Application nos. 8675/15 and 8697/15, Judgment of 13 February 2020, paras 110 and 343: The ECHR can be described as the 'constitutional instrument of European public order' in the field of human rights.

[763] Athanassiou (2010), p. 277.

[764] Viterbo (2006), p. 2.

3. The concept of "possession"

The ECtHR has not provided a definition of the term "possessions" as this would involve the risk of not being broad enough to include all rights that should qualify as possessions and thus possibly undermine the adequate protection of the right to property. The ECtHR has made clear that deciding whether a right qualifies as a possession is determined primarily on the basis of the national law. Nevertheless, it has prominently recognised that the concept of "possessions" bears also an autonomous meaning as formed by the ECtHR. Consequently, the classification of an asset as possession under national law is not a necessary prerequisite for granting protection over this asset based on the P1-A1, since this can be autonomously classified as "possession" under the ECHR.[765]

In its rich case-law, the ECtHR has recognized that movable and immovable property, rights *in rem* and *in personam*, intellectual property and even legitimate expectations qualify as "possessions". Therefore, the concept of "possession" is not exhausted in the ownership of physical goods. Instead, it also includes other rights and interests, including pecuniary claims,[766] which are recognised as assets and are accordingly classified as property rights protected under P1-A1.[767] The case of legitimate expectations deserves particular attention as it expands the concept of possessions beyond the merely 'existing' possessions.[768] Specifically, in relation to a business, the ECtHR has recognised that clientele,[769] shares in a company[770] and economic interests connected with the running of a business are considered possessions. These possessions are highly relevant in cases of a license revocation.[771] It is well-established case-law, that a right or interest is not required to be already vested with a person, so it is protected under P1-A1. It is noted, however, that

[765] Anastopoulou (2023).

[766] Case of *Stran Greek Refineries and Stratis Andreadis v Greece*, Application no 13427/87, Judgment of 09 December 1994, paras 59 and 62.

[767] Case of *Iatridis v. Greece*, Application no. 31107/96, Judgment of 25 March 1999. See also Case of *Anheuser-Busch Inc. v. Portugal*, Application no. 73049/01, Judgment of 11 January 2007, para. 63.

[768] Case of *Prince Hans-Adam II of Liechtenstein v. Germany*, Application no. 42527/98, Application of 12 July 2001, paras. 82-83.

[769] Case of *Van Marle v. the Netherlands*, Applications nos. 8543/79, 8674/79, 8675/79 and 8685/79, Judgment of 8 May 1984; Case of *Iatridis v. Greece*, Application no. 31107/96, Judgment of 25 March 1999.

[770] Case of *Tre Traktörer Aktiebolag v. Sweden*, Application no. 10873/84, Judgment of 7 July 1989.

[771] *Ibid.*

a mere hope[772] or a 'conditional claim which lapses as a result of the non-fulfilment of the condition'[773] do not qualify as a legitimate expectation.

In light of the above, it has been accepted that 'all existing and actual […] vested economic interests […] qualify as legally protected "property rights"'.[774] Hence, it can be established that claims of creditors against the credit institution and "deposits in a bank fall under the concept of "possessions" as they represent a vested economic interest and, in particular, a pecuniary claim" of creditors and depositor against the bank.[775]

Therefore, overall, there are three primary groups of third parties whose right to property may be affected by the supervisory and resolution measures, i.e., credit institution, shareholders, depositors.

4. Interference with the right to property (deprivation, control of use of property, general rule)

Before turning to examining how supervisory and resolution measures may impinge on the right to property, it is important to first explore the three categories of interference with the right to property. Under the ECHR there are three rules of property interference, in other words limiting the right to property can be classified in three categories, i.e., deprivation (second rule), control of use of property (third rule),[776] and interference of a general nature (first rule).

Deprivation of property essentially entails dispossession of property, that is in plain language taking away the property from its owner and transfer it to a public body or private individual. Deprivation can be effectuated via expropriation[777] or nationalization.[778] The ECtHR may find that there is a *de facto* expropriation even in the absence of a formal

[772] Case of *Pressos Compania Naviera S.A. and Others v. Belgium*, Application no. 17849/9, Judgment of 3 July 1997, para. 31; Case of *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom*, Application no. 44302/02, Judgment of 30 August 2007, para. 61; Case of *Von Maltzan and Others v. Germany*, Application nos. 71916/01, 71917/01 and 10260/02, Judgment of 2 March 2005, para 74(c); Case of *Kopecký v. Slovakia*, Application no. 44912/98, Judgment of 28 September 2004, para. 35(c).

[773] Case of *Prince Hans-Adam II of Liechtenstein v. Germany*, Application no. 42527/98, Judgment of 12 July, paras. 82-83; see also Case of *Gratzinger and Gratzingerova v. the Czech Republic*, Application no. 39794/98, Judgment of 10 July 2002, para. 69.

[774] Athanassiou (2010), p. 277.

[775] Anastopoulou (2023). See also Maguze (2016), pp. 220-221.

[776] Registry to the European Court of Human Rights (2022).

[777] Case of *Andorfer Tonwerke v. Austria*, Application no. 7987/77, Judgment of 13 December 1979, p. 31.

[778] Case of *X v. the United Kingdom*, Application no. 3039/67, Judgment of 24 May 1967, p. 66.

decision by the public authorities to expropriate one's property.[779] The court has illustrative noted in this regard, in the *Sporrong and Lonnroth* case[780] that:

> In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of […]. Since the Convention is intended to guarantee rights that are 'practical and effective' […], it has to be ascertained whether that situation amounted to a *de facto* expropriation, as was argued by the applicants.

A temporary dispossession of property would not qualify as deprivation, but instead as control of use of the property.[781] Furthermore, cases in which the owner of the property is forced by the actions of a public authority to sell its property. Will equally qualify as dispossession even if being of an indirect nature.[782]

As regard to the second rule, the case-law of ECtHR provides ample of examples[783] of property interferences which qualify as control of use of property, such as confiscation. In

[779] See Case of *Papamichalopoulos v. Greece,* Application no. 14556/89, Judgment of 24 June 1993, in which the applicants were deprived of their land. More specifically,as per the summary included in the judgment, on 22 August 1967 under Act (Αναγκαστικός Νόμος) No 109/1967 the Greek State assigned to the Navy Fund (Ταμείο Εθνικού Στόλου) a vast area near the resort of Aghia Marina, which was regarded as a state forest. Yet, the assigned area comprised agricultural land belonging to the applicants or their predecessors in title. Although, there were court orders in the form of interim injunctions whereby the courts ordered the restitution of the land to the applicants occupied by the Navy Fund, no restitution took place and the Navy Fund initiated works on the land in question in order to construct a naval base and a holiday village for naval officers. Similarly, in Case of *Sarica and Dilaver v. Turkey*, Applications nos. 35335/05 and 41170/05, Judgment of 16 November 2017, para. 43, the land of the applicant was incorporated into a military zone, thus the Turkish authorities had occupied immovable property and changed its intended use irreversibly. This amounted to a *de facto* expropriation as eventually the State deprived the owners from the land of their property without having issued any kind of formal public declaratory act ordering the transferring of ownership (see also Case of *Yavuz Özden v. Turkey*, Application nos. 21371/10, Judgment of 14 September 2021, paras. 79- 80).

[780] Case of *Sporrong and Lönnroth v* Sweden, Application nos. 7151/75; 7152/75, Judgment of 18 December 1984, para. 63.

[781] As established in the Case of *Handyside v United Kingdom*, Application no. 5493/72, Judgment of 07 December 1976.

[782] forced sales, of the kind at issue in the Case of *Håkansson and Sturesson v* Sweden, Application no. 11855/85, Judgment of 21 February 1990, case in which the "[t]he applicant in this case had bought farming land at auction, but had been obliged to resell it, since the authorities refused to grant him the permit he needed to retain it". See also Sermet (1999).

[783] For some these examples see Registry to the European Court of Human Rights (2022): "Measures qualified by the Court under the third rule, as control of use, cover a range of situations, including, for example, the following: revocation or change of conditions of licences affecting the running of businesses (Case of *Tre Traktörer Aktiebolag v. Sweden*, Application no. 10873/84, Judgment of 7 July 1989, para. 55); Case of *Rosenzweig and Bonded Warehouses Ltd v. Poland*, Application no. 51728/99, Judgment 28 July 2005, para. 49;; Case of *Bimer S.A. v. Moldova*, Application no. 15084/03, Judgment of 10 July 2007, paras. 49 and 51; Case of *Megadat.com SRL v. Moldova*, Application no. 21151/04, Judgment of 8 April 2008, para. 65; Case of *Centro Europa 7 SRL and Di Stefano v Italy*, Application no. 38433/09, Judgment of 7 June 2012, para. 186; Case of *NIT S.R.L. v. The Republic of Moldova*, Application no. 28470/1, Judgment of 5 April 2022, para. 247; Case *Könyv-Tár Kft and Others v. Hungary*, Application no. 21623/13, Judgment of 5 October 2021, para. 43

this context, it is important to note that withdrawal of a license has been deemed as falling under the control-of-use rule.[784]

Finally, the first rule applies when a measure limiting the right to property cannot qualify either as deprivation or as control of use. Given its catch-all purpose, it is considered to be of a general nature ensuring that impermissible interference with the property rights is not afforded judicial protection.[785] Hence, the ECtHR first assesses whether a measure falls under the second or third rule as then decides whether the first is rule eventually applicable. Given the broad nature of the second rule, many cases are classified as control of use, instead of falling under the general interference category. Hence the application of the latter is more limited than someone might expect.[786]

5. Assessing compliance of supervisory or resolution measures with the right to property under P1-A1

In *Marckx v. Belgium*, the ECtHR stressed that the peaceful enjoyment of one's possessions, i.e., the right to property, as guaranteed under P1-A1, can be limited by operation of the law for reasons of general interest, thereby stressing the qualified nature

and 59 (introducing a State monopoly on the school books market); Case of Mellacher and Others v. Austria, Application no. 10522/83; 11011/84; 11070/84, Judgment of 19 December 1989, para. 44 (rent control systems); Case of *Hutten-Czapska v Poland*, Application no. 35014/97, Judgment of 19 June 2006, para. 160; Case of *Aquilina v. Malta*, Application no. 40246/18, Judgment of 9 June 2020, para. 54; Case of *Bittó and Others v. Slovakia*, Application 30255/09, Judgment of 28 January 2014, para. 101; Case of *Immobiliare Salfi v Italy*, Application no. 22774/93, Judgment of 28 July 1999, para. 46 (on statutory suspension of the enforcement of orders for re-possession in respect of tenants who had ceased to pay rent); Case of *Lindheim and Others v. Norway*, Application no. 13221/08 and 2139/10, Judgment of 12 June 2012, para. 75-78 (on the limitations imposed by operation of law on the level of rent that the property owners could demand from the lease holder and the indefinite extension of a lease contract on the same terms, while the owners continued to receive rent on the same terms they had freely agreed to when signing the contract and were free to sell their land albeit subject to the lease attaching to the land); Case of *Chassagnou and Others v. France*, Applications nos. 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999, para. 74 (loss of certain exclusive rights over land and the obligation to tolerate hunting on the applicants' land); Case of *Herrmann v Germany*, Application no. 9300/07, Judgment of June 2012, para. 72; Case of *Yaroslavtsev v. Russia*, Application no. 42138/02, Judgment of 2 December 2004, para.32 and Case of *Sildedzis v Poland*, Application no. 45214/99, Judgment of 24 May 2005, para. 45 (on the refusal to issue official registration of a car); Case of *Uzan and Others v. Turkey*, Application nos. 19620/05, 41487/05, 17613/08, Judgment of 5 March 2019, para. 194 (on the freezing of bank accounts); Case of *Ansay and Others v Turkey*, Application no. 49908/99, Judgment of 2 March 2006 (on the imposition of positive obligations on landowner (e.g. obligatory reafforestation); or imposition of a legal qualification as forest land, with the attendant obligations imposed on the owner); Case of *Democracy and Human Rights Resource Centre and Mustafayev v. Azerbaijan*, Application nos. 74288/14 and 64568/16, Judgment of 14 October 2021, para.66.

[784] In this regard see Case of *Tre Traktörer Aktiebolag v. Sweden*, Application no. 10873/84, Judgment of 7 July 1989 in which the court noted that the "economic interests connected with" the running of a business (here a restaurant whose license of operation was revoked) constitutes "possessions" under the meaning of P1-A1 of the ECHR, as the license was the principal prerequisite, so the restaurant carries on its operation.

[785] Grgiæ, Mataga, Longar, & Vilfan (2007).

[786] *Ibid.*

of the right to property which is not an "unfettered prerogative".[787] Such limitation is subject to certain rules with the most prominent one being the principle of proportionality,[788] which will be analysed further below in this Chapter.

In order to assess whether a supervisory or resolution measure interferes with the right to property or instead constitutes a lawful and proportionate limitation of such right, it is first necessary to establish that the right interfered with qualifies as "possession" within the meaning of the ECHR and thus falls *ratione materiae* under P1-A1. Should this prerequisite be fulfilled, then it should be examined whether the following conditions are cumulatively met:[789] the measure under scrutiny must (a) be lawful;[790] (b) serve a legitimate public/general interest;[791] and (c) be proportionate, i.e., it achieves a fair balance between the general interest pursued and the means it employs to achieve such interest.[792]

The first condition under point (a) above implies two requirements. Specifically, it requires that the interference with the right to property is provided for under a Union or national rule and respect its essence, which must, further, have a certain 'quality' in the sense that it must be 'accessible to the person concerned and foreseeable as to its effects'.[793] In this context, the CJEU in the *Crysostomides* case[794] noted that:

> It should be noted that, under Article 17(1) and Article 52(1) of the Charter, no one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions in accordance with the law, *subject to fair compensation being paid in good time for their loss*. For the purposes of determining the scope of that right, it is necessary, in the light of Article 52(3) of the Charter, to take account of Article 1 of Additional Protocol No 1 to the ECHR (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat*

[787] Judgment of the Court (Fourth Chamber) of 18 March 2010, *Alassini and Others*, C-317/08, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, ECLI:EU:C:2010:146, para. 63; Judgment of the Court (Third Chamber) of 15 June 2006, *Dokter and Others*, C-28/05, ECLI:EU:C:2006:408, para. 75; Judgment of the Court (Fifth Chamber) of 13 September 2018, *UBS Europe and Others*, C-358/16, ECLI:EU:C:2018:715, para. 62.

[788] Möller (2019).

[789] de Vauplane (2012).

[790] Case of *Iatrides v. Greece*, Application no. 31107/96, Judgment of 25 March 1999, para. 58.

[791] Case of *Lekić v. Slovenia,* Application no 36480/07, Judgment of 11 December 2018.

[792] Case of *Beyeler v. Italy*, Application no. 33202/96, Judgment of 5 January 2000, para 114.

[793] See Case of *Kurić and Others v.Slovenia*, Application no. 26828/06, Judgment of 26 June 2012, para 341: "According to the Court's established case-law, the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law, and it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects".

[794] Judgment of the General Court (Fourth Chamber, Extended Composition) of 13 July 2018, *Chrysostomides, K. & Co. and Others v Council and Others*, T-680/13, ECLI:EU:T:2018:486 ("*Chrysostomides* judgment"), paras. 272-273.

> *International Foundation v Council and Commission*, C 402/05 P and C 415/05 P, EU:C:2008:461, paragraph 356). According to the case-law of the ECtHR, the terms 'in accordance with the law' not only require that the impugned measure should have some basis in domestic law, but also that it also refer to the quality of the law in question, that it be accessible to the interested parties and foreseeable as to its effects (see, to that effect, ECtHR, 13 July 2010, *Kurić and Others v. Slovenia*, CE:ECHR:2010:0713JUD 002682806, paragraph 363). It is necessary therefore to examine whether the first series of harmful measures was adopted in the absence of a clear, foreseeable and accessible legislative framework and which provides for compensation and appropriate legal protection.

While the CJEU reiterates the stance of ECtHR regarding the 'quality' of the legislation, it also specifically notes the well-establish rule that deprivation of one's possessions is possible for reasons pertaining to the public interest but *subject to fair compensation being paid in good time for their loss*. This element is of particular importance when it comes to assessing the lawfulness of the limitation of the right to property as a result of adopted supervisory and resolution measures. This aspect will be duly addressed in Chapter 5.

As regards the second condition of public interest, the ECtHR takes a generous approach towards the Contracting States allowing them a wide margin of appreciation in terms of determining the "public interest". National authorities are better placed to conduct the substantive assessment of what is public interest, whereas the ECtHR would step in and evaluate such assessment, thus interfering with the margin of appreciation, only if the decision of the Contracting State regarding what constitutes public interest is 'manifestly without reasonable foundation'.[795]

Finally, in relation to the third condition, that of the proportionate interference with the right to property, according to the CJEU's case-law, the limitations to protected rights (including that of the property) are in line with the principle of proportionality 'only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others'.[796]

The above requirements will be examined, under the following sections of this Chapter, in connection with (a) the failing or likely to fail determination, and the triggering of early intervention measures in the context of supervision on the one hand, and (b) the bail-in of claims in the context of resolution on the other hand. The forthcoming sections will also examine the limitation of the liability of supervisory and resolution authorities, including their compensatory liability, in order to answer the question to what extend such

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[795] Case of *Jahn and Others,* Application nos. 46720/99, 72203/01, 72552/01, Judgment of 30 June 2005, para. 91. See also Registry to the European Court of Human Rights (2022).

[796] Judgment of the Court (Grand Chamber) of 16 December 2020, *Council v K. Chrysostomides & Co. and Others,* Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, ECLI:EU:C:2020:1028 ("*Chrysostomides* appeal judgment"), para. 155.

compensatory limitation is tolerable from a constitutional perspective, in particular in light of the principle of proportionality.

6. Compliance of supervisory measures with Article 1 of Protocol 1 of the ECHR and the EU Charter

The ECB's actions as banking supervisor are under scrutiny regarding their compliance with the fundamental rights protected by virtue of the Charter.[797] As the ECB's supervisory measures are multi-faceted, they can engage with a number of fundamental rights either substantive or procedural. The former may include Article 7 on the right to respect someone's home in case in which the ECB issues guidance to the NCAs and credit institutions in relation to non-performing loans. Supervisory measures which may lead to the insolvency of a credit institution will prominently trigger Article 17 on the right to property. Further, third parties whose rights have been violated are entitled to the right to an effective remedy and access to legal aid granted by Article 47 of the Charter.[798] Equally important are the procedural rules which come into play and ensure the due process is abide by in the ECB's decision-making. In this regard, third parties have a right to good administration (Article 41), the prohibition of *ne bis in idem* (Article 50) as well as the right on access to documents (Article 42). Decisions of the ECB as supervisor will most likely involve an interference with the right to property and due process rights. As mentioned earlier, the scope and application of the rights under the Charter are the same as those of the corresponding rights protected under the ECHR.

SSMR explicitly refers to the Charter which the ECB should pay regard to and put great emphasis on the right to effective remedy and to a fair trial, whilst it also refers to the right to personal data and the freedom to conduct business. These references are enshrined respectively in Recital 63 of the SSMR explicitly states that "[w]hen determining whether the right of access to the file by persons concerned should be limited, the ECB should respect the fundamental rights and observe the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial", whereas, Recital 86 stipulates that the SSMR "respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, and has to be implemented in accordance with those rights and principles".

An area of supervisory action that could be a primary suspect of interfering with the right to property would be the failure of the supervisor to implement, although necessary, early intervention measures before determining that a credit institution is failing or likely to fail.

[797] See Lamandini, Muñoz, & Álvarez (2015).

[798] Moloney (2021), p. 213, who includes Article 33 arguing that the ECB's recent policy directions as regards the treatment by banks of payment breaks over the Covid Crisis could potentially, depending on their impact, have Charter impacts as regards the right of the family to legal, economic and social protection.

6.1. Absence of early (kick-off of) intervention measures

As mentioned before, the ECB is competent to determine whether a credit institution is failing or likely to fail. Article 18(1) of the SRMR requires the ECB to consult the SRB when making this determination.[799] Further according to Article 18(1) the credit institution will be subject to resolution if the SRB, having regard to timing and other relevant circumstances, assesses that there is no reasonable prospect that any alternative private sector measures,[800] or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments and eligible liabilities in accordance with Article 59 of the BRRD taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe cannot be prevented.

The purpose of the early intervention measures, which are one of the pillars of the BRRD,[801] is to prevent the failure of the credit institution. Therefore, it is of outmost importance that the supervisor closely monitors the institution (mainly this is achieved through the SREP tool) so as it can act rapidly when it detects that the credit institution is infringing or likely to infringe its obligations, in particular those pertaining to capital requirements, under the CRR and CRD. Article 27 BRRD provides some indicators based on which the supervisor can establish that the institution is likely to infringe its obligations, i.e., the rapid deterioration of the financial condition of the credit institution, including deterioration of its liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures.[802]

[799] See also Recital 26 of the SRMR.

[800] such as measures by an institutional protection scheme.

[801] The other two being recovery and resolution planning, and resolution.

[802] The supervisory, under the early intervention measures may:

(a) require the management body of the institution to implement one or more of the arrangements or measures set out in the recovery plan or to update such a recovery plan when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and implement one or more of the arrangements or measures set out in the updated plan within a specific timeframe and in order to ensure that the conditions referred to in the introductory phrase no longer apply;

(b) require the management body of the institution to examine the situation, identify measures to overcome any problems identified and draw up an action programme to overcome those problems and a timetable for its implementation;

(c) require the management body of the institution to convene, or if the management body fails to comply with that requirement convene directly, a meeting of shareholders of the institution, and in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders;

(d) require one or more members of the management body or senior management to be removed or replaced if those persons are found unfit to perform their duties pursuant to Article 13 of Directive 2013/36/EU or Article 9 of Directive 2014/65/EU;

Having regard to the power of the ECB to trigger early intervention measures, the first question that arises is whether it could be held liable against third parties for not adopting such measures in due time and effectively for not preventing the failure of a credit institution and accordingly the loss caused to the third parties. If the answer to this question is negative, then the last resort of the aggrieved parties would be the legal basis of P1-A1 as the ECB would not have adopted the necessary prudential supervisory measures in order to avert the failure of the bank and accordingly the revocation of the banking and the loss of the aggrieved parties (that are shareholders, creditors and depositors). It is noted *ab initio* that it is extremely unlikely that the ECB would be held liable on the basis of the pertinent supervisory legislation, as well as for violating the right to property.

For the purposes of discussing this scenario, let us assume a situation in which a credit institution suddenly faces liquidity tensions thereby violating its obligation under Article 414 CRR and the supervisor does not undertake immediate action. Shortly after the violation which requires credit institutions to hold liquid assets which are equal to the:

> *sum of the values of which covers the liquidity outflows less the liquidity inflows under stressed conditions so as to ensure that institutions maintain levels of liquidity buffers which are adequate to face any possible imbalance between liquidity inflows and outflows under gravely stressed conditions over a period of thirty days.*

The above requirement is the so-called Liquidity Coverage Ratio ('LCR') and is measured over a 30-day period. The purpose of the LCR is to ensure that the credit institutions are able to meet their short-term obligations. Following the crisis of 2007, Basel Committee introduced the LCR in Basel III. It serves as a stress test which monitors the ability of the banks to hold "high-quality liquid assets to allow them to survive a period of significant liquidity stress lasting 30 calendar days".[803] It is noted that "[t]he 30-calendar-day stress

(e) require the management body of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, where applicable;

(f) require changes to the institution's business strategy;

(g) require changes to the legal or operational structures of the institution; and

(h) acquire, including through on-site inspections and provide to the resolution authority, all the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 36 of the BRRD.

[803] Banking for International Settlements, Liquidity Coverage Ratio (LCR) – Executive Summary, available at: https://www.bis.org/fsi/fsisummaries/lcr.htm.

period is the minimum period deemed necessary for corrective action to be taken by the bank's management or by supervisors". [804] [805]

Article 16 SSMR stipulates that, in the context of its supervisory powers, the ECB is empowered to require any credit institution in participating Member States to take the necessary measures at an early stage to remedy relevant problems,[806] including a problem in meeting the LCR ratio. The wording of Article 16 does suggest that the competent supervisory authority enjoys discretion as to deciding the implementation of such early intervention measures. This view can further be supported based on the EBA Guidelines on triggers for use of early intervention measures,[807] which rather expressly state that the triggers referred to therein "do not oblige competent authorities to automatically apply early intervention measures in all cases". [808] Instead, the triggers serve as a guidance for the competent authorities in order to help them "in deciding whether to apply early intervention measures while minimising the risk that their decisions and actions might be challenged by entities under their supervision". [809]

The clear leeway afforded to the supervisor should be deemed necessary from both a policy and legal perspective, as it purports to allow the latter the time to assess the situation of a supervised bank and act in way that would not be overly strict.

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[804] *Ibid.*

[805] According to Article 4 of Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions, OJ L 11, 17.1.2015, p. 1–36, the LCR needs to be met at any time, whereas Article 15(1) of Commission Implementing Regulation (EU) 2021/451 of 17 December 2020 laying down implementing technical standards for the application of Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to supervisory reporting of institutions and repealing Implementing Regulation (EU) No 680/2014, OJ L 97, 19.3.2021, p. 1–1955, requires a quarterly frequency of LCR reporting.

[806] See also Recital 40 BRRD: "In order to preserve financial stability, it is important that competent authorities are able to remedy the deterioration of an institution's financial and economic situation before that institution reaches a point at which authorities have no other alternative than to resolve it. To that end, competent authorities should be granted early intervention powers, including the power to appoint a temporary administrator, either to replace or to temporarily work with the management body and senior management of an institution. The task of the temporary administrator should be to exercise any powers conferred on it with a view to promoting solutions to redress the financial situation of the institution. The appointment of the temporary administrator should not unduly interfere with rights of the shareholders or owners or procedural obligations established under Union or national company law and should respect international obligations of the Union or Member States, relating to investment protection. The early intervention powers should include those already provided for in Directive 2013/36/EU for circumstances other than those considered to be early intervention as well as other situations considered to be necessary to restore the financial soundness of an institution.

[807] EBA, Final report, Guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU, EBA/GL/2015/03, 8 May 2015.

[808] *Ibid.*

[809] *Ibid.*

Given the discretion afforded to competent supervisors, it would be very hard for claimants to establish that the supervisor failed to take action although it was required to do so, unless such failure appears to be so manifest that exceeds the outer limits o such discretion. Therefore, the claimant could rely upon Article 17 of the Charter and invoke a violation of the right to property to establish the non-contractual liability of the supervisor.

7. Compliance of resolution measures with Article 1 of Protocol 1 of the ECHR and the EU Charter

By its very nature, the resolution framework established under the BRRD substantively interferes with the right to property as it affects the shareholders and creditors, including the depositors, of credit institutions. Amongst the resolution measures, the most contested one regarding its relationship with the right to property is the bail-in tool. The sections which follow will focus on the bail-in mechanism and the concerns it raises regarding its compatibility with P1-A1.

The first question that needs to be answered is whether debt (either in the form of claims of creditors against the credit institution, or the form of deposits) qualify as possessions under the meaning of P1-A1. A positive answer has already been given to this question under Section 3 of this Chapter. It is recalled that creditors' claims and deposits are considered vested economic interests which qualify as possessions. This qualification is not affected by the secured or unsecured nature of such claims. Effectively, if a claim for repayment of a pecuniary interest or a claim for repayment/return of deposited money are unsecured, such claims are still considered possessions and thus the owner of such claims is entitled to judicial protection.[810]

The second question that begs answer is whether bail-in of claims either in the form of conversion or write down of debt constitutes an interference with the right to property. The answer to this question is also positive.

Such conversion or write down of debt could be seen as falling under the second rule of deprivation of property given that the holder of the debt, once this is subject to bail-in, "would be deprived permanently of his claim for repayment, in the case of a creditor, or of his pecuniary claim against the credit institution for the amount of his deposits".[811, 812] Hence in the conversion scenario, creditors and depositors will receive equity in the credit institution, or in the worse-case scenario, that of the complete write-down of their claim, they will receive nothing in return. In both scenarios they will not be able to request repayment of their claims or return of their deposits respectively.[813]

[810] Maguze (2016), p. 221.

[811] Anastopoulou (2023).

[812] Maguze (2016), p. 222; Sluysmans, Bosma, Timmer, & van Triet (2015), p. 396; For the claim of the depositors against the bank see Athanassiou (2014), p. 719.

[813] *Ibid*, p. 222.

However, the bail-in, especially when it is implemented in the form of the conversion of claims into equity, appears to be more appropriately classified under the control-of-use rule, given that it does not deprive the owner of its property and right to sell, bequeath, or make a gift of it, but rather and more precisely the owner remains 'in possession' of its property, yet he/she is obliged to exercise its property rights in a certain way, i.e., receiving equity instead of money in his/her pocket.[814]

As mentioned above in section 5 of this Chapter, interfering with and thus limiting the right to property is tolerable provided that the following conditions are cumulatively met: such limitation (a) is provided for under the law, (b) pursues a legitimate general interest, and (c) is proportionate.

One could question the compliance of the bail-in mechanism with conditions (a) and (b) above. Although regarding condition (b) one could not deny that the bail-in as part of the EU resolution framework certainly pursues a legitimate general interest, that of preserving financial stability and minimizing financial losses, condition (a) requires further consideration. This is due to the fact that in exceptional instances the resolution authorities are empowered to exclude eligible liabilities from the bail-in. As a result, some creditors may suffer greater losses compared to the losses they would incur had the eligible liabilities not been excluded. Therefore, the bail-in mechanism could be deemed as not meeting the criterion of the quality of the law, in the sense that the very consequences it could entail cannot be completely foreseeable.

Indisputably, the resolution authorities must enjoy a margin of discretion so they can make well-calibrated decisions and effectively apply the resolution tools.[815] Although the exercise of such discretion might be perceived as leading to a granular application of the bail-in,[816] it should not be understood as violating the condition of the quality of the law. Deciding to exempt eligible liabilities from bail-in does not undermine the foreseeability of the bail-in rules. Rather, the bail-in rules should be deemed as complying with the criterion of the quality of the law since the creditors are well aware of the discretion of the resolution authorities to exclude bail-inable liabilities as well as of the specific criteria provided for under the BRRD based on which the resolution authorities exercise said discretion. In the absence of such discretion, the resolution authorities would lack the necessary leeway to balance the various interests involved in order to achieve the primary objective of the BRRD, that is to ensure financial stability. Therefore, it is not necessary that the creditors know in advance whether and how the resolution authorities will exercise their discretion. The knowledge that such discretion may lead to some eligible liabilities being exempted thereby increasing the burden imposed on other non-exempted creditors

[814] See Case of *Handyside v United Kingdom*, Application no. 5493/72, Judgment of 07 December 1976, para. 62.

[815] Tröger (2017).

[816] Maguze (2016), p. 224.

should be considered sufficient to establish that the bail-in rules comply with the criterion of the foreseeability.

The third condition of the proportionality deserves particular attention as it is the only condition which a resolution measure of the current resolution framework could violate.

In the context of the financial crisis of 2008-2012 and the events that followed thereafter, gave the CJEU and the ECtHR ample opportunity to adjudicate on the interplay between bail-in and right to property. The infamous bail-in of deposits implemented in the Cypriot banking system led to a great stream of litigation in front of the CJEU against the ECB, the European Commission, the EU and the Eurogroup.

As a way of short background, it is noted that, in July 2013, approximately 47,5% of eligible deposits in the Bank of Cyprus (a private credit institution) were subject to bail-in whereby the depositors received equity in return.[817] The CJEU shed light on the balancing between protecting the right of individuals to property on the one hand, and upholding the public interest on the other hand, in *Ledra* and *Chrysostomides* cases.

In *Ledra* case which involved the conversion of deposits into equity, the following rational lies in the core of the CJEU judgment:

> In view of the objective of ensuring the stability of the banking system in the euro area, and having regard to the imminent risk of financial losses to which depositors with the two banks concerned would have been exposed if the latter had failed, such measures do not constitute a disproportionate and intolerable interference impairing the very substance of the appellants' right to property. Consequently, they cannot be regarded as unjustified restrictions on that right […].[818]

In line with the court ruling in *Ledra* case, the General Court in the Chrysostomides and Bourdouvali joined cases, examined the haircut imposed on uninsured deposits. Regarding the ability of the measure to contribute to achieving the objective pursued, the court stated that "it was not manifestly unreasonable to conclude that that haircut would contribute to ensuring the stability of the banking system of the euro area".[819] As regards the proportionality and necessity of said measure, the court further continued and stated that it cannot be considered that this measure "exceeds the limits of what is appropriate and necessary in order to achieve the objectives pursued"[820] for the following reasons. In view

[817] Announcement of Bank of Cyprus on the Recapitalisation through Bail-in and Resolution Exit Bank of Cyprus, available at < https://www.bankofcyprus.com/en-GB/Start/News_Archive/Recapitalisation-through-Bail-in-and-Resolution-Exit-Bank-of-Cyprus-Announcement/> last accessed 8 July 2022.

[818] Judgment of the Court (Grand Chamber) of 20 September 2016, *Ledra Advertising v Commission and ECB*, C-8/15 P, Joined Cases C-8/15 P to C-10/15 P, ECLI:EU:C:2016:701, paras. 73 to 75.

[819] *Chrysostomides* judgment, para. 299.

[820] *Ibid.*

of the imminent risk of collapse of the banking sector in Cyprus and the potential contagious effects on the financial stability of the Euro area, a haircut appeared to be necessary to prevent greater financial losses for the banking system as whole but also for the particular depositors who had seen their deposits being bailed-in. "The speed with which the harmful measures were adopted testifies to the urgency of the situation of the Republic of Cyprus at the time of the facts".[821] The court also added that the applicants had recourse to the national competent courts to claim compensation for their loss.[822] The court finally noted that "the disadvantages resulting from the application to the applicants of [said measure] […] are not manifestly disproportionate" given that the losses that the applicants would have incurred in the absence of public intervention and the application of the bail-in measure would be far greater. Therefore, the court concluded that in light of the above, applying the bail-in tool and converting uninsured deposits into shares in the Bank of Cyprus did not constitute "a disproportionate and intolerable interference, impairing the very substance of those depositors' right to property" and cannot, thus, be considered an unjustified restriction thereof.[823]

The CJEU neither provided a thorough and in-depth proportionality assessment, nor did it reveal the threshold for assessing proportionality, which nonetheless could be understood to be quite low. The impending threat of the collapse of the Cypriot banking sector and the ensuing complete write-off of deposits to which the depositors would have been exposed in the event of the banks' liquidation can justify the outcome of the proportionality assessment of the CJEU.

The *Kotnik and others* case[824] also gave the CJEU the opportunity to assess the clash between bail-in and property rights. The case concerned state aid measures that the Slovenian authorities implemented, in 2013, in relation to five Slovenian banks which were confronting capital constraints.[825] The application of these measures involved the granting of state aid in accordance with the 2013 Banking Communication of the EU Commission and resulted in equity capital, hybrid capital and subordinated debt being written off. The aggrieved parties who suffered losses on account of these measures resorted to national courts. Following a request from the Supreme Court of Slovenia, the CJEU issued a preliminary ruling whereby it held that converting subordinate rights into equity or writing down their value does not interfere disproportionately with the right to property. The court in this case as well compared and contrasted the loss suffered by the aggrieved parties on account of the measures implemented by the Slovenian authorities with the loss that said parties would have suffered if the banks had been subjected to normal insolvency

[821] *Ibid*, para.310.

[822] *Ibid*.

[823] *Chrysostomides* appeal judgment and *Chrysostomides* judgment, para. 259.

[824] Judgment of the Court (Grand Chamber) of 19 July 2016, *Kotnik and Others*, C-526/14, ECLI:EU:C:2016:570 ("*Kotnik* judgment").

[825] *Ibid*.

proceedings. It concluded that the losses would be greater in the second scenario, thus the measures were proportionate as they "do not exceed what is necessary to overcome the capital shortfall of the bank concerned",[826] therefore "it cannot reasonably be maintained that the burden-sharing measures (…) constitute interference in the right to property of the shareholders and the subordinated creditors".[827, 828]

The assessment of the court was heavily influenced by the wide discretion that the authorities enjoy in the context of the burden-sharing rule under the 2013 Banking Communication. This evidences that discretion plays a decisive role in the proportionality assessment weighing in favour of the authorities and against the individuals' right to property.

These two sets of cases demonstrate that the stance of the CJEU tips in favour of the authorities adopting and implementing resolution measures, at least in situations of severe crises where the financial stability and the swift function of the banking sector are under strike. It is expected that the CJEU will take into account the given circumstances under which the resolution of a bank takes place, however, based on the precedents so far, it seems rather unlike that the court will become more intrusive in its proportionality assessment in similar cases in the future. Nevertheless, it appears that there are two situations in which the CJEU could, if wished, take a step further in its assessment of proportionality. These two situations are (a) the choice of the resolution authority between the bail-in and other resolution measures, and (b) the application of the bail-in in system-wide crises.

It is submitted that in these two situations, the CJEU must apply a fiercer proportionality assessment. This would entail an expansion of the cases in which the resolution authorities might be found liable, however such expansion should be considered appropriate and justified as it is subject to two safeguards. First, because it would not lead to an over-expansion of the authorities' liability since the CJEU is already very cautious, if not overly protective of the resolution authorities, when it comes to establishing liability for shortcomings in the resolution decisions, and second because a more intensive proportionality review, as suggested, would not entail that the CJEU's decision substitutes for the decision of the resolution authority for the reasons explained below. In light of these two safeguards, a slight further opening of the door to aggrieved parties increasing their chances to successfully seek compensation should be deemed warranted.

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[826] *Ibid*, para. 102.

[827] *Ibid*, para. 78-79.

[828] It is noted that the same events led to litigation before the ECtHR in the Case of *Pintar and Others v. Slovenia,* Application no. 60642/08, Judgment of 14 September 2021, in which the ECtHR noted in para. 93 that "the cancellation of the applicants' shares or bonds amounted to an interference with their right guaranteed by this provision".

7.1. Bail-in vs. sale of business and bridge bank tools

By virtue of the BRRD, the resolution authorities are vested with discretionary powers as regards the resolution tools they choose to apply in each resolution case.[829] However, this discretion is not unconstrained. Rather, it should be limited by the principle of proportionality which should serve as a guidance in the choice of the resolution authorities. This theoretical approach can be better understood in view of the following scenario.

Assuming that all the resolution measures available under Article 37 of the BRRD, bail-in, sale of business and the bridge bank tool (in combination with the asset separation tool where its application is required) are equivalent in terms of their effectiveness in achieving financial stability and the smooth continuation of the operation of the banking system. In such a situation, the resolution authorities would pass the proportionality test, only if they chose to apply the resolution measure which would interfere the less with the right to property. Hence, the bail-in should be a measure of last resort if the sale of business and the bridge bank tool are equally sufficient to achieve the pursued objective of preserving financial stability "as they involve the transfer of claims and liabilities to another bank and do not entail a bail-in of deposits or other securities".[830]

The proportionality review in such cases would not require the courts to enter into assessing technical details which would in any case be impermissible in view of the principle of separation of powers. On the contrary, the courts would only need to review whether the resolution authorities took into account the proportionality principle. This task requires that the resolution authorities provide a thorough justification for the reasons they chose to apply a certain resolution tool in order to allow the courts to assess whether the principle of proportionality fed into the resolution authorities' decision. In cases where such comprehensive justification is lacking, the courts should not deny the failure of the resolution authorities to conduct a proper proportionality assessment regarding the resolution measure they chose to apply.

A more intense review of the proportionality of resolution measures would be beneficial not only for the individuals who have suffered losses on account of a disproportionate resolution measure, but it would also enhance the quality of the resolution decisions. Facing the risk of being held liable, resolution authorities would be extra cautious in choosing the most appropriate resolution tool and meticulously justify their decision. The courts would be then able to assess whether the proportionality test have been complied with, without substituting or the decision of the competent authorities, but would make such assessment on relying on the justification and evidence furnished by the authorities to attest their assessment.

[829] On the discretion of the SRB see Gortsos (2019), pp. 233-234

[830] Anastopoulou (2023).

7.2. System-wide crises and depositors. Is bail-in always a proportionate tool?

The other situation in which a fierce proportionality assessment of the application of the bail-in tool would be warranted is in the cases of system-wide crises. The principle of proportionality requires that that a measure which limits a fundamental right, including the right to property must cumulatively meet the following three well-known criteria, i.e., the measure must be (i) suitable, in the sense that the measure is appropriate and capable to achieve the objective pursued; (ii) necessary, in the sense that there are no other less restrictive measures which are capable of achieving the objective pursued;[831] and (iii) *stricto sensu* proportionate, in the sense that the measure strikes a fair balance between the advantages achieved by upholding the public interest objective and the ensued disadvantages, which is the limitation of the individual's fundamental rights. Therefore, the third limb of the proportionality test requires a cost-benefit analysis.

In the clash between the public interest and property rights, the CJEU, until now, has repeatedly revealed its favourite winner, that is the public interest. It is sufficient to recall the judgments in *Ledra, Chrysostomides* and *Kotnik* cases whereby the CJEU clearly put forward the upholding of the public interest against the protection of the right to property. One could convincingly argue that the limitation of the right to property in these cases was indeed proportionate given the valuable public interest objective pursued which was to preserve the stability of the banking sector, minimize losses and avail contagious effects across the EU Member States' borders.

Whereas in the cases above, the advantages stemming from the limitation of the right to property outweighed the disadvantages, it is questionable whether the same would hold true in a situation of a system-wide crisis in which the resolution authority would apply the bail-in tool in a great number of banks in a jurisdiction thereby subjecting unsecured deposits to a haircut. Such a situation should hardly be justified under the third limb of the proportionality test, but also even under the first limb.

To assess whether the condition of the suitability of the measure and the *stricto sensu* proportionality are complied with in such circumstances, one should first examine the purpose of the resolution framework. Preserving the financial stability and the trust of the public in the banking sector lie at the core of the objectives of the resolution framework.[832]

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[831] The CJEU test "least restrictive effective means test" requires that "when there is a choice between several appropriate measures, the least onerous measure must be used (…)." See to this effect, Judgment of the Court (Fifth Chamber) of 11 July 1989, *Schräder v Hauptzollamt Gronau*, Case 265/87, ECLI:EU:C:1989:303, para. 21.

[832] This teleological interpretation could be supported in light of a number of BBRD provisions and in particular Article 31(2)(a) which states that "[t]he resolution objectives referred to in paragraph 1 are: (a) to ensure the continuity of critical functions", and Article 2(1)(35) which provides that "'critical functions' means activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations". See also Grünewald (2017), p. 297; Wojcik (2016), p. 120.

In a scenario of a system-wide crisis, though, where the resolution authority would decide to subject unsecured deposits of a great number of banks to bail-in, it would be doubtful whether the very objectives of the resolution framework would be achieved.

This discussion could become more illustrative through the lenses of the example of the situation in Greece especially in the period between 2011-2016. The turmoil in the Greek banking sector which was the effect of the unprecedent sovereign debt crisis in Greece[833] resulted in 14 banks being resolved during this period.[834] Since the BRRD was only applicable since 1 January 2015, national law applied for the resolution of the majority of these banks. The resolution tools available under national law included the bail-in tool, nonetheless the Greek resolution authority did not apply a haircut of eligible liabilities in any of the resolution cases in question. Although this is a hypothetical scenario and there are no concrete data available in relation hereto, one could expect that if a haircut had been applied, it would have affected a great number of senior creditors and depositors.

It would be fair to argue that the effects of such hypothetical scenario would be disastrous for the stability of the Greek banking sector and the Greek economy.[835] In particular, it would create deep mistrust in the safety even of deposits held with Greek banks that were not facing capital or liquidity constraints, thus leading to a deposit outflow. If such outflow was realized, it would have entailed great consequences for the soundness and capital robustness of Greek banks, thereby disturbing the stability of the whole Greek banking sector. Probably, it would also ensue cross-border destabilising effects. In the event that Greek authorities had decided to mitigate the risk of deposit outflows by implementing capital controls, which would necessarily have been of a long-term nature, this would have led to an abrupt economy recession. [836]

It is reasonably expected that applying the bail-in tool to a great number of banks and accordingly creditors and retail depositors (especially corporate depositors) in situations of a system-wide crisis, would be a “poisonous mix”.[837] The percentage of non-performing loans would increase abruptly, capital and liquidity problems would be escalated, the economic recession owing to the crisis would be severely deepened, thus further impacting

[833] For a general overview of the impact of the sovereign crisis on the Greek Banking system see Gortsos (2016b).

[834] See Mavridou, Theodossiou, & Gklezakou (2019).

[835] Ibid 34. The authors conclude: “When attempting a counterfactual ‘what if’ assessment of the developments that might have occurred if the BRRD had been in place when the crisis started, one may find it difficult to see how financial stability would have been efficiently protected under the BRRD”.

[836] Ventoruzzo & Sandrelli (2020), p. 51. The authors note that: “Some authors have convincingly argued that, had the authorities applied the Directive’s requirement whereby a minimum 8% private sector involvement must be enforced before any public funds are injected into a bank, then senior debt and even deposits would have been affected, with the consequent trigger of a downward spiral generating an even grimmer crisis and domino effects for the other banks”.

[837] Gortsos (2016a), p. 22.

on the stability of the financial system and leading to the collapse of the banking sector.[838] In turn, this would strengthen the shadow banking sector and would amplify the scope of its activities offering depositors other means of saving their funds. Obviously, any intended benefits arising from the applicable haircuts would be vanished because of the acute consequences that their application on a wide-scale basis would have caused. Overall, the very purpose of the resolution framework, that is financial stability, would have been defeated.

In light of the above, it could be fairly argued that if the resolution authorities choose to bail-in deposits in response to banking failures triggered by a system-wide crisis, the third limb of the proportionality test should not be considered as complied with. It will be even questionable whether the first limb of suitable would be attained. Although on a micro-level, one could argue that the measure is suitable to achieve the orderly resolution of the failing credit institution, on a macro level the measure would not appear to be appropriate to achieve financial stability given the upheaval that it could cause to the banking sector and the economy.

Reserving a special treatment for depositors when assessing the proportionality of haircuts in system-wide crises, distinguishing them from the shareholders and creditors could be justify in view of the different characteristics that depositors present compared to the shareholders and creditors of a bank. The latter are consciously engaged in an activity that involves risk as they have invested in or acted as lenders of the bank expected to receive financial gains in return. The risk inherent in their activity should be reflected in the loss they would suffer in case of a bank failure. In contrast, the intended objective of depositors is to keep their savings safe without engaging in an investment-like activity.[839]

Furthermore, another characteristic that sets depositors apart from shareholders and creditors is that depositors – even if they are aware that they will bear losses – are normally not able to closely monitor whether the bank they are keeping their deposits with is exercising its business in a prudent manner mitigating the risk of failure involved from their activities.[840] Hence, should depositors be relieved from a potential haircut of their deposits, this would not create moral hazard as the depositors can exercise far less influence on the business model of the bank. Instead, shareholders and creditors are equipped with necessary means to exert control over the bank and the business decisions it makes. Admittedly, shielding shareholders and creditors from a potential bail-in would trigger moral hazard as they would not be interested in monitoring the prudency of the banks'

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[838] Gortsos (2016c); See also Athanassiou (2014), p. 719.

[839] The opposite view is also supported, but in this author's mind deposits should not qualify as investments. For a comprehensive analysis of the issue see Athanassiou (2014), pp. 715-720.

[840] See also Avgouleas & Goodhart (2015).

decisions having the reassurance that their investments are secured, although they are in a position to exert certain influence over the banks' activities.[841, 842]

In light of the above, it is submitted that subjecting uncovered deposits to bail-in in cases of system-wide crises would entail such acute, if not irreversible, effects on the economy and the financial system that consequently the resolution of failing credit institutions *via* the route of the bail-in that the bail-in measure would ultimately seem to fail to be suitable on a macro level to achieve the objective pursued, whereas at the same time the disadvantages would outweigh the benefits of such resolution measure. Under these circumstances, the courts should apply a stricter proportionality test and require the competent resolution authorities to demonstrate that the effects of the application of haircuts to uncovered deposits is an appropriate resolution measure that does not indeed undermine the pursued purpose of financial stability, and that the benefits of the resolution measure contribute to attaining said purpose.

[841] *Kotnik* judgment, para. 58.2.

[842] Case of *Dennis Grainger and others v the UK,* Application no. 34940/10, Judgment of 10 July 2012, para. 42.

Chapter 4: The case-law on the liability of financial supervisory and resolution authorities in the EU (ECtHR – CJEU – selected national courts)

1. Important judgments on liability of financial authorities

The debate on whether liability of financial authorities must be limited and to what extent, has been illustratively discussed in the case-law of both European and national courts. In this regard, this section discusses some of the most important European and national courts' judgments and evaluates the courts' stance towards financial authority's liability.

1.1. *Peter Paul* case

Peter Paul case is a cornerstone in the CJEU's case-law as regards assessing conferment of rights to individuals (retail depositors) under EU banking legislation. It is noted that the stance of the CJEU reflects the approach of limiting the financial authorities' liability. Entirely excluding liability of supervisory authorities for their misconduct arguably extends beyond the red constitutional limits, if no mechanism is available to ensure compensation of the aggrieved third parties.[843] As already mentioned in Chapter 2, it is hardly expected that the CJEU will follow the same reasoning as the one laid down in *Peter Paul*, should a similar case be brought before it, given the extensive development and harmonisation of EU banking legislation which expressly refers to the protection of depositors as one of its objectives.[844] Nevertheless, for reasons of comprehensiveness the facts of the case and the CJEU's judgment should be analysed herein.

The case gave rise to a preliminary ruling of the CJEU following a respective reference from the Bundesgerichtshof[845] in the course of proceedings instituted by Peter Paul and other applicants against the Bundesrepublik Deutschland in relation to damages that the applicants incurred because of allegedly defective supervision from the German supervisory authority.[846] The facts of the case are the following.

The applicants had a bank account with the BVH Bank für Vermogensanlagen und Handel AG ("BVH Bank") in Dusseldorf. BVH Bank had obtained a banking license in 1987. However, BVH Bank was not participating in the deposit guarantee scheme. Although it applied to join the deposit scheme, it did not succeed as it did not fulfil the required conditions. BVH Bank was facing financial difficulties and in 1997 the German supervisory authority decided to withdraw the bank's license and initiate bankruptcy proceedings. Given that the bank had not joined the deposit guarantee scheme, the depositors were not entitled to immediate compensation, but only to a portion of the proceeds of the bankruptcy process.[847]

[843] See Chapter 4 section 1.

[844] Busch & Keunen (2019).

[845] The Federal Court of Justice (Bundesgerichtshof – BGH) is Germany's highest court of civil and criminal jurisdiction, i.e. "ordinary jurisdiction".

[846] Bundesaufsichtsamt für das Kreditwesen.

[847] Tison (2005), p. 23.

In light of this, the applicants filed an action for damages before the German courts against the German State thereby invoking damages arising (1) as a consequence of defective prudential supervision by the Bundesaufsichtsamt, the German supervisor, therefore they requested compensation in excess of the EUR 20,000 under the first of their claims, and (2) from the failure of the German state to properly transpose the EU Deposit Guarantee Directive 94/19.[848] They alleged that had the German State transposed the Directive 94/19 in due time, then BVH Bank would have joined the deposit guarantee system offering a compensation for deposits of at least EUR 20,000, thereby invoking *Francovich* state liability.

As regards the first claim of the plaintiffs, the court of first instance found that the German State had indeed failed to properly transpose the Deposit Guarantee Directive and hence applied the *Francovich* liability thereby ordering the German State to pay EUR 20,000 as compensation to the plaintiffs. As regards the second claim, the court dismissed the plaintiff's argument on the basis that the German Banking Act conferred immunity from liability to the German supervisory authority, thereby making inadmissible any claims for damages due to defective supervision.

The plaintiffs appealed the judgment of the court of first instance. Taking into account the first instance court's reasoning on the second claim, the plaintiffs in their appeal argued that the German State itself should be held liable based on the *Francovich* liability rules for the defective supervision of the German supervisor. Since this argument involved the interpretation of the EU Deposit Guarantee Directive, the German court suspended the proceedings and sent a preliminary request to the CJEU inquiring whether the Deposit Guarantee Directive had a direct effect thereby enabling depositors to invoke it against the Member State and hence request compensation in addition to the amount guaranteed, i.e., in addition to the amount of EUR 20,000. The German court further inquired whether a series of banking directives[849] either on an individual basis or read in conjunction, "*confer*

[848] The German state did not transpose Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes OJ L 135, 31.5.1994, p. 5–14, by the relevant deadline which was before the 1st July 1995, but only later on 1 August 1998 by the Law transposing the EC Deposit-Guarantee Schemes Directive and the EC Investor Compensation Schemes Directive, of 16 July 1998.

[849] Article 6(1), 4th and 12th recitals in the preamble of the First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ L 322, 17.12.1977, p. 30–37; Articles 3, 4 to 7, 10 to 17, 11th recital in the preamble of the Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ L 386, 30.12.1989, p. 1–13; Article 7 in conjunction with Articles 2 to 6 of the Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions, OJ L 124, 5.5.1989, p. 16–20; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50 (in the field of credit institutions); Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), OJ L 228, 11.8.1992, p. 1–23 (in the field of non-life insurance); Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) OJ L 360, 9.12.1992, p. 1–27; Council Directive 93/22/EEC of 10 May 1993 on investment services

on the saver and investor rights to the effect that the competent authorities of the Member States must take prudential supervisory measures, with which they are charged by those directives, in the interests of that category of persons and must incur liability for any misconduct" thereof.

The repercussions of the judgment were to be so critical that six Member States (Germany being included) submitted observations to the CJEU, supporting the view that the EU banking legislation does not provide any legal basis for holding Member States liable for defective supervision. Both the European Commission and the Advocate-General Stix-Hackl sided with the Member States and supported the same view.

It is worth examining the Advocate General's opinion on the German court's enquiries posed to the CJEU.

As to the first question on whether the Deposit Guarantee Directive is directly applicable, Advocate General C. Stix-Hackl noted the following: "*[t]he [CJEU] has consistently held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State in proceedings before the national courts if that State has failed to implement the directive in national law by the end of the period prescribed or has failed to implement the directive correctly*".[850] The Advocate General then continued and examined whether Article 3(1) to 3(5) of Directive 94/19 meets the criteria of being "unconditional and sufficiently precise". First, the Advocate General reinstated the case-law of CJEU noting that "*a provision of a directive is unconditional if it lays down an obligation which is neither subject to any material condition nor, in order to be implemented or effective, requires the adoption of any measure lying within the discretion of the Community institutions or the Member States*".[851] As regards the element of "sufficiently precise", the Advocate General highlighted that "*a provision of a directive is sufficiently precise if it generally and unambiguously meets certain requirements relating to material content and to the persons covered. The precision of both the material scope of a provision of a directive and the category of persons to whom it applies depends on the completeness of the rules in question. Such 'legal completeness' is acknowledged by*

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in the securities field, OJ L 141, 11.6.1993, p. 27–46; Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 375, 31.12.1985, p. 3–18; Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis, OJ L 110, 28.4.1992, p. 52–58; Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions, OJ L 141, 11.6.1993, p. 1–26; Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJ L 141, 11.6.1993, p. 27–46

[850] AG Opinion of 25 November 2003, *Peter Paul and Others*, C-222/02, ECLI:EU:C:2003:637, para. 60.

[851] *Ibid*, para. 72.

the Court if the relevant provisions can be applied without the Member States adopting further implementing measures”.[852]

In light of these, C. Stix-Hackl correctly concluded that the provisions of Directive 94/19 can neither be classified as unconditional nor as sufficiently precise as they lay down powers and obligation of the credit institutions, the supervisory authorities and the guarantee scheme. In this context, Directive 94/19 allowed the supervisory authorities a discretionary leeway in taking “*appropriate [supervisory] measures*”[853] in the event that a credit institution has failed to join the deposit guarantee scheme. The interest of the credit institutions and of the financial system as a whole, and not only the interests of depositors are to be taken into account when the supervisory authority decides on the supervisory action to be taken. This stance is depicted in the very succinct statement of the Advocate General according to which: “*a comprehensive weighing of many interests must take place, in which the interests of particular depositors may from time to time conflict with those of other depositors or particular public interests. The protection of interests other than those of depositors, such as the interest in a functioning banking system, even precludes, as a matter of principle, the taking into consideration of the interests of depositors alone*”.[854]

The Advocate General concluded that Article 3 paragraphs (2) to (5) of Directive 94/19 *“do not confer on depositors the right to require that the competent authorities avail themselves of the measures mentioned”* in the said paragraphs of Article 3. Hence, under Directive 94/19, depositors cannot claim compensation for damages arising from supervisory misconduct, beyond the amount of EUR 20,000 specified in Article 7(1) of the said directive.

As regards the second question of the *Francovich* state liability, C. Stix-Hackl noted that the provisions of Article 3(2) to (5) of Directive 94/19 lay down rules regarding the relationship between credit institutions and supervisory authorities and the measures the latter can adopt if the former fail to join the deposit guarantee scheme. Nonetheless, these provisions do not refer to depositors and hence do not grant to them any rights. The Advocate General continued saying that adopting the opposite interpretation would arguably result in the supervisory activity of the competent authorities being impeded as they might get exposed to substantial claims for compensation.[855]

The Advocate General was of the same view also for the other directives invoked by the applicants regarding the supervisory authority’s liability. With regard especially to the First and Second Banking Directives, although they made an explicit reference to the protection of the depositors, this did not suffice to conclude that the directives conferred rights to depositors to require certain supervisory actions to be taken by the supervisor.

[852] *Ibid*, para. 73.

[853] *Ibid*, para. 79.

[854] *Ibid*, para. 76.

[855] *Ibid*, para. 96.

Consequently, should the supervisor fail to adopt such measures and this failure led to the depositors to incur damage, the latter cannot rely on unconditional and sufficiently precise provisions in these directives to claim compensation before the national courts.[856]

Arguably, this view raises certain doubts given that the protection of depositors was explicitly referred to in the above directives. On this point, the Advocate General noted that such reference is to be found only in the recitals of the directives and relates to the freedom of establishment and freedom to provide services without being reflected in substantive provisions of the First and Second Banking Directives.[857]

The CJEU in its judgment followed the arguments of the Advocate General. As to the first question,[858] the CJEU concluded that the provisions of Article 3(2) to (5) entitles the depositors to compensation in the case the bank fails and undergoes insolvency proceedings, however, they do not confer on depositors the right to require the supervisory authorities to take supervisory measures in their interest. Accordingly, the depositors do not enjoy the right to seek compensation for damage they suffered due to the fact that the supervisory authorities failed to take such measures.

The CJEU supported its view in light of recital 24 of Directive 94/19 which explicitly states that: "[…] *this Directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized*".

Thus, the CJEU concluded that in cases in which a compensation mechanism is in place, the Member States can enact legislation, including the legislation for setting up the deposit guarantee scheme, which explicitly provides that the financial supervisory authorities operate solely in the public interest, thereby excluding their liability towards aggrieved depositors who incurred losses on account of defective supervision. This conclusion will be closely scrutinise in Chapter 5 which will focus on *inter alia* the legal and policy dimension of the compensatory immunity afforded to financial authorities.

Equally, the CJEU held that neither the other directives on banking prudential supervision invoked by the applicants confer rights on depositors that the supervisory authorities take supervisory measures in their interest. The CJEU, following the Advocate General's view, noted that "*it does not necessarily follow* […] *from the fact that the objectives pursued by those directives also include the protection of depositors that those directives seek to*

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[856] *Ibid*, paras. 121-127.

[857] *Ibid*, para. 123.

[858] i.e., whether depositors enjoy an individual right under Directive 94/19/EC to require the supervisory authority to adopt the supervisory measures enshrined in Article 3(2) to (5) of the said Directive in their interest.

confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities".[859]

The objectives of the said directives are to make "*possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision*".[860] Hence, the harmonisation is limited to what is "*essential, necessary and sufficient to secure the mutual recognition of authorisations and of prudential supervision systems*".[861] As a result, the rules on the non-contractual liability of Member States is no harmonised neither should it be in light of the minimum harmonisation requirement set forth by said directives. The CJEU added that such harmonisation of liability rules is neither required for the protection of depositors since Directive 94/19/EC only provides for a "minimal protection of depositors" when their deposits become unavailable without differentiating their protection based on whether the unavailability is due to supervisory failure or another reason.

Another issue that the CJEU addressed in *Peter Paul* case was whether depositors could hold the State liable for the loss of their deposits in the event the supervisory authority did not perform its duties correctly. The CJEU expressly excluded such possibility on the ground that the directives under scrutiny did not intend to confer rights on individuals.

The CJEU judgment in Peter Paul seems to eradicate depositors' chances to get compensation for damages attributable to defective supervision. The reluctance of the CJEU to recognise that the relevant EU law provisions in banking supervision confer rights to individuals is probably explained as an attempt of the court to protect financial authorities against litigation floodgates and excessive damages claims which may ensue adverse fiscal budgetary consequences. In any case, as a preliminary remark, it is noted that *Peter Paul* does not seem to constitute any longer good law and in any case, it only concerned the deposit guarantee directive. There are no CJEU's cases on EU legislation concerning the other banking supervision legislation or the capital markets laws and it cannot be excluded that the CJEU will deviate from the *Peter Paul* judgment in a future case.

1.2. *Three Rivers* case

The *Three Rivers* case of 2002 in the UK, back then still within the European Union borders, gave rise to similar questions as the ones addressed by the CJEU in *Peter Paul.* More specifically, the House of Lord (acting then as the supreme court of the United

[859] Judgment of the Court (Full Court) of 12 October 2004, *Peter Paul and Others*, C-222/02, ECLI:EU:C:2004:606 ("*Peter Paul* judgment"), para. 40.

[860] *Ibid,* para. 41.

[861] *Ibid,* para. 40.

[861] *Ibid,* para. 42.

Kingdom[862]) was called to examine the question whether EU banking law can be interpreted in such a way so as to confer rights to individual depositors.

Before turning to the analysis of the case, it is necessary to briefly refer to the liability regime in the UK. The UK legislation[863] grants statutory immunity to the Financial Conduct Authority (FCA) from claims for alleged damages it caused during the performance of its duties.[864] However, said statutory immunity does not extend to cases in which the FCA carried out its functions in bad faith. In the latter case of bad faith, a claimant will have available in its common law toolkit the tort of misfeasance in public office.[865] The statutory immunity of the FCA is further confined by the Human Rights Act (HRA)1998,[866] in the sense that the FCA will not enjoy statutory immunity if it violates the HRA.[867]

The leading authority for the tort of misfeasance in public office[868] is the 2001 judgment of the House of Lords in the *Three Rivers District Council v. Governor and Company of The Bank of England*.[869]

The case gave rise to a series of court judgments and concerned a tort claim against the Bank of England (BoE) where the applicants argued that the BoE should be held liable for the tort of misfeasance in public office. The claimants alleged that the BoE should not have granted a license to the Bank of Credit and Commerce International SA ('BCCI'). The events that gave rise to the case can be summarised as follows.[870]

BCCI was a Luxembourgish credit institution incorporated in September 1972. In November of the same year, BCCI commenced its deposit-taking activities in the UK *via*

[862] Following the UK Constitutional Reform Act of 2005, the House of Lords ceased to act as judicial authority and this function was conferred to the newly established UK Supreme Court.

[863] UK Financial Services Act 1986, as in force.

[864] McMeel (2022), p. 289.

[865] *Ibid*, p. 290.

[866] The UK Human Rights Act 1998 came into force in 2000 and incorporated in the UK legal order, with a delay of nearly 50 years, the ECHR of 1950.

[867] McMeel (2022), p. 291.

[868] *Ibid,* p. 302, points to the Law Commission, *Misconduct in Public Office* (para 2.93) which underscores the difficulty in succeeding in the tort of misfeasance in public office: "*Misfeasance in public office has limited application given its restriction solely to public office holders, and hight threshold requirement of bad faith. As such, the number of successful claims is low, and the exact boundaries of the tort are not fully developed in the case law".*

[869] *Three Rivers District Council v. Governor and Company of The Bank of England* [2001] UKHL 16 ("*Three Rivers 2001* judgment");

[870] The summary of the facts is based on the https://publications.parliament.uk/pa/ld200001/ldjudgmt/jd010322/three-1.htm

establishing an office, which in 1974 was transformed into a subsidiary of the Luxembourgish entity which was subject to the supervision of the Luxembourg Banking Commission ("LBC").

Until 1979, statutory provisions for the banking supervision in the UK were not in place. Instead, BoE had been exercising informal powers in relation to banking supervision. The statutory landscape radically changed with the enactment of the UK Banking Act 1979 which incorporate the First Council Banking Co-ordination Directive (77/780/EEC). The Banking Act 1979, as amended by the Banking Act 1987, laid down provisions for the authorisation of credit institutions by envisaging that if a credit institution has its *principal place of business* outside the UK, then the BoE can consider the criteria referring to the management of the business and the prudence with which the business of that credit institution is conducted to be fulfilled provided that BoE had obtained information from the home supervisory authority that it is satisfied with respect to the above-mentioned criteria and in addition the BoE is satisfied as to the nature and scope of the supervision exercised by the home supervisory authority.

In 1980, the BoE rejected the relevant application of BCCI to be authorised to operate as a bank, but rather it granted to BCCI a license to operate as a deposit-taking institution. The BoE relied on the assessment of LBC, even though the *principal place of business* of BCCI was in the UK. Eventually, BoE withdrew the BCCI's license in July 1991. In the meantime, BoE did not take any action although concerns had been raised as to the viability of BCCI and despite the fact that the competent supervisory authority was BoE and not the Luxembourgish authority.

The result of the licence withdrawal was summarised by Lord Steyn as following: "Thousands of depositors in the United Kingdom and elsewhere suffered substantial losses. The principal cause of the collapse of BCCI was fraud on a vast scale perpetrated at a senior level in BCCI."[871] The claimants sought compensation on the basis of a violation of the First Banking Directive and on the common law tort of misfeasance in public office.[872]

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[871] *Three Rivers 2001* judgment, para. 188. According to McMeel (2022), p. 303: *"[s]ome 6,000 UK depositors were the claimants, in partnership with the liquidators of BCCI, seeking damages in the sum of £550 million plus interest*".

[872] Lord Steyn provided a comprehensive analysis of the contours of this tort in the *Three Rivers 2001* judgment, paras. 190-91: "*The coherent development of the law requires the House to consider the place of the tort of misfeasance in public office against the general scheme of the law of tort. It is well established that individuals in the position of the depositors cannot maintain an action for compensation for losses they suffered as a result of the Bank [of England]'s breach of statutory duties. Judicial review is regarded as an adequate remedy. Similarly, persons in the position of the depositors cannot sue the Bank [of England] for losses resulting from the negligent licensing, supervision or failure to withdraw a licence. The availability of the tort of misfeasance in public office has been said to be one of the reasons justifying the non-actionability of a claim in negligence where there is an act of maladministration. It is also established that an ultra vires act will not per se give rise to liability in tort. […] The tort of misfeasance in public office is an exception to "the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable". The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes*".

In the first judgment,[873] delivered on 18 May 2000, the House of Lords held that the First Banking Directive[874] did not confer on individual the right to claim damages against the BoE. Interestingly, and perhaps not surprisingly for the UK courts, the House of Lords did not make a reference for a preliminary ruling to the CJEU as it considered the First Banking Directive to be an *acte clair*.

The House of Lords then, in its second judgment,[875] examined the admissibility of the claim in order to allow a full trial on the merits on the case. In this context, it held that BoE could be sued for misfeasance in public office by various depositors who had lost suffered losses following the collapse of BCCI, and these depositors' claims could not be stuck out as it could not be said that their claim had no real prospect of success.

Nevertheless, in view of the "uphill struggle"[876] to prove the misfeasance in public office, the claimants eventually withdrew from the court proceedings and the trial came to an end with a decision being reached on the merits of the case.[877] It was not sufficient for the claimants to prove negligence on the part of BoE, even if such negligence was proved to be gross. Thus, the had to establish "some intentional or reckless impropriety"[878] which was extremely difficult, almost "implausible".[879] The case thus was discontinued but, in the judgment, awarding the litigation costs in favour of BoE, the trial judge, Tomlinson J, interestingly mentioned the following: [880]

> *I should also make it plain that it should not be thought that as a result of my consideration of the evidence in this case I have concluded that the Bank [of England] is beyond criticism of the manner in which it discharged such duties as were cast upon it in consequence of its permitting BCCI SA to carry on business within the UK. It was not however my task to identify matters in respect of which the Bank [of England] could be criticised. It was not for me to identify*

[873] *Three Rivers District Council and Others (Original Appellants and Cross-Respondents) v. Governor and Company of The Bank of England (Original Respondents and Cross-Appellants)* [2003] 2 AC 1.

[874] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ L 322, 17.12.1977, p. 30–37.

[875] [2001] UKHL 16.

[876] Nolan (2013), p. 206.

[877] *Three Rivers District Council v Governor and Company of the Bank of England* [2006] EWHC 816 (Comm), (2006) 5 Costs LR 714 (Tomlinson J: on the costs consequences of discontinuance). See Zuckerman (2006) who suggests the defendants' legal costs were some £80 million.

[878] *Three Rivers 2001* judgment, para. 179 (Lord Millett).

[879] *Three Rivers 2001* judgment, para. 182 (Lord Hobhouse).

[880] *Three Rivers District Council v Governor and Company of the Bank of England* [2006] EWHC 816 (Comm), (2006) 5 Costs LR 714, para. 136.

> *areas where the Bank [of England] might arguably have been complacent or in respect of which it may have made errors of judgment or been negligent. That was the task of Lord Justice Bingham and he expressed various criticisms of the Bank [of England] in his report. It was my task to determine whether the Bank [of England] had as alleged by the liquidators approached its duties in a manner which amounted to the tort of misfeasance in public office. This is a very different inquiry. The liquidators alleged that the Bank [of England] by 22 of its officials had acted deliberately unlawfully and in bad faith and that at least 42 of its officials had employed widespread dishonesty in order to ensure that this conduct could take place and that it would go undetected. In this judgment I have sought briefly to explain why in my view the Bank [of England]'s officials should be exonerated of the grave allegations made against them.*

From the *Three Rivers* saga two primary conclusions can be drawn. First, back then EU banking legislation was construed in such a way as not to confer rights to individuals. The ruling of the House of Lords was later 'endorsed' by the CJEU in *Paul Peter* case. It is noted again that *Peter Paul* judgment should be read in the context of an early, 'pre-mature' banking legislation era and should no longer constitute good law. The second conclusion is that the non-contractual liability criteria in the UK follow the stringent approach also to be found in many other jurisdictions which reflects an deep reluctance of the courts to find the financial authorities liable for wrongdoings in the course of discharging their functions.

1.3. Nikolay Kantarev v. Balgarska Narodna Banka case

A similar case but certainly distinguishable from *Peter Paul* was recently brough before the CJEU involving *inter alia* the interpretation of Directive 94/19 on deposit guarantee schemes. The CJEU's ruling in *Kanterev* judgment[881] is of primary interest as it concerns inter alia the Francovich liability for central banks and supervisory authorities for incorrect transposition of EU law.

The case emerged from the reference for a preliminary ruling from the Bulgarian administrative court in Sofia to the CJEU in relation to proceedings against the Bulgarian National Bank (BNB) for damage sustained by depositors owning to late payment of their deposits from the guarantee scheme when the Bulgarian bank Korporativna Targovska Banka suffered a "massive bank run"[882] which ended up in its license been withdrawn. The late payment was due to an erroneous transposition of the Directive 94/19 into Bulgarian law. The latter departed from Directive 94/19 as it required that deposits that became unavailable would be paid to the respective depositors (up to the amount guaranteed) only

[881] Judgment of the Court (Fifth Chamber) of 4 October 2018, *Nikolay Kantarev v. Balgarska Naronda Banka*, C-57/16, ECLI:EU:C:2018:807.

[882] See European Banking Authority, Recommendation to the Bulgarian National Bank and Bulgarian Deposit Insurance Fund on action necessary to comply with Directive 94/19/EC, EBA/REC/2014/02, 17 October 2014.

once the competent authority withdraws the banking license of the credit institution concerned.

One set of questions posed by the referring Bulgarian court in *Kantarev* was whether national law could depart from Directive 94/19 in relation to when the deposits should become 'unavailable' and thus paid to the depositors. As regards this point, the incorrect transposition of the EU Directive, according to the CJEU, constitutes a 'sufficiently serious breach' of EU law. The court emphasised that the unavailability of deposits must be determined within a very short period, without waiting for the necessary conditions for initiating insolvency proceedings or withdrawing a banking licence to be satisfied. Besides, withdrawal of a credit institution's banking licence may, inter alia, result from failure to join a deposit-guarantee fund without, however, meaning that the deposits of that institution have become unavailable.[883]

Then the CJEU turned to examine a second set of questions which relates to whether Directive 94/19 must be interpreted as having direct effect and conferring on depositors the right to bring an action for damages for harm allegedly sustained due to late reimbursement of deposits, on the ground of State liability, for a breach of EU law against the public authority (such as the BNB) responsible for determining whether the deposits of a credit institution are unavailable. If so, the Bulgarian court further inquired for a clarification on the concept of a 'sufficiently serious' breach within the meaning of EU law.[884]

In addressing this set of questions, the CJEU reiterated the conditions for establishing the non-contractual Francovich liability and held that it is for the referring court to ascertain whether these conditions are met. However, it clarified two important aspects.

First, the CJEU explained in what terms *Kantarev* case is different from *Peter Paul* and thus why the two judgments could not be seen as mutually contradictory. The latter concerned whether a Member State could preclude compensation of aggrieved parties for damages on account of defective supervision on the ground that the relevant banking supervision provisions have been enacted to serve the 'public interest'. The CJEU gave a positive answer to this question by ruling that Directive 94/19 "*does not preclude [a Member State from adopting] national legislation which limits individuals from claiming damages for harm sustained by insufficient or deficient supervision on the part of the national authority supervising credit institutions or from pursuing State liability under EU law on the ground that those responsibilities of supervision are fulfilled in the general interest*" provided that said Member States has in place a guarantee scheme. On the

[883] *Kantarev* judgment, para. 52-53.

[884] *Kantarev* judgment, para. 88.

opposite, in the *Kantarev* case, the central issue was *Francovich* liability for incorrect transposition of Directive 94/19.[885]

Second, the CJEU elaborated on the concept of 'sufficiently serious breach' of EU law by stating that:

> *As regards the condition in respect of there being a sufficiently serious breach of EU law, it should be noted that, according to the Court's case-law, such a breach implies a manifest and grave disregard by the Member State for the limits set on its discretion. The factors which may be taken into consideration in that regard include, inter alia, the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether any error of law was excusable or inexcusable, whether the infringement and the damage caused was intentional or involuntary, or the fact that the position taken by an EU institution may have contributed towards the omission, adoption or retention of national measures or practices contrary to EU law (see, to that effect, judgment of 5 March 1996, Brasserie du pêcheurandFactortame, C-46/93 and C-48/93, EU:C:1996:79, paragraph 56)*

In light of this, the CJEU underlined that the Law on the Bulgarian Central Bank subjects the right to damages to an *intention* of the part of the BNB to cause harm. This requirement under Bulgarian law, according to the CJEU, is additional to that of a sufficiently serious breach of EU law and thus it must be set aside.

Furthermore, the CJEU noted the condition under Bulgarian law requiring the applicant to provide a "proof of wrongdoing" on the part of BNB in order to successfully claim damages. The CJEU held that it is for the Bulgarian court to assess whether this condition goes beyond the 'sufficiently serious breach' test of EU law, by highlighting that:[886]

> *the Court has already held that, while certain objective and subjective factors connected with the concept of 'fault' under a national legal system may be relevant, in the light of the case-law referred to in paragraph 105 above, for the purpose of determining whether or not a given breach of EU law is sufficiently serious, the obligation to make reparation for loss or damage caused to individuals cannot depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of EU law [...].*

[885] The AG Kokott in her opinion (paras. 78-85) illustrated the difference in the following words: "Mr Kantarev does not consider the supervisory authorities responsible for the loss of his deposit, but for failure to comply with the compensation arrangements provided for in Directive 94/19." (Opinion AG, *Kantarev*, C-571/16, ECLI:EU:C:2018:412).

[886] *Kantarev* judgment, paras. 127-128.

Effectively, Member States when setting the national conditions for establishing non-contractual liability are free to use the concept of 'fault' as long as such concept does not go beyond the concept of sufficiently serious breach.[887]

1.4. Icesave saga

In a similar vein as the *Peter Paul* and *Three Rivers* cases, the court of the European Free Trade Association (EFTA Court) was called to assess Directive 94/19 in its *EFTA Supervisory Authority v Iceland* judgment,[888] known as the *Icesave* case. The facts that gave rise to the *Icesave* case have its roots in the financial crisis of 2008.

In 2006, the Icelandic bank Landsbanki established a branch in the UK which provided online saving accounts offering remarkably high interest rates, whereas in 2008 established a deposit branch in the Netherlands offering again very high interest rates (Icesave accounts). Both branches attracted a great number of depositors in both these countries. However, in April 2008, as a result of the financial crisis, both branches suffered extensive deposit runs. Shortly after, on 6 October 2008 the depositors lost access to their accounts both in the UK and the Netherlands, whereas on 7 October 2008, the Icelandic Financial Supervisory Authority (IFSA) put the bank under winding-up.

Although Iceland had transposed, on 1 January 2000, into its national law Directive 94/19 through the enactment of Act No 98/1999 on a Deposit Guarantee and Investor Compensation Scheme (SGICS), and thus the SGICS was obliged to pay to the depositors their lost deposits up to the guaranteed amount, no such payments took place. The UK and Netherlands authorities arranged for a pay out of retail depositors from their own deposit-guarantee schemes. Such depositors were repaid in full by the UK authorities, whereas the Dutch authorities repaid up to EUR 100,000. Immediately after the payments, both the British and Dutch governments requested reimbursement from Iceland. Despite the willingness of the then Icelandic government to repay and the relevant negotiations that took place, the Icelandic people demanded a referendum on whether Iceland was to repay the deposits or not. Two referendums were held and in both of them, the Icelandic public unsurprisingly rejected the option to reimburse the UK and the Netherlands.

Following this outcome and a series of other events, eventually the EFTA Surveillance Authority (ESA) submitted an application to the EFTA Court requesting the latter to adjudicate on whether Iceland had failed to comply with its obligations under Directive 94/19. The EFTA dismissed the application and provided great relief to the Icelandic economy. The dismissal was premised *inter alia* on the following ground.[889]

The EFTA court first held that Directive 94/19 did not lay down an obligation on the State and its authorities to ensure compensation if a deposit guarantee scheme is unable to cope

[887] Busch (2022), p. 125.

[888] Case E-16/11, *EFTA Surveillance Authority v Iceland*, Judgment of 28 January 2013 ("*Icesave* judgment").

[889] This ground is pertinent to be analysed for the purposes of this thesis.

with its obligations in the event of a systemic crisis.[890] More precisely, "recital 24 of the Directive 94/19 states that liability of a State and its competent authorities in respect of depositors is precluded 'if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized'." [891] In light of the wording of recital 24, the EFTA court deduced that states are not encumbered with an obligation of result to ensure compensation for aggrieved depositors in the Landsbanki branches in the UK and the Netherlands in a systemic crisis of the magnitude experienced in Iceland. Effectively, the EFTA court concluded that Iceland (and thus EEA states) were not legally responsible under the Directive 94/19 for non-payment of deposits in case of an enormous event.

Overall, the *Icesave* case is a primal example of a court casting a protective net around a supervisory authority and accordingly around a state to shield the latter from immense budgetary consequences. The case also demonstrates the fine balances required to be made when weighting of various conflicting interest in banking supervision.[892]

1.5. Banco Popular

The *Banco Popular* case holds a prominent place on the canvas of judgments relating *inter alia* to the non-contractual liability of financial authorities and in particular of the SRB.

Banco Popular was a credit institution established in 1926. According to the SSMR rules, Banco Popular was classified as a significant credit institution and thus was placed under the direct prudential supervision of the ECB. Despite its considerable growth and territorial expansion, Banco Popular experienced a sudden recession in 2016 geared by the piled up NPLs, the decreasing credit demand and the deposit runs fuelled by the rating downgrades. Faced with imminent collapse,[893] Banco Popular was declared FOLTF by the ECB on June 06, 2017 and the following day, on June 07, 2017, the SRB adopted a resolution scheme by virtue of which it places Banco Popular under resolution according to the EU resolution framework. The SRB's decision reads as follows:

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[890] *Icesave* judgment, para. 144.

[891] *Ibid*, para. 172.

[892] See Athanassiou (2011), pp. 30-31, who notes that the Icelandic supervisory authority "justified [its] decision to take no action until October 2008, when Icesave went bankrupt, by invoking [its] concern for the preservation of the stability of the financial system. What was a legitimate decision, had significant adverse effects for depositors". See also the European Consumers' Organisation, Financial Supervision in Europe: Consumer perspective, Ref.: X/054/2009 - 16/07/09 BEUC.

[893] Few weeks before the collapse of the bank the deposits outflow stood at around EUR 18 billion, which was said to be equivalent to almost one quarter of the total deposits held by Banco Popular. sources: https://www.reuters.com/article/us-popular-m-a-deposits/deposit-outflow-from-popular-around-18-billion-euros-in-recent-weeks-sources-idUSKBN18Y1EU, https://www.reuters.com/article/us-popular-m-a-santander-idUSKBN18Y0IU.

> *the SRB adopted a resolution scheme providing for the application of the sale of business tool to the Institution, having regard to the results of the valuation of the Institution carried out in accordance with Article 20 SRMR. Under the resolution scheme, following a marketing process, the SRB has decided to transfer Banco Popular to Banco Santander S.A. The SRB decided to exercise the power of write-down and conversion of capital instruments prior to the transfer, to address the shortfall in the value of the Institution. In particular, all the existing shares (Common Equity Tier 1), and the Additional Tier 1 instruments were written down, while the Tier 2 instruments were converted into new shares, which were transferred to Banco Santander S.A. for the price of EUR 1.*[894]

The resolution of Banco Popular led to a strand of litigation before the national and Union courts, with approximately 100 applications being lodged before the CJEU by natural or legal persons who owned capital instruments in Banco Popular. Five out of these 100 cases, namely cases T-481/17, T-510/17, T-523/17, T-570/17 and T-628/17, were designated as 'test cases' and were adjudicated by the General Court. The applicants sought the annulment of the resolution scheme adopted by the SRB as well as compensation for the losses they suffered on account of the application of said resolution scheme. The General Court dismissed all five cases, and its judgments were upheld on appeal by the ECJ.

The pilot cases provided the CJEU with the opportunity to adjudicate on the lawfulness of SRB's decisions. Although the cases also offered fertile ground for the CJEU to set the liability standard for the non-contractual liability of the SRB, the court did not disclose such standard. Yet, the cases are worth mentioning as they reveal the extent of the court's review and the high threshold set by the CJEU in order to find the SRB's conduct to constitute a manifest error, which could bear a relevant for the action for damages as well.

In relation to the scope of its review, the General Court (rather expectedly) clarified that it carries out a limited review since the SRB is required to adopt decisions involving highly complex economic and technical assessments. Further, the General Court considered that when it adjudicates upon complex assessments such as those made by the SRB in the Banco Popular case, it must assess whether the SRB relied on evidence which is factually accurate, reliable and consistent, whereas at the same time the court must review whether that evidence constitutes all the relevant information which must be taken into account in order to assess a complex situation and whether that information is capable of supporting the conclusions drawn from it.[895] According to the General Court, in order to successfully request the annulment of the resolution scheme, the applicants have to demonstrate that the SRB acted unlawfully, namely that it committed a manifest error. Pursuant to the General Court, in order to ascertain that such a manifest error exists and thus decide to annul the SRB's resolution scheme, the applicants must adduce such evidence which sufficiently

[894] Summary of the effects of the resolution action SRB Press Release dated 07 June 2017, available at: https://www.srb.europa.eu/en/node/315.

[895] Judgment of the General Court (Third Chamber, Extended Composition) of 1 June 2022, *Algebris (UK) Ltd v European Commission*, T-570/17, ECLI:EU:T:2022:314.

demonstrate that factual assessments used in that scheme by the SRB are implausible.[896] Admittedly, the threshold of implausibility is almost impossible to be reached, effectively rendering the SRB's decisions immune to an action for annulment.

Turning to the arguments of the applicants regarding the alleged violation of their right to property arising from the application of the resolution scheme, the General Court concluded that it cannot be considered that the write down and conversion of Banco Popular's capital instruments constituted an excessive and intolerable interference, impairing the very substance of the shareholders' right to property, but instead, in view of the specific circumstances of the cases, such limitation should be regarded as a justified and proportionate restriction of their right to property. The General Court rejected the applicants' claims without an elaborative proportionality assessment and with avoiding to articulate the liability standard applicable for the non-contractual liability of the SRB. Given the threshold of implausibility for the action for annulment, one could expect that the liability standard is equally elevated.

The General Court finally noted that, even if there was an unlawful contact on the part of the SRB (and the EU Commission), the applicants failed to prove any causal link between this unlawful conduct and the Banco Popular's liquidity crisis, and thus with the alleged damage.

2. Liability Standard of Greek financial authorities

The liability standard enshrined in Articles 105-106 is a no-fault standard, i.e., the liability of the public authorities does not depend on a fault in their actions (negligence or wilful misconduct), but the simple violation of law and the occurrence of damage suffice to establish their non-contractual liability.[897] Should the courts find that a public authority is liable under Articles 105-106, the latter is under an obligation to compensate in full the aggrieved party.

Arguably, this liability standard envisaged in Articles 105-106 seems to be rigorous to be applied to the non-contractual liability of the financial authorities given the complexity of their duties as well as the policy reasons which justify, if not warrant, that the liability of financial authorities be limited.

In 2014, the Greek Conseil d' Etat addressed these considerations in a significant pilot judgment.[898] The case was brought before the court by aggrieved individuals who suffered damages from the failure of a Greek insurance undertaking. They claimed that had the Greek insurance sector supervisor discharged its supervisory duties diligently, they would not have incurred losses.

[896] *Ibid*, para 109.

[897] In Greek αντικειμενική ευθύνη

[898] Greek Council of State decision no. 3783/2014 (Aspis Pronoia case).

For reasons of completeness, it is noted that until 2010 the Greek supervisory model was premised on the sector approach whereby "the BoG was responsible for micro-prudential supervision and consumer protection regarding credit, financial and electronic money institutions; the HCMC was vested with the prudential supervision and conduct of business supervision of investment firms, mutual fund management companies, portfolio investment companies; real estate investment companies and investment intermediation companies; and finally, insurance companies' micro-prudential supervision was falling under the competences of the Supervision Committee of Private Insurance (SCPI)[899]".[900] In 2010, the Greek legislator decided to switch to a supervisory model which follows a modified sectoral approach. One of the measures adopted towards this switch was the abolishment of the SCPI and the transfer of its responsibilities *en bloc* to the BoG.[901] By operation of the law, the Greek state subrogated the abolished SCPI to the latter's rights and obligations. As a result, the Greek state was the respondent in the court proceedings regarding the action in damages brought by the aggrieved individuals on the basis on the non-contractual liability of SCPI.

In this pilot judgment, the Conseil d' Etat laid down interpretative rules of Articles 105-106 when they are to be applied to the non-contractual liability of the Greek financial authorities, premising its approach on the rules of the *Francovich* liability doctrine. The court's ruling is summarised in the paragraphs that follow.

First, the Conseil d' Etat examined whether the relevant Greek legislation on insurance services supervision[902] intended to protect the rights of individuals or it was only set to serve the public interest. This element was important as Articles 105-106 explicitly exclude from their scope of application the breach of legislation which is enacted for the purpose to benefit the public interest. It is clear that in such cases the non-contractual liability of the public authorities is excluded. In answering this fundamental point, the Conseil d' Etat concluded that the purpose of the said legislation is not only to serve the public interest, but also to protect the rights of the insurance services recipients. Consequently, the latter are entitled to bring proceedings against the supervisor should their rights be breached on account of defective supervision. The state's attorneys argued that this interpretation is against the *Peter Paul* judgment[903] in which the CJEU did not recognise that the Directive on the Deposit Guarantee Scheme was intended to protect the rights of individuals. The

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[899] Greek Law 3229/2004 vested the Supervision Committee of Private Insurance with the supervision of the insurance companies, which until then was exercised by the Ministry of Commerce.

[900] Gortsos & Anastopoulou (2022).

[901] By virtue of Article 1 of Greek Law 3867/2010. The other measure adopted towards the modified sectoral approach was based on Article 59(1) of Greek Law 3606/2007 which provided that "the duties for the protection of consumers using investment services offered by credit institutions were transferred from the BoG to the HCMC". See Gortsos & Anastopoulou (2022).

[902] Greek Law 3229/2004.

[903] Judgment of the Court (Full Court) of 12 October 2004, *Peter Paul and Others*, C-222/02, ECLI:EU:C:2004:606.

Conseil d' Etat rejected this argument on the basis that in the *Peter Paul* case the legislation under the CJEU's scrutiny pertained to the deposit guarantee schemes for banks, whereas at the same time in its judgment the CJEU did not exclude the possibility that national laws do confer rights to individuals with the effect that latter enjoy *locus standi* before the national judicial *fora* claiming compensation arising from supervisory failures.

Having established that the individuals enjoy *locus standi,* the Conseil d' Etat proceeded with examining the pertinent insurance legislation. It pointed that the Greek legal framework was providing for a guarantee mechanism in the life insurance sector following the White Paper of 12.07.2010 of the EU Commission on the Insurance Guarantee Schemes.[904] The guarantee mechanism was funded by the contributions of the insurance undertakings and their policyholders and it was to be triggered in case of the financial collapse of an insurance undertaking based on a two-step plan. As a first step once an insurance undertaking has failed, a successor entity was to be sought to subrogate the former in the life insurance portfolio. Further, in the first step, the Private Life Insurance Guarantee Fund (PLIGF)[905] undertook to cover the insurance claims of the policyholders. The law provided for a maximum threshold of covering such claims of EUR 30,000 per policyholder of life insurance contracts and EUR 60,000 for death or permanent disability compensations. The second step in the process involved the payment of the insurance claims had the PLIGF not covered them in the first step.

Importantly, the Conseil d' Etat interpreted the legal framework and held that the funds of this guarantee mechanism were to be directed for the covering of damages arising in cases in which an insurance undertaking goes insolvent or its license is revoked by the competent public authority. Hence, the activation of the guarantee mechanism is universal in the sense that the funds are to be channelled in compensating aggrieved parties irrespective of whether the insurance undertaking's failure was due to "intentional or erroneous actions and omissions of the [undertaking's] managers, supervisory failure or external factors e.g. unforeseen and large-scale financial crises".[906]

Then, the Conseil d' Etat turned to the interpretation of Articles 105-106 and their application in cases of the non-contractual liability of the Greek financial authorities. After recalling that Articles 105-106 establish a no-fault liability standard and require full compensation, it highlighted that these rules are not appropriate to be applied in cases of non-contractual liability of the financial authorities. The court considered that these rules would be very stringent in view of the intricacy and peculiar nature of the supervisory and resolution duties. The court reiterated that supervisory and resolution decisions encompass a high degree of complexity and difficulty mainly owning to the complicated economic and technical choices that the financial authorities should make, as well as to the

[904] European Commission, White Paper on Insurance Guarantee Schemes, 12.07.2010, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0370&from=EN.

[905] Established by Greek Law 3867/2010.

[906] Gortsos & Anastopoulou (2022).

challenging exercise of appropriately balancing the various interests involved in which case it cannot be ruled out that some damage may be caused to individuals for the greater good of protecting the stability of the financial system. The court equally emphasised that the financial authorities enjoy not only extensive powers, but also a wide degree of discretion as regards their choices. All these elements considerably differentiate the performance of supervisory and resolution activities from the performance of activities of other public authorities.

In view of the above, arguably it is legally justifiable as well as required from a policy perspective to apply different liability rules to the non-contractual liability of the financial authorities than those applicable to other public authorities. Indeed, the Conseil d' Etat concluded that the financial authorities' liability cannot be suitably addressed by the general rules of Articles 105-106. However, the court noted that since the Greek legal framework does not contain specific provisions governing the financial authorities' liability, Articles 105-106 should be applied by analogy to the latter's non-contractual liability involving though a different liability standard and a derogation from the rule of full compensation.

In particular, in its pilot judgment, the court following the CJEU's case-law on the liability standard, established two interpretative rules of Articles 105-106. As to the first rule, the court held that the non-contractual liability of the Greek financial authorities can arise "*not from any illegal act or omission in their actions, but only from a manifest and serious error thereof*"[907] in view of the complex and technical nature of the financial authorities' duties, whereas according to the second rule, the financial authorities should be liable for reasonable and not full compensation.[908] According to the Conseil d' Etat, the reasonable compensation rule is justified in view of the fact that the insurance policyholders voluntarily expose themselves to insurance risk. If they were entitled to full compensation, this "*would [...] tantamount to an impermissible substitution of the State in the place of [the] insolvent insurance undertaking*".[909]

However, the Conseil d' Etat took a step further and held that the application of Article 105-106 by analogy is excluded in the cases where there is a compensation mechanism in place which is suitable and appropriate to compensate the aggrieved parties who suffered damages from the acts or omissions of the financial authorities. In the case at hand, the PLIGF constituted such a compensation mechanism, thereby excluding the application of Articles 105-106. The court concluded its judgment by holding that the particular

[907] Gortsos & Anastopoulou (2022).

[908] This interpretative rule of reasonable compensation was followed by the Athens Administrative Court of Appeal decision no. 2410/2015 concerning aggrieved investors. It is understood that the reasonable compensation rule should also apply in case of credit institutions, investment firms and insurance undertakings seeking themselves compensation.

[909] Gortsos & Anastopoulou (2022).

compensation mechanism, i.e., the PLIGF, was in line with the Constitution, without though further reasoning on this conclusion.[910]

The pilot judgment was a breakthrough in the Greek case-law as for the first time the Counsil of State laid down interpretative rules of the legal framework on the non-contractual liability of the financial authorities. Effectively, the court limited the liability of the financial authorities in two ways. First, it set the liability standard higher than the standard for the other state organs by limiting the cases in which the financial authorities may incur liability only to those instances where the financial authorities have committed a manifest or serious error in the course of executing their supervisory or resolution duties. Second, the court limited the compensatory liability of the financial authorities by granting compensatory immunity to the financial authorities in the situation where a compensation mechanism, such as a guarantee scheme, is in place and which can serve to compensate the aggrieved third parties. The Conseil d' Etat effectively followed the rational of CJEU in the *Peter Paul* judgment and endeavoured to achieve a balance between limiting the non-contractual liability of the financial authorities and protecting the rights of individuals who has suffered losses on account of defective supervisory or resolution actions or omissions.

The pilot judgment has been followed by lower administrative courts in Greece when adjudicating on the liability of the financial authorities in cases of aggrieved investors and depositors. In the core of the thought of the Counsil of State lies the protection of public interest which commands that the financial authorities should be able to bare teeth without being exposed to an over-expanded liability regime which in turn threatens them with excessive budgetary burden.

For reasons of completeness, it should be highlighted that the compensatory immunity granted to the Greek financial authorities must be understood as being applicable only in cases where the aggrieved third parties have recourse to a compensatory mechanism and does not extend to situations where such mechanism is absent, e.g., supervised entities suing the financial authorities or investors who do not enjoy access to guarantee schemes.

It still remains questionable, though, whether such compensatory immunity is within the constitutional redlines. The wording of the Greek Constitution itself could provide some leeway in its interpretation. More specifically, the Greek State is under an obligation by the Constitution to compensate any aggrieved party for the damage the latter suffered on account of an unlawful act or omission of the State. Nevertheless, the Constitution does not explicitly set out a rule of full compensation. The full compensation rule had been introduced by the courts in their interpretation of Article 105. Therefore, in the absence of an explicit rule that a full compensation is required, it could be argued that the Constitution, in principle, tolerates a limitation of the compensation to be awarded to the party that incurred loss, as long as such limitation of the compensation amount does not become disproportionate. Chapter 5 section 2 will elaborate further on this aspect.

[910] Roxana (2013), p. 218; Prevedourou (2014), p. 411; Audikos (2014).

The liability standard of the BoG when acting in its capacity as resolution authority in the context of the SRM is clearly laid down in the statute which provides that BoG is liable for gross negligence and bad faith (*dolus*). Gross negligence is understood to involve a situation in which the financial authority did not exercise its duties with the degree of diligence that "the average prudent and conscientious person shows within his 'professional circle'".[911] [912] The Greek Supreme Civil Court[913] has described gross negligence as the situation where the behaviour under scrutiny departs from the behaviour of the average diligent person in such as "significant, unusual and particularly large" extent that shows a complete indifference on the part of the wrongdoer as to the illegal consequences of its behaviour to another person.[914] On the other hand, the concept of bad faith describes a situation where the wrongdoer "predicts the illegal and harmful result of his behaviour and seeks/intents to achieve it or simply accepts its incidence".[915]

2.1. Greek case-law on the non-contractual liability of the Bank of Greece and Hellenic Capital Markets Commission[916]

The Greek financial authorities have been faced with litigation for alleged failures in the exercise of their duties mainly in the form of actions for annulment of their decisions, whereas court cases emanating from actions for damages are fewer. Both the financial institutions and third parties have sued the supervisors for damages, yet in most of these cases the courts dismissed the applications.[917] All legal disputes between claimants and the financial supervisors are adjudicated by the courts, as the Greek legislation does not provide for extra-judicial routes for settling disputes of this nature.

This section first examines cases on banking supervision and resolution and then turns to capital markets supervision. Most of the cases precede the pilot judgment.

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[911] Gortsos & Anastopoulou (2022).

[912] In this regard see article 330(2) of the Greek Civil Code which applies to both contractual and non-contractual (tort) liability cases

[913] Areios Pagos (Greek Supreme Civil Court) decision no. 921/2009.

[914] Gortsos & Anastopoulou (2022).

[915] *Ibid.*

[916] This section is based on Gortsos & Anastopoulou (2022).

[917] Athens Court of Appeal decision no. 4172/2001 which was upheld by the Greek Cour of Cassation decision no. 503/2003 and Greek Cour of Cassation decision no. 1492/2008. It is further noted that the BoG's non-contractual liability has been examined also in cases relating to its central banking function and, in particular as regards violations in the free movement of capitals in the EU (Athens Court of Appeal decision no. 4172/2001 which was upheld by the Greek Cour of Cassation decision no. 503/2003 and Greek Cour of Cassation decision no. 1492/2008) where compensation was awarded, and in relation to foreign exchange management (Greek Cour of Cassation decision no. 214/2003 which overruled Athens Court of Appeal decision no. 5956/2001 issued on Athens Court of First Instance decision no. 3944/2000).

2.1.1. Banking Supervision

2.1.1.1. Banque Paribas

The courts have dealt with two significant cases on banking supervision and granted compensation in one of them. The first case related to the "supervision of credit" and was brought against the BoG by *Banque Paribas* operating in Greece through branches. It is the only case relating to banking supervision where the BoG compensated the plaintiff. In particular, the BoG Governor had issued an Act[918] forbidding in certain cases the sale on credit of agricultural products. The same Act also prohibited banks from issuing letters of credit guaranteeing the re-payment of agricultural products for which sale on credit was not allowed. Following an inspection, the BoG concluded that *Paribas* had violated the Governor's Act regarding the letters of credit and in 1989 sanctioned the bank by requiring it to deposit to the BoG's accounts an amount for a six-month period interest-free. The bank sued the BoG claiming that it was not in breach of the Governor's Act and that the BoG has to restore the loss sustained due to the illegal decision and subsequent sanctioning. The damage claimed was the loss of interest (loss of profit) that *Paribas* would have gained by lending to clients the amount it was obliged to deposit to the BoG.

Initially, both the Athens Administrative Court of First Instance [919] and the Athens Administrative Court of Appeal [920] dismissed the lawsuit on the grounds that the BoG's civil liability is explicitly excluded under the law[921] and that in any case the respective provisions allegedly breached are established only in the public interest (negative condition of Art. 105). However, the Greek Council of State[922] overturned the Athens Administrative Court of Appeal ruling and paved the way to compensation as it held that the legislative provisions on the supervision of bank credit[923] are also intended to confer rights to the supervised banks which are entitled to sue the BoG for damages arising from any illegal sanctions imposed to them. Subsequently, the case was brought again before the Athens Administrative Court of Appeal [924] so it examines whether there was a violation of the Governor's Act. The court concluded that the claimant did not infringe the Act, hence the sanction was illegal and in the presence of causal link the plaintiff was entitled to compensation under Art. 105.

The damages of EUR 48.534,00 were awarded which was the equivalent of the full amount requested by the plaintiff in drachmas. The BoG appealed against the latter decision in front of the Greek Council of State which, however, dismissed the appeal and upheld the

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[918] BoG Act 115/14.9.1982.

[919] Athens Administrative Court of First Instance decision no. 797/1992.

[920] Athens Administrative Court of Appeal decision no. 2354/1994.

[921] Under Greek Legislative Decree 659/1984.

[922] Greek Council of State decision no. 2938/2001.

[923] Greek Legislative Decree 588/1948 and Greek Law 1387/1950 in conjunction with Greek Law 1266/1982.

[924] Athens Administrative Court of Appeal decision no. 1896/2003.

Athens Administrative Court of Appeal's ruling by giving an end in 2010 to this long-lasting legal dispute which started in 1992.[925]

2.1.1.2. *Proton Bank*

The second case is the *Proton Bank* case. The court ruling[926] was delivered in 2019 but the case has its roots in the outbreak of the Greek sovereign crisis in 2010. Proton Bank commenced its operation in 2001 as an investment bank and in 2008 it decided to participate in the government scheme for supporting liquidity in the Greek economy, whereas in December 2009 a new shareholder acquired its control. Since then, Proton Bank increased its lending activities by 70% by granting loans to companies which – as it was proven later – were directly or indirectly controlled by the new shareholder and other businesspersons sharing common interests with him. Thus, its loan portfolio was exposed to high credit risk as the loans were granted to a single debtor.

Furthermore, the loans were not granted against adequate collateral, the funds were not used for the purposes stated in the loan agreement and in addition they were channelled to the end recipients through complex structures with the aim of misleading and deceiving the supervisor. Therefore, the lending operations of Proton Bank which its Executive Board and the new shareholder fraudulently concealed from the rest of the shareholders and the BoG were found to be in breach of the legal framework. Before the fraud was detected, the BoG had taken numerous supervisory decisions, including the appointment of an administrator, whilst at the end it decided to apply, for the first time in the Greek history, the resolution framework (with resort to the bridge bank tool, as discussed below), withdraw the bank's license and proceed with its liquidation.

The Proton Bank fraud case ended with the criminal conviction of the shareholder and the Executive Board's members. However, the other shareholders which were negatively affected by the scam sued the BoG asking compensation under Art. 105 for out-of-pocket loss and moral harm suffered from the alleged illegal acts and omissions of the BoG during the exercise of supervision in accordance with Law 3601/2007, including violation of its discretion, and in particular in the time period when the BoG had appointed the administrator and thus it was controlling the bank. According to the plaintiffs, the BoG's failures led to the revocation of the bank's license, which resulted in loss of the value of their shares.[927] The court specified that a credit institution has separate legal personality and owns property which is distinct from the one of its shareholders.[928] Therefore, in case of a tort against the credit institution a claim for damages arises only in favour of the institution itself, i.e., the entity that directly sustained loss. Any harm to shareholders' property is not direct but only a "reflexive" effect of the damaged caused by the allegedly

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[925] Greek Council of State decision no. 2783/2010.

[926] Athens Administrative Court of First Instance decision no. 365/2019.

[927] The shareholders also filed an action for damages which was dismissed by Greek Council of State decision no. 419/2014.

[928] Greek Law 2190/1920 on *societés anonymes*, which was applicable at that time (recently repealed by Greek Law 4548/2018).

illegal acts of the supervisory authority. Accordingly, the action was dismissed on these grounds.

2.1.2. Banking resolution

2.1.2.1. *The Proton Bank case*

In view of the severe liquidity and insolvency problems of *Proton Bank*, the BoG decided to put the credit institution into liquidation following the application of the bridge bank resolution tool.[929] The shareholders of *Proton Bank* sued the BoG in accordance with Art. 105 for losses incurred due to the liquidation of the bank. As mentioned above, amidst the Greek sovereign crisis, when many credit institutions encountered acute difficulties due to the continuous credit rating downgrades, the ensuing liquidity shortage and deposit outflows, Proton Bank's Executive Board together with the new shareholder was engaged in activities which infringed the law and exposed the bank to high liquidity and insolvency risk. The court rejected the application based on the following grounds.[930]

The BoG pleaded the inadmissibility of the application by claiming that the shareholders do not have a standing and legal interest to bring proceedings as the banking supervision and resolution framework[931] aim only to ensure the sound and transparent operation of the banking sector. To support its position, the BoG referred to the *Peter Paul* judgment. The court contested the BoG's arguments and held that the respective legislative provisions aim also to protect – under certain conditions – the shareholders (at least those with no voting rights in the meeting of the shareholders). Therefore, the BoG's civil liability is not excluded. In addition, the court noted that the *Peter Paul* decision does not preclude national legislation from granting compensation rights to individuals in the event of failures in the supervisory duties. As soon as the court established the admissibility of the application, it continued with examining the conditions for establishing non-contractual liability of the BoG. In this regard, the court followed the Greek Council of State's pilot judgment and held that Art. 105 is applied only by analogy to the BoG's liability and only reasonable compensation can be awarded.

The court then examined the supervisory actions undertaken by the BoG in order to assess whether there was a manifest or serious error during the performance of its duties. The court noted that during the key time-period of 2010-2011 the financial authority had taken several actions, the first of them being taken as early as within five months after the new shareholder took control of the bank. In particular, The BoG had issued several recommendations addressed to Proton bank asking the credit institution –*inter alia*– to

[929] In accordance with Greek Law 3601/2007, as amended by Greek Law. 4021/2011, Art. 63E. The BRRD was not yet in place at that time.

[930] Athens Administrative Court of First Instance decision no. 17728/2018 referring to Greek Council of State decision no. 3783/2014.

[931] Greek Law 3601/2007 transposing Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (Text with EEA relevance) OJ L 177, 30.6.2006, p. 1–200.

increase the share capital by EUR 100 million; reduce its credit exposure; establish separate risk management procedures; comply with the regulatory framework etc. In July 2010, the BoG conducted an on-site inspection where it was understood that some loans were granted to companies owned by the new shareholder. Immediately, the BoG requested the bank to reduce its exposure to affiliate companies and in the meantime to increase the share capital to stave off the credit risk arising from the exposure to a single debtor.

In February 2011, the supervisor conducted a second on-site inspection which showed a deterioration in the quality of the business portfolio, lending to a group of affiliated customers despite the previous recommendations, deviation from the lending policy of the bank, exercise of powers by the banks' Risk Management Department without appropriate internal authorisation and cases of conflict of interest during the approval of the loans to certain debtors. In March and June 2011, three more on-site inspections were conducted scrutinising suspicious transactions and the BoG informed the AML authority to conduct further investigation. At the same time, the BoG had imposed fines on the bank for the violations of the regulatory framework. Following the inspections, the BoG invited Proton to explain the situation, but it was not convinced by the bank's clarifications. Hence, in August 2011, the BoG decided to appoint an administrator by virtue of Art. 63(2) of Law 3601/2007, with the task of drafting and submitting within one month a report on the "capital adequacy and overall financial, administrative and organisational adequacy of the bank".

Following the administrator's report, the BoG assessed the situation and in early October 2011 decided to take resolution action, withdrawing Proton's license, putting the bank into liquidation and establishing in parallel a bridge bank.[932] In view of these actions, the complex economic and technical assessments carried out by the BoG and the lack of knowledge of the illegal activities of the new shareholder (who was a well-known businessman with considerable financial resources), the court concluded that there was no manifest and serious error during the exercise of supervision.

2.1.2.2. *The Agricultural Bank of Greece (ATE) case*

It is worth complementing the analysis of *Proton* case by the Greek Council of State's ruling on the *Agricultural Bank of Greece (ATE)* case,[933] where the court dismissed an action for annulment of the BoG's decisions to withdraw the license of ATE and put it into liquidation following the application of the sale of business resolution tool.[934] The Greek Council of State noted that, in the context of the resolution measures of Law 3601/2007, "*the BoG can, in addition to the appointment of an administrator and a request for a share capital increase, to implement more drastic measures, always guided by the need to stabilise the bank, protect public confidence to the financial system and stave off system risks. The last and most radical measures that can be adopted are the withdrawal of license*

[932] BoG Decision 19/01/09.10.2011.

[933] Greek Council of State decision no. 3013/2014.

[934] In accordance with Greek Law 3601/2007 as amended by Greek Law 4021/2011, Art. 63D.

and liquidation of the bank combined with resolution measures". The court highlighted that such measures must be assessed against the principle of proportionality and require a reasoned decision of the supervisor on their necessity and urgency.

Accordingly, it found, on the one hand, that the BoG had sufficiently substantiated and justified its assessment that the bank is no longer viable and, on the other hand, that prior to withdrawing the license, as a last resort measure, it had taken several precautionary supervisory measures (such as issuance of recommendations, on-site inspections and request for capital increase). Regarding the necessity and suitability of the measures, the court noted that the BoG enjoys broad discretion when making choices of technical nature and deciding which measures are necessary and suitable. Hence, judicial review is limited to assessing whether the BoG's decision is a measure manifestly disproportional to the objective pursued. It is worth noting that the Greek Council of State's ruling on the limits of the judicial review when assessing the proportionality of such measures is in line with the CJEU judgments in the *Gauweiler* and *Weiss* cases.[935]

2.1.3. Capital Markets Supervision

2.1.3.1. *T. Worldwide Investments SA case*

On the capital markets side, the HCMC has faced litigation in a few cases for alleged failures during the exercise of its supervisory duties. The first important case on action for damages started in 2002 when two plaintiffs sued the HCMC and asked compensation under Art. 105 of (the above-mentioned) Law 2783/1941 on the civil liability of the State for loss they sustained on account of the HCMC's inadequate supervision over certain investment firms and its failure to take precautionary supervisory measures. The Athens Administrative Court of First Instance found that the HCMC was in breach of its duties and awarded compensation to the applicants.[936] The Athens Administrative Court of Appeal [937] though overturned this judgment and its ruling was subsequently upheld by the Greek Council of State.[938]

The importance of this case was that it established the time of knowledge of the unlawful acts of the financial firm as the key element for determining the liability of the supervisor. In particular, the two plaintiffs entered portfolio management agreements with company Y established in Luxembourg (*T. Worldwide Investments*) and with company Z. Both Y and Z operated in Greece, following investment advice from company X which was affiliated

[935] Judgment of the Court (Grand Chamber) of 16 June 2015, *Peter Gauweiler and Others v Deutscher Bundestag*, C-62/14, ECLI:EU:C:2015:400, para. 68 and Judgment of the Court (Grand Chamber) of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000, para. 73.

[936] Athens Administrative Court of First Instance decision no. 15526/2003.

[937] Athens Administrative Court of Appeal decision no. 1367/2008.

[938] Greek Council of State decision no. 1607/2016.

with Y and Z.[939] However, company X had obtained an operating license which did not cover the provision of investment advice, whereas company Y was not supervised in Luxembourg and was providing shadow investment services in Greece without a license. Finally, company Z did not meet the criteria for receiving an investment firm license in Greece. Following an anonymous tip, the HCMC conducted inspections and decided to withdraw the license of companies X and Z and imposed a fine on company Y. Consequently, the plaintiffs incurred loss and brought an action for damages against the HCMC alleging that the authority knew or should have known the illegal activity of the companies, yet it did not take appropriate measures in a timely manner in order to prevent the harmful misconduct. They claimed pecuniary damages of EUR 121,872 and EUR 140,000 respectively.

The Athens Administrative Court of First Instance noted that precautionary are the measures related to the examination of the criteria for granting a license to supervised entities and the continuous monitoring of the of their operation; whilst, *ex-post* control is exercised by means of fines, license suspension or withdrawal and other means provided for in the law in cases where the financial institution violates the regulatory framework. According to the court, the *ex-post* control is effective only if it takes place immediately after the HCMC becomes aware of illegal conduct of the supervised entity. In case of a delayed response, it is liable for omission under Art. 105. Against this background, the court found the HCMC liable, partially accepted the plaintiffs' claim and awarded compensation of EUR 48,504.77 and EUR 110,066 respectively, as it was not satisfied by the proof provided for the remainder of the amounts.

The Athens Administrative Court of Appeal overruled the first instance judgment and held that the HCMC properly discharged its supervisory duties as it did not know, and could not have known, in the absence of complaints, suspicions or even rumours, that the companies were engaged in unlawful activities. As soon as it got information about violations of the law it responded immediately and took necessary measures to protect the investors and the proper function of the capital markets. Finally, it noted that "the HCMC does not have the ability to continuously monitor the trading activities of the supervised entities so that it is able to know every transaction they make" and in addition that continuous monitoring would be "objectively impossible but also inappropriate, as it would paralyse the operation of companies and constitute excessive intervention in their financial freedom protected by the Constitution". This ruling was upheld by the Greek Council of State.[940]

2.1.3.2. *Hedley Finance Ltd case*

The *Hedley Finance Ltd* case was an investor fraud case involving more than 150 investors having been deceived and lost more than 35 million euros. The responsible individuals for the scam were prosecuted and faced criminal proceedings, whereas the investors-victims

[939] The names of the companies are not disclosed.

[940] Greek Council of State decision no.1607/2016.

of the fraud sued both the HCMC and the Greek State (Ministry of Finance) for the loss of their invested capital in accordance with Art. 105. This is the only case were the Greek courts ordered the HCMC to compensate investors for losses that resulted due to HCMC's failure to diligently exercise its supervisory duties.[941] However, the court rejected the action for damages to the extent filed against the State, as it found that the State acted in a timely and effective manner when it got aware of the illegal activities of the firm. The total compensation awarded to the five applicants was EUR 398,366.24 plus interest rate. The facts of the case are the following.

In 1997, *Hedley Finance Ltd* ("H.F."), incorporated in the British Virgin Islands, obtained a license from the Greek Ministry of Finance to establish an office in Greece. The license authorised H.F. to only engage through this office in the coordination, supervision, control, monitoring and promotion of the company's activities outside Greece and explicitly prohibited H.F. from carrying out commercial activity in Greece. Hence, the H.F.'s activities authorised by the Greek State did not fall under the field of the supervisory competence of the HCMC. However, through a complex nexus of offshore companies, including *Canyon Finance*, *Goldsmith Investments Ltd* and *Deal FX*, *H.F.* approached investors convincing them that *H.F.* was an internationally renowned and reliable investment institution with many branches abroad, mainly in London. Further, they convinced investors that *H.F.*, together with the *OVB* firm, had obtained a license from the HCMC to act as intermediaries for the allocation of the *Goldsmith Fund* ("Fund"), a mutual fund managed by *Goldsmith Investment Ltd.* Yet, the Fund did not exist. Lastly, they fraudulently convinced investors that their investment had minimal risk as it was insured with the Lloyd's in London and the Royal Bank of Scotland was acting as the trustee of the mutual fund. Remarkably, the owners of *H.F.* had fled USA after being prosecuted there for fraud and other criminal acts related to the US capital markets and came to Greece in 1991. Importantly though, the HCMC had not been informed about the criminal conviction and the recognition of the US judgment in Greece.

The courts held that the decisive element for establishing the HCMC's liability was whether it was aware of the illegal activities of the firm as the authority is not under a continuous obligation to monitor all transactions of every single supervised entity. Such knowledge was not present until May 2001 when the HCMC received an anonymous information together with a newspaper article about suspicious activities of *H.F.* The HCMC conducted an inspection at the premises of the Fund and discovered that instead *H.F.* was established at the registered address. Even though the offices of the Fund were not found and the indications that the *H.F.* was engaged in activities without having obtained a license to that end, the HCMC ignored the indications and relied on the fact that H.F. appeared to be an international firm not subject to its supervisory competence. Following this inspection, the HCMC failed to inform properly the investment community that the Fund did not exist, and it also delayed by four months to inform the Ministry of Finance about the scam. Therefore, the court concluded that the HCMC had not carried out

[941] Athens Administrative Court of Appeal decision no. 1151/2010 upheld the Athens Administrative Court of First Instance decision no. 859/2008.

diligently its supervisory tasks and by omitting to take timely and appropriate measures it failed to prevent damage to the investors.

2.1.3.3. *Subsequent court decisions*

The Athens Administrative Court of Appeal followed the same line of reasoning established in the above-mentioned cases also in subsequent cases concerning the HCMC's liability and rejected the respective action for damages. In the *first group* of cases (*G. Xylogiannis and others v. HCMC* ,[942] *E. Papasteriadis v. HCMC*[943] and *Ch. Gimtsas v HCMC*[944]) the court dismissed the appeal on the grounds that the HCMC is not bound by an obligation to continuously monitor and screen all transactions and activities of the supervised entities, and that it could be held liable for omitting to act and avert the investors' loss only in case where it was aware of the illegal activities of the service provider. According to the court, the HCMC became aware of potential infringements in the operation of the entity following a newspaper article which published an anonymous complaint about the investment firm. The HCMC promptly carried out on-site inspection, during which it verified several violations of the legal framework and decided to initially suspend and at the end revoke the operation license of the firm. The plaintiffs were clients of the company. From the liquidation process, they received only 10% of the money they had invested and claimed compensation from the HCMC for the remainder of the amount.

In the first case the claimants asked restoration of a total amount of EUR 157,166.62[945] whereas in the second case the compensation sought was EUR 58.638,13 and in the third case EUR 134,775.28. The applicants, *inter alia*, argued that the HCMC failed to discharge properly its duties during the authorisation and subsequent precautional supervision of the firm. In this regard, the court noted that the financial data submitted by the firm on an annual, monthly and weekly basis did not prove that it violated the provisions of legislation or that it put the interests of its investors at stake.

The *second group* of cases arose from the withdrawal of another investment firm's license. The cases presented similar facts to those of the cases mentioned in the previous paragraph and were dismissed on the same grounds. In particular, the investment firm was engaged in activities in violation of the law which *inter alia* resulted in putting at risk the interest of its clients. When the HCMC became aware of rumours regarding such activities of the licensed firm, it carried out an on-site inspection and verified specific violations. Thereafter, it required the company to take measures, including holding its clients' funds with a trustee. Following a second inspection, the HCMC decided to withdraw the entity's

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[942] Athens Administrative Court of Appeal decision no.1729/2014.

[943] Athens Administrative Court of Appeal decision no.2544/2015 upheld the Athens Administrative Court of First Instance decision no.15123/2011.

[944] Athens Administrative Court of Appeal decision no.331/2016 upheld the Athens Administrative Court of First Instance decision no.2661/2013.

[945] For each of the five applicants the amounts of EUR 31,642.23; EUR 39,716.94; EUR 31,333.20; EUR 27,450.51; and EUR 27,023.74 respectively.

license on the grounds that its operation poses risks to the investors' protection and the proper function of the capital markets. The plaintiffs lost their invested capital on account of the license withdrawal and asked the HCMC to restore their damage.

In *M. Vavalos and others v. HCMC* case[946] the applicants' claims amounted to EUR 368,324.82,[947] whereas in *Ch. Achlioptas and others v HCMC*[948] the requested amount reached EUR 460,589.51.[949] Finally, in E. *Vlachou Tsotsorou v HCMC*[950] the applicant claimed EUR 167,075.65.[951]

3. Liability Standard in major jurisdictions

Taking a comparative look at the national legal orders of the EU Member States and the UK[952] one could identify ranging, yet similar, approaches in terms of liability standards applicable to financial authorities in these jurisdictions. Most of the liability standards require a fault that goes beyond simple negligence, in other words gross negligence and/or bad faith must be present in the actions of the financial authorities so their non-contractual liability can be triggered. In other jurisdictions, simple negligence is the threshold to be crossed in order to establish the liability of financial authorities, which is, though, hard to establish in practice in light of the wide statutory discretion that the authorities enjoy. The restriction of the recoverable damages are other ways to limit the liability of the financial authorities, whereas in other jurisdictions which provide for an objective liability (no-fault based) the non-contractual liability of the authorities is effectively limited by the strict approach taken by case-law in interpreting the criteria of the civil liability of public authorities. Finally, precluding individuals from successfully establishing the liability of

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[946] Athens Administrative Court of Appeal decision no.4170/2015 upheld the Athens Administrative Court of First Instance decision no. 8788/2012.

[947] Out-of-pocket losses of EUR 122,274.48 and EUR 46,050.34 for the first and second applicant respectively and in addition compensation for moral harm amounting to EUR 100,000 for each of them.

[948] Athens Administrative Court of Appeal decision no.2410/2015 upheld the Athens Administrative Court of First Instance decision no. 8787/2012.

[949] Out-of-pocket losses of EUR 146,189.51 and EUR 117,400 the first and second applicant respectively and in addition compensation for moral harm amounting to EUR 100,000 for each of them.

[950] Athens Administrative Court of Appeal decision no.613/2015 upheld Athens Administrative Court of First Instance decision no. 9672/2012.

[951] EUR 100,000 from this amount were asked for moral damage.

[952] Busch, Gortsos, & McMeel (2022a); Dijkstra (2012), pp. 346, 348. Dijkstra in his study examined the liability standard of 48 financial authorities of the 27 Member States (including the UK which was then still a Member State but excluding Croatia which was not yet a member of the EU at the time of his research). Translating his findings into statistical figures, the picture that emerges is that 23% of these financial authorities are subject to an objective liability standard, 25% of them are to be held liable for ordinary negligence whereas another 25% of them is to be found liable in cases of gross negligence. Finally, 10% is subject to a bad faith standard whilst only 4% enjoys immunity. For the remaining 13%, the liability standard was not known.

financial authorities can be achieved by statute which is enacted 'in the public interest only' and thus its protective scope does not contain the protection of individuals' rights.

The liability standard that requires a fault going beyond simple negligence, gross negligence and/or bad faith is commonly adopted – although with great variations – among EU Member States which require that a gross negligence and/or bad faith is present in the action of the financial authorities so the latter can be held liable.

For instance, in France national law requires that the French financial authorities have acted with gross fault. This could be said to amount to negligence which is so gross (manifest) that "an ordinary, non-professional person would not have committed it".[953] This can be understood as also including intent on the part of the financial authorities.[954] In Italy a similar liability regime is implemented. More specifically, financial authorities are liable for gross negligence or intentional misconduct. Yet, the concept of gross negligence is surrounded by some ambiguity.[955]

In the same vein, the Dutch legal framework provides for a statutory limitation of the financial authorities' liability. The authorities can be held liable in cases they have acted intentionally in improperly performing or exercising their tasks and powers respectively, or such improper performance or exercise must be the result of gross negligence.[956] [957] The concept of intent is close to the one observed in other EU Member States. In particular, the Dutch financial authorities have acted with intent when they "have wilfully and knowingly neglected [their] duties or otherwise [have] been aware that [their] acts or omissions would entail – or probably entail – improper performance of [their] duties".[958] The gross fault includes a situation where the financial authorities have acted so reprehensibly and indifferently that the improper performance or exercise of their duties and powers respectively "is a real possibility".[959]

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[953] Bonneau (2022).

[954] *Ibid.*

[955] According to Bonneau (2022): "the regulatory framework is evolving and therefore is not unambiguous'; (2) a regulatory provision has been applied by the financial supervisor according to an interpretation later modified by a court or (3) facts are particularly complex and difficult to assess", however "'gross negligence occurs' also in cases of 'lack of professional diligence, expertise, and prudence' as required 'for the public service provided.'"

[956] According to Busch (2022): "The limitations of liability for the AFM and DNB are laid down in section 1:25d (2) and Art. 1:25d (1) Wft, respectively. Please note that section 1:25d Wft *also* sets a causation requirement that is stricter than the general causation requirement under Dutch law. This heavier causation criterion thus comes on top of the liability condition of intent and gross fault".

[957] The same liability standard applies to the Dutch national bank (DNB) also when it acts as resolution authority within the framework of the SRM.

[958] *Dutch Parliamentary Papers II* 2011/12, 33058, No. 3, p. 5 as mentioned in Busch (2022).

[959] Busch (2022).

In Portugal, the statute[960] provides that simple negligence on the part of the financial authorities is the threshold to be crossed to establish the liability of the financial authorities. However, the wide discretion afforded to Portuguese authorities under the statute seems to create an effective roadblock to successful civil actions thereby limiting the non-contractual liability of the financial authorities.[961]

Contrary to the statutory limitation of the liability available under the French, Italian and Dutch legal frameworks, in Greece the statute introduces a no-fault based liability standard for public bodies. As explained in the previous section, this liability standard entails that the authorities can be held liable for any illegal act or omission without any negligence or intent (*dolus*) being required. As generous as this liability standard may seem, claimants do not benefit from such an extensive liability regime of the Greek supervisory authorities, as the Greek courts have ruled that such liability standard is not appropriate to apply to the Greek supervisory authorities considering the nature of its tasks and duties. Thus, case-law introduced the criterion of 'manifest and serious error' in the action of the supervisors so the latter can be held liable. The criterion seems to follow the *Francovich* liability doctrine and it is understood as entailing 'grave illegality'. As regards the liability standard of the Bank of Greece as resolution authority in the context of the SRM, the statute clearly limits its liability to situations of gross negligence and bad faith.

In Spain a similar approach is identified in the sense that no limitation of the non-contractual liability of the financial authorities is introduced under the statute and claimants need not to prove neither negligence in the actions of the financial supervisors nor that the public service developed 'abnormally'.[962] [963] It seems that the strict interpretation of the conditions required to be met to establish the liability, principally the condition of unlawfulness and causation, by the courts suffices to indirectly limit the liability of the financial authorities in Spain.[964]

Germany, on the other hand, constitutes a prime example of 'over-protecting' the financial authorities by having enacted pertinent legislation 'in the public interest only'. More specifically, financial supervisors, including primarily the banking supervisor BaFin, exercise their powers having regard to the public interest only. Effectively, the courts have traditionally denied the possibility of private individuals to seek compensation for shortcomings in the supervisory action except for in extreme, if not situations of utter abuse

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[960] article 7, section 1 of Portuguese Law No. 67/2007.

[961] Gortsos & Anastopoulou (2022).

[962] *Ibid.*

[963] In Ramos Muñoz, Cerrato García, & Bosque Argachal (2022) it is noted that: "Abnormal (*anormal*) constitute the literal translation from the law and case law. Acknowledging that the literal translation may not be intuitive when confronted with EU case law and also with the terms used in other legal traditions, it may be translated as *unlawful*. Nevertheless, it is relevant to point out that this term would not be the exact synonym used under Spanish law".

[964] Gortsos & Anastopoulou (2022).

of power[965] and evidently illegal behaviour.[966] The German Federal Supreme Court has tried to blunt this overly strict approach in 1979 by stating that in principle the pertinent legislation especially with regard to management of insolvencies of credit institutions must be interpreted as not merely aiming at the protection of the public interest, but also the protection of depositors.[967] Nonetheless, the legislator emphatically reiterated in other piece of legislation that the supervisory duties are to be discharged 'in the public interest' thereby 'responding' to the Federal Court's stance. It is accepted, though, that such exclusion of liability does not apply in cases where supervised entities or other individuals are the addressees of the wrongful and harmful supervisory act (e.g., imposed sanctions).[968] Yet these cases do not expand the scope of liability since they are rather limited and refer only to very specific acts or decisions, not including inactions, as well as because it appears that establishing the criterion of causal link would not be straight-forward.[969]

As regards the common law jurisdictions, a strict approach is adopted requiring that the financial authorities act in bad faith in order to open the door to their non-contractual liability. In the UK, parties who suffered losses on account of defective actions of the financial authorities have recourse to the tort of misfeasance in public office. It is a rather rarely invoked tort in personal injury claims as it requires that the tortfeasor is a public authority. However, in cases of a claim for damages against financial authorities is the only tort basis available to the claimants. The tort in negligence is excluded since it has long been established in common law that financial authorities do not owe a duty of care to the depositors and investors.[970] The tort of misfeasance in public office is an intentional tort in the sense that the claimant can establish tort only if he/she proves malice on the part of a public officer of the public body responsible for the harmful decision. As an intentional tort is contrasted from torts which can be committed by negligence or in the event of breach of statutory duty.[971]

The leading authority for the tort of misfeasance in public authority is the *Three Rivers* case, analysed in section 1.2. of this Chapter, which established the two separate manifestations of liability for misfeasance in public office which can be classified as meeting the requirement of bad faith:

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[965] In Binder (2022) it is noted that: "*Under general principles of private law, an abuse of power, for the purposes of liability under Section 839 BGB, would require that the relevant official had acted out of improper, personal motives, unrelated to the cause in question*".

[966] Binder (2022).

[967] *Ibid*.

[968] *Ibid*.

[969] Gortsos & Anastopoulou (2022).

[970] *Yuen Kun Yeu v Attorney General for Hong Kong* [1986] AC 175, PC, and *Davis v Radcliffe* [1990] 1 WLR 821, PC.

[971] McMeel (2022).

> *First there is the case of targeted malice by a public officer, i.e., conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts, knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.* [972]

Hence, the tort base on bad faith is available to depositors and investors to claim compensation for shortcomings in the action of the financial authorities. This limitation of liability is not only available in common law but is also enshrined in the statute.[973] As almost a mirroring architecture of legal remedies available on the EU level, an aggrieved party in the UK could also invoke a breach of the Human Rights Act 1998, which incorporated the ECHR in the UK legal framework, on the part of the financial authorities to establish a claim for compensation.[974]

Ireland follows closely the example of the liability regime in the UK. Gross negligence does not suffice in order to establish non-contractual liability, but instead the minimum threshold to be crossed is that of bad faith. Statute[975] provides that liability for damages arising from any act or omission of the financial authorities in the performance or purported performance or exercise of any of their functions or powers can only be established if it is proved that such authorities' act or omission was in bad faith. Therefore, simple or gross negligence do not qualify as the mental state which could trigger the liability of the financial authorities in Ireland. This liability standard appears to be stricter from and thus to go beyond the *Francovich* liability standard of 'a sufficiently serious breach', especially in light of the *Nikolay Kantarev* judgment,[976] as a breach arising from a negligent act could possibly qualify as a sufficiently serious breach.[977]

It is questionable though whether all these models of liability standard achieve a fair balance between the protection of the public interest and the protection of individuals' rights. Some looming gaps could potentially be identified in this respect as it will be explained in Chapter 5. Another issue that transpires in related discussions[978] is whether

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[972] *Three Rivers District Council v Governor and Company of the Bank of England (No 3) ('Three Rivers')* [2001] UKHL 16, [2003] 2 AC 1, at 191 (Lord Steyn).

[973] currently contained in the UK Financial Services and Markets Act 2000 (FSMA).

[974] McMeel (2022).

[975] section 33AJ(2) of the UK 1942 Act limiting the liability of the then Central Bank and Financial Services Authority.

[976] *Kantarev* judgment.

[977] For a detail account also on the relationship with the trot in misfeasance in public office see Gortsos & Anastopoulou (2022).

[978] *Ibid.*

the national liability regimes currently in place are in line with the liability standard laid down by the CJEU in *Francovich*. A rather simple answer would be that *prima facie* most of national regimes seem to go beyond the 'sufficiently serious breach' requirement, and thus deviate from the rules of the Union law. Chapter 5 will focus on the evaluation of this situation also providing critical reflections on the *Francovich* liability rule.

Chapter 5: Synthesis – Evaluation – Proposals – Epilogue

1. Synopsis – Synthesis

The purpose of this last Chapter is first to provide a synthesis of the analysis included in the preceded Chapters. This part will offer a critical synopsis of the liability standard applicable to the non-contractual liability of EU and national financial authorities (section 1.2.), as well as of the differences between the liability standard of the SRB and the one of the national resolution authorities (section 1.3.), whereas it will also take a deep into the *Peter Paul* judgment of the CJEU providing an appraisal of the judgment in view of the current EU banking supervision law.

The second purpose of this Chapter is to offer an evaluation of and critical reflection on the current legal framework and the relevant case-law pertaining to the non-contractual liability of the financial authorities on national level and EU level (by examining the cases of the ECB and SRB), along with setting forth proposals towards a more effective liability regime which, at the same time, pays due regard to the peculiarities of the financial authorities' status and activities.

In this second part devoted to the evaluation and proposals, this Chapter will first examine the question *'to be or not to be liable?'* providing an answer to the dilemma should financial authorities enjoy immunity from liability, or should they be liable for the damage they caused during the performance of their duties. The constitutional and policy dimensions of this question will clearly point to the first limb ('*to be liable*') as the winner of this dilemma (section 2.1.). Then, the focus turns on the potential limitations that are applied to the liability of the financial authorities by exploring the question of whether the current liability framework offers for *'too much or too little'* liability. The limitation of the liability can be achieved through two separate routes, either through strictly interpreting the liability conditions or by means of compensatory immunity to be afforded to the financial authorities (section 2.2.). The critical analysis will demonstrate that the current liability structure in the EU and the EU Member States falls short of a comprehensive liability regime and leans towards the '*too little*' limb. In this context, the Chapter will critically assess the 'sufficiently serious breach test' and will conclude that it introduces a very high threshold of proof, rendering it almost impossible for the aggrieved parties to successfully claim compensation for supervisory or resolution failures. Therefore, it seems that the CJEU's test of the 'sufficiently serious breach' offers a first gateway for the financial authorities to be spared from the non-contractual liability, as if it is the key to the riddle allowing financial authorities to break out of the '*liability escape room*' (Section 2.3.). In the same vein, some proposals will be put forward in relation to the liability standard it should apply in the case of substantive rights as opposed to the case of procedural rights (Section 2.4.).

Then the Chapter will evaluate – primarily from a constitutional standpoint, but also from a policy perspective – the compensatory immunity granted to the financial authorities either by operation of statute or as a creature of the case-law, and it will conclude that compensatory immunity cannot be tolerable from a constitutional perspective, but it is neither desirable from a policy standpoint. In this vein, the Chapter argues that compensatory immunity serves as a second key to the riddle allowing financial authorities to break out of the *'liability escape room'* (Section 2.5.).

The Chapter then moves to another debated area, that is unspoken loopholes in the protection of the right to property which emerge from the limitation of the non-contractual liability of financial authorities through the limitation of the right to property of individuals. This situation is primarily brought at the spotlight when the EU resolution framework is triggered, and the bail-in tool is applied. The Chapter concludes that the current legislative framework calls for improvement towards a more comprehensive protection of the property right (Section 2.6.).

Furthermore, the Chapter devotes particular attention to identifying accountability gaps between the ECB and respective competent national authorities which should be bridged (Section 2.7.1.). Then, the Chapter puts great emphasis on the challenging issue of effective judicial protection in the composite procedures by identifying them as the third riddle to break out of the *'liability escape room'* and by offering suggestions on how to sail in the uncharted waters of the composite procedures.

The Chapter concludes with some final remarks by way of epilogue.

1.1. Introduction

Since the dawn of the financial markets' operation, ensuring protection against the inherent risks accompanying financial activities emerged as an impending requirement. The financial markets are gravely affected by imperfections, most prominently by information asymmetry and negative externalities which may cause destabilising effects for the financial system.

Hence, the risk of market failures along with the consumer protection and financial stability considerations that arise, indisputably gear the need for the restless supervision of the financial market operators. In this respect, it is well-established in people's mind that the exercise of supervision over the market operators by public authorities is an intrinsic element for a sound and stable operation of the financial system. The assurance that the State relentlessly 'keeps an eye' on the activities of the financial institutions feeds the public with trust that the financial system operates smoothly within the prescribed legislative boundaries.

The role of the financial markets and, in particular, of the banking sector is so vital for the economy, while the effects of bank failures could be so destructive for the stability of the financial system that the State's 'intervention' in order to advert the genesis of such failures is an undeniable request. The State intervention is exercised by means of regulation and supervision. It is pertinent to briefly recall that *regulation* refers to the imposition of rules which restrict individuals' discretion in a particular field of activity. Effectively, when performing specific activities which are regulated, individuals are compelled to act in a certain way prescribed by the applicable regulatory framework. The content of regulation spreads out on two levels; *first*, it sets forth the rules subject to which financial institutions must operate, and *second* it lays down the competences and powers of the financial supervisors which will assess the behaviour of the supervised entities. On the other hand, *prudential supervision* can be described as the act of monitoring and ensuring compliance

with the regulatory rules.[979] Based on the foregoing, one could understand the interplay between regulation and supervision as follows; regulation is a *conditio-sine-qua-non* for planning and implementing supervision, whereas at the same time, regulation would become pointless without any authority supervising the application of the regulatory rules produced.

Regulation and prudential supervision constitute the first pillar of the EBU. Within this pillar, public authorities aim to defeat the risks and imbalances present in the financial system, since they are best situated and vested with the necessary powers to monitor the developments on a system-wide basis and identify – on time – systemic risks and take appropriate action to rectify them. For instance, information asymmetry, which arises between financial institutions and their customers, as the latter lack the ability, expertise, and time to assess adequately whether the financial institution is liquid and solvent, is rectified by the financial supervisory authorities which benefit from the expertise of their staff and can effectively and efficiently assess whether the institution holds adequate and of high-quality capital, whether it meets the liquidity requirements and follows sound practices. A further example, in this context, relates to the role of the supervisory authorities as regard to the imperfection of the negative externalities. Such externalities arise in the form of spill-over effects and pose systemic risks, e.g., the bankruptcy of one institution may cause chilling effects and endanger the stability of the entire financial system, which, in turn, may hamper economy growth.

Supervisory authorities, including the ECB, face challenges due to both the complexity of their supervisory duties but also due to novel conditions that constantly emerge in the financial sector. As discussed in Sections 2.2. of Chapter 1, these complexities find their roots *inter alia* in the difficulty to implement supervision in practice, to the prudential nature of supervision which entails that supervisors should act on a precautionary level to avert possible negative effects in the financial system which entails that the risk is not always visible to the supervisors *a priori*, i.e., before it materialises. Further features of the prudential supervision that create supervisory challenges are the ongoing expansion of the *ratione personae* and *materiae* scope of the duties that modern supervisory authorities are called to undertake, the involvement of the supervisors in developing regulatory policies and the need to adopt regulatory standards to the continuously evolving financial sector. In addition, supervisory authorities in EBU need to overcome the hurdle of lacking fully harmonised regulation across the participating Member States to the EBU. At the same time, novel conditions in the market entail that the supervisors need to measure and assess risks that did not previously fall under the traditional perimeter of risks of the banking sector, such as cyber-security risks and climate-change-related risks. These challenges complicate the task of the supervisory authorities, whereas at the same time bring at the spotlight the 'fragile' nature of the financial system and justifies the imperative.

In the unlike event where the supervisory authority did not manage to avert the failure of a credit institution, the action is transferred from the terrain of prudential supervision to the

[979] For the difference between regulation and supervision see Dempegiotis (2008), p. 132; Lastra (2003), p. 49; Schioppa Tommaso (2004); Llewellyn (1999).

grounds of resolution. Resolution of ailing banks is the second pillar of the EBU and purports to ensure the 'orderly collapse' of a bank with the minimum possible effects both on a micro and macro level. Traditionally, and unlike other private companies, the failure of a bank has not been dealt with exclusively by the private sector, but State action – more precisely, state funding – has always been the main ingredient in the winding-up process of banks. The injection of public funds has been (and – to a certain extent – still is) an unwritten expectation, an almost 'moral obligation' of the State in order to protect depositors and creditors from taking the hit of the financial losses arising from the bank's failure.

While the State intervention in case of an ailing bank could be justified in light of the crucial role of the banks for the economy and the channelling of funds in the financial sector, the use of public funds to bail banks out entails major consequences for the sovereign debt. The global financial crisis of 2007-2008 plainly demonstrated the catastrophic fiscal results that the link between sovereigns and the banking sector may ensue. In response to the negative feedback loops between sovereigns, banks and the real economy, the EU took decisive actions and adopted the EU resolution framework which comprises of radical measures to minimize the effects of banks' failures on budgetary policies of Member States.

The basic idea underpinning this framework is that bail-outs are no longer sustainable and thus bank failures should be first and foremost dealt with by the private sector. In this context, the competent resolution authorities are empowered to decide the resolution tools to be implemented so they ensure the orderly resolution of an ailing bank with the least possible effects on the stability of the financial system.

Challenges though are not only a prerogative of the supervisory realm but are present also in the resolution cosmos. Efficiency and uniformity in the application of the resolution framework across the euro-area is equally subject to several intricacies and faces various hurdles. The major challenges include the fluid relationship between resolution and liquidation as well as the interpretation of the 'public interest' concept, the obscure interplay between state aid rules and resolution rules, and finally the lack of proper mentality and 'culture' to implement the resolution tools enshrined in BRRD.

Undeniably, the supervisory and resolution authorities are vested with extensive powers which are essential, so they are able to discharge their duties effectively. Power though comes hand in hand with accountability. "Far-reaching tasks and powers of authorities come with the risk of public misconduct".[980] Such public misconduct can potentially be the root cause for the failure of a credit institution and accordingly for the damage third parties may suffer.[981] Therefore, accountability serves as an answer to Juvenal's question *'quis custodiet ipsos custodes'*.

[980] Almhofer (2021), p. 221.

[981] *Ibid.*

Accountability is the natural counterpart of powers, especially where such powers are exercised by independent public authorities. In such situations the accountability serves as a mechanism to ensure the continuous democratic legitimacy of the independent authorities as extensively analysed in Chapter 1 herein. Accountability is multi-faceted and based on Hüpkes' typology it can be classified as parliamentary, ministerial, market-based, financial and judicial accountability. All the faces of accountability, and primarily the judicial one which can lead to the non-contractual liability of the financial authorities, and which constitutes the focus of this thesis, are the means which allow for the scrutiny of the conduct of supervisory and resolution authorities.

1.2. Applicable liability standard in the EU and the EU Member States

Before examining the applicable liability standard on the EU and EU Member States level, it is pertinent to briefly recall the concept of liability. As discussed in section 5 of Chapter 1, liability refers to someone's legal responsibility for his/her actions and omissions. A person or entity that wilfully or negligently caused damage to another person or entity can be held civilly liable for the monetary value of the damages caused. It is recalled that to hold a person liable under a fault-based liability regime requires either negligence (ordinary or gross) or wilful misconduct (bad faith) on the part of the tortfeasor (behavioural standards). The standard of liability in ordinary negligence is rather low as it requires to prove that the wrongdoer failed to exercise ordinary care. The content of ordinary care, also referred to as reasonable care or due care, is determined by the law and/or by the case-law.[982] Gross negligence, on the other hand, refers to a conduct or failure to act which is so thoughtless and careless that it demonstrates a substantial lack of concern on the part of the wrongdoer for whether damage will result.[983] The boundaries between simple and gross negligence are not always simple to define in practice. Finally, the wrongdoer will be held liable for acting in bad faith when he/she acts with the knowledge that this action is likely to cause damage to a third party. Non-contractual liability, in particular, refers to the legal responsibility that someone bears for the damage its actions and omissions caused to a third party outside a contractual relationship.

The Union and the EU Member States (as discussed in section 3 of Chapter 4) opt for a clear limitation of the non-contractual liability of the financial authorities, either through statutory provisions or through case-law, or through a combination of both means. However, the limitations set to the non-contractual liability of the national supervisors and resolution authorities are not streamlined across the EU Member States. Some jurisdictions opt for a liability standard requiring the plaintiff to prove a fault arising from gross negligence or bad faith, whereas others set the bar higher requiring the proof of bad faith or even go as far as to provide statutory immunities to the financial authorities. Equally, there is no streamlined interpretation of the behavioural standards and of the other requirements for establishing non-contractual liability amongst the jurisdictions owing to the different historical and cultural background of each Member State. Furthermore, there

[982] European Group on Tort Law (2005).

[983] Dijkstra (2015), p. 15.

are some jurisdictions which opt to grant compensatory immunity to their financial authorities as an effective way to limit their liability.

As thoroughly discussed in Chapter 2, section 2.1., the CJEU for the first time set forth the obligation of the Member States and the EU organs to make good for any damage they have caused to third parties in its seminal judgment in *Francovich* case. In a series of judgments that preceded and followed *Francovich*, CJEU elaborated on the liability standard applicable in such cases. According to the court's case-law, claimants must satisfy the CJEU that there is an unlawful act or omission on the part of the Union body or the Member State which constitutes a breach of Union law. Yet, the latter's liability is triggered not in the event of any breach, but only in the case there is a 'sufficiently serious breach'[984] (the so-called *Schöppenstedt*[985] formula). Therefore, the applicable liability standard in the EU is that of a fault which constitutes a *sufficiently serious breach of EU law*.

The CJEU further elaborated on the test of the 'sufficiently serious breach' in *Brasserie* and a series of other cases,[986] in which the court held that the right of aggrieved parties to be compensated should not be conditional upon a "fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law".[987] The CJEU went one step further in the recent *Kantarev* case where it highlighted that the obligation to make good for loss or damage by public authorities should not be conditional upon a fault that goes beyond that of a 'sufficiently serious breach' of EU law, where the test of sufficiently serious breach implies a manifest and grave disregard by the public authority of the limits set on its discretion.[988] It clearly emerges from the *Kantarev* judgment that a national liability regime, under which the liability of financial authorities would be triggered only in situations where the authorities caused damage after acting *intentionally*, goes beyond the test of a sufficiently serious breach of EU law.[989] Thus, a negligent act or omission could meet the test of a 'sufficiently serious breach'.

To determine whether a conduct qualifies as sufficiently serious breach, the CJEU takes into account the complexity of situations to be regulated, the difficulties in the application

[984] See *Laboratoires pharmaceutiques Bergaderm* judgment, paras. 42–43; Judgment of the Court of 10 December 2002, *Commission v Camar and Tico*, C-312/00 P, ECLI:EU:C:2002:736, para. 53; Judgment of the Court (Second Chamber) of 19 April 2007, *Holcim (Deutschland) v Commission*, C-282/05 P, ECLI:EU:C:2007:226, para. 47.

[985] Judgment of the Court of 2 December 1971, *Zuckerfabrik Schoeppenstedt v Council*, case 5/71, ECLI:EU:C:1971:116.

[986] *Brasserie* judgment, paras. 75-80; *Dillenkofer* judgment, para. 28. In *Brasserie* case the CJEU unified the conditions of liability for the Member States and Community.

[987] *Brasserie* judgment, para. 55; *Dillenkofer* judgment, para. 13.

[988] *Kantarev* judgment, paras. 105 and 127.

[989] Busch & Keunen (2019).

or interpretation of the texts and accordingly the clarity of the breached rules, the margin of discretion available to the author of the act in question,[990] whether the error of law was excusable or not,[991] or whether the breach was intentional or not.[992]

Against this background, it can be examined whether the liability standards in the various EU Member States are in line with the benchmark set by the CJEU, although such benchmark is far from being conclusive and comprehensive. Based on the brief overview included in section 3 of Chapter 4, it transpires that in some EU Member States, financial authorities are protected against their non-contractual liability even in cases where they have acted in gross negligence, and statutory provisions only allow for their non-contractual liability in cases of bad faith (intentional misconduct). This liability standard is clearly at odds with the sufficiently serious liability test.

It appears, therefore, that a standard whereby the financial authorities' liability is triggered in cases of gross negligence *and* bad faith would comply with the Union law. It remains a question, however, whether such standard, as interpreted and applied by national courts, is indeed mirroring the one of the 'sufficiently serious breach' as understood by the CJEU, or it is, in fact, narrower.[993] Although this question is not the object of the present thesis, for reasons of completeness it could be briefly evaluated, merely on a high level. Based on a recent comparative study,[994] it transpires that the national liability standards of 'gross negligence and bad faith' follow carefully the 'sufficiently serious breach' test. Besides, it is to be understood that the EU Member States enjoy a certain leeway in terms of interpreting the concept of fault as a liability condition under national law provided that they ensure that such concept does not go beyond the concept of a 'sufficiently serious breach' of EU law.[995]

Literature suggests[996] that earlier case-law of the CJEU indicates that a condition of 'gross fault' or 'gross negligence' would also go beyond what is required under the test of a

[990] *Laboratoires pharmaceutiques Bergaderm* judgment, para. 40.

[991] Almhofer (2021), p. 225.

[992] Craig (2006), p. 772.

[993] Narrower in the sense that the national courts will interpret the sufficiently serious breach stricter allowing for fewer cases where a conduct falling under the gross negligence category would be found by the national courts to satisfy the sufficiently serious breach test.

[994] Contained in Busch, Gortsos, & McMeel (2022a).

[995] Gortsos & Anastopoulou (2022).

[996] See Perrone (2022) who mentions that: "[f]or example, the CJEU has held that national legislation limiting the liability of the Italian Corte di Cassazione to cases where there has been intent or gross negligence ('dolo o colpa grave') is contrary to the conditions for liability resulting from the principle of Member State liability under EU law".

'sufficiently serious breach'.[997] So far, this reasoning has not been applied in cases of financial authorities' liability. Far from being a safe guess, it appears that the CJEU would not extend this approach to financial authorities given the sensitive character of their duties and the critical financial stability objective they pursue. If the opposite were to happen, it would indeed be a surprising shift in the CJEU's approach marking a more friendly stance towards aggrieved third parties. However, this does not seem to be a realistic scenario.

It should further be pointed out that the CJEU, in what could be described as a rather thoughtful approach, does not expressly apply a test of 'simple or gross negligence' and of 'bad faith', but instead the test of the 'sufficiently serious breach' which is determined based on criteria that the court has indicatively provided. Effectively, this test provides the CJEU with the necessary leeway to be satisfied *ad hoc* that a conduct meets the test without it being constrained by the conceptually narrower notions of 'simple or gross negligence' and 'bad faith'.

The Union legislation and accordingly the national law transposing such Union legislation, provide two instances where EU Member States are not obliged to follow the 'sufficiently serious breach' test. The first instance is in the realm of the Prospectus Regulation[998] which in its Article 20(9) provides that '[t]his Regulation shall not affect the competent authority's[999] liability, which shall continue to be governed solely by national law (…).'[1000] The second instance refers to the liability of the financial authorities when acting in their capacity as national resolution authorities. Article 3(12) of the BBRD[1001] explicitly sets forth that the liability standard to be applied is the one provided in accordance with the national law rules.[1002]

[997] See Perrone (2022) who points that in Judgment of The Court (Grand Chamber) of 13 June 2006, *Traghetti del Mediterraneo SpA v Italy*, C-173/03, ECLI:EU:C:2006:391, para. 46 and Judgment of the Court (Third Chamber) of 24 November 2011, *Commission v Italy*, C-379/10, ECLI:EU:C:2011:775, in the Italian language version of both cases reference is made to 'dolo o colpa grave', which is to be translated with 'intent or gross negligence'; rather confusingly, in the English language version this has been translated as 'serious misconduct or intentional fault'.

[998] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ L 168, 30.6.2017, p. 12–82 ("Prospectus Regulation").

[999] The financial supervisors are the competent authorities in the context of the Prospectus Regulation.

[1000] Article 13(6), first paragraph of the Prospectus Directive (the predecessor of the Prospectus Regulation) contained the same provision.

[1001] 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, OJ L 173, 12.6.2014, p. 190–348 (as amended).

[1002] Article 3(12) BRRD: '(…) Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive.'

Both these provisions could be said to allow the establishment of a higher liability standard going beyond the 'sufficiently serious breach'. For the purposes of this thesis, the effect of Article 3(12) of the BRRD deserves further scrutiny and reflection. To this end, the following Section 1.3 of this Chapter, will focus on the liability standard of the national resolution authorities as opposed to the one applied to the SRB.

1.3. Liability Standard of the SRB vs. NRAs

As discussed under Section 8.5 of Chapter 2, the liability standard of the SRB could appear to be discerned from the one of the ECB in light of the wording of Article 87(3) SRMR which deviates from the corresponding wording of Article 340 TFEU. It is recalled that Article 87(3) stipulates that "[i]n the case of non-contractual liability, the Board shall, in accordance *with the general principles common to the laws concerning the liability of public authorities of the Member States*, make good any damage caused by it or by its staff in the performance of their duties" deviating from the wording of Article 340 which states that "[i]n the case of non-contractual liability, the Union shall, in accordance *with the general principles common to the laws of the Member States*, make good any damage caused by its institutions or by its servants in the performance of their duties".

This thesis argues that the above-described discrepancy in the wording should be interpreted as a mere appreciation of the fact that there is a clear tendency in the Member States to limit the financial authorities' liability compared to other public authorities' liability[1003] given the complex nature of the formers' activities. This could be supported in light of the following considerations.

From a constitutional standpoint, setting a different liability threshold for the SRB compared to the threshold established under Article 340 TFEU would not be problematic insofar this threshold would be lower and not higher than the threshold of Article 340 TFEU. Therefore, as a first note, a lower liability standard dedicated to the SRB would not violate the TFEU and in principle it would be permissible. However, it would be problematic, if the European legislator intended to go beyond the *sufficiently serious breach* criterion set by the CJEU restricting the SRB's liability in such a disproportionate way which in practice would deprive aggrieved parties from effective judicial protection. In view of the *sufficiently serious breach* criterion, which applies to Union bodies and Member States, the liability of the ECB and SRB is already limited by the case-law of CJEU in a way which could be deemed balanced in the following sense; on the one hand it protects the financial authorities taking into account the complexity of their tasks, whilst on the other hand it does not limit judicial protection of aggrieved individuals in a disproportionate way. Therefore, further restricting the SRB's liability compared to the liability of the ECB and the ESAs would risk to damage this balance raising questions from a constitutional law perspective.

Save the aforementioned constitutional law considerations, a teleological interpretation of Article 87(3) SRMR would also seem to suggest that there is no ground that could justify the introduction of a different and more stringent liability standard for the SRB compared to the one applicable to the ECB and the ESAs. In particular, the SRB pursues the same

[1003] See also Busch, Gortsos, & McMeel (2022b).

ultimate objective (which is the stability of the financial system) with the ECB and ESAs, whilst its tasks involve similar levels of complexity, risks and discretion as those tasks present in the SSM and ESAs' realm. Therefore, there seems to be no policy or legal considerations which could convincingly justify setting a differentiated liability threshold for the SRB.

Taking into consideration the above, it seems that the EU legislator would not have expediently added any material or legitimate different legal choice beyond what is already followed in the case-law of the CJEU, had he intended to (further) limit the SRB's liability by introducing Article 87(3) SRMR. Hence, the different wording used should be seen as an explicit legislative interpretation guidance reflecting and confirming the perimeter of the current approach of the case-law.

As regard to the liability standards applicable to the NRAs across the euro-area and to the SRB,[1004] it is necessary to apply an aligned liability standard in order to ensure equal treatment of the aggrieved parties across the euro-area as well as of the financial authorities on both EU and national level. Based on a systematic interpretation of the pertinent EU legislation and in light of the case-law of the CJEU, it would be possible to infer that the liability standard of the NRAs cannot depart from the *Francovich* liability rules. Nonetheless, the divergent liability standards across the euro-area, even after the *Kantarev* judgment, as discussed under Section 8.5. of Chapter 2, demonstrate that this interpretation is far from being uniformly accepted and applied across the EU Member States. Hence, it appears that aligning the liability standards applicable to the NRAs would require an explicit legislative amendment by introducing in Article 3(12) BRRD a clarification that the limitation of liability of NRAs should not go beyond the *Francovich* liability rules.

1.4. Appraisal of *Peter Paul* and its position in the context of the 'mature' banking supervision law

Moving from the applicable liability standard to the individuals who enjoy *locus standi,* this section will lay down an appraisal of the *Peter Paul* judgment putting forward some proposals regarding the place this judgment must hold in the current context of the 'mature' EU banking legislation universe.

The *Peter Paul* ruling, which was discussed in Section 1.1. of Chapter 4, is a landmark case in the field of non-contractual liability in banking supervision and the protection of depositors. In this judgment the CJEU ruled that the pertinent EU banking supervision legislation does not confer direct rights on depositors and thus the latter enjoy no substantive right to seek compensation from the State or the financial authority concerned in case in which compensation is ensured *via* a compensation mechanism, even if the damage such depositors suffered is attributable to defective supervision. The *Peter Paul* rational found extensive application by national courts, including the Greek Council of State,[1005] when interpreting the non-contractual liability of national financial authorities.

[1004] Discussed in Chapter 2.

[1005] As it was examined in Chapter 4, section 1.1.

The judgment of CJEU in *Peter Paul* could be criticised on the following grounds. First, it narrowed down the *Francovich* doctrine by restrictively interpreting the criterion of 'conferring rights' to individuals by holding that this criterion is only fulfilled in the event that the banking legislation requires the financial authority concerned to take measures to protect the depositors. This restrictive approach is rooted in the efforts of the court to limit the liability of financial authorities and thereby to limit the budgetary consequences arising when compensating aggrieved parties.[1006]

Therefore, *Peter Paul* judgment could be seen as hampering the development of *Francovich* liability in cases of EU law violations.[1007] In the contemporary environment of the 'mature' banking supervision legislation, it is hard to accept that, 20 years following its issuance, *Peter Paul* ruling of 2004 continues to enjoy an appealing position in 2024. More specifically, the stringent approach in *Peter Paul* should not be sustained for three primary reasons.

First, when the judgment refers to 'conferring rights' it seems to understand them as 'legally enforceable rights' and thus depart from the more generous approach in *Francovich* where 'conferring rights' seemed to be satisfied merely on the ground that the relevant piece of EU legislation aims at protecting the *interests* of individuals.[1008] The aim of protecting the *interests* of individuals should be considered a natural component of the pertinent EU legislation as the ultimate objective is the stability of the financial system and such stability could not be achieved if the interests of individuals (and especially of depositors) were not to benefit from the net of judicial protection.[1009] Besides, the rigid interpretation in *Peter Paul* cannot, or at least can no longer, be sustained in view of the evolution of the EU banking supervision legislation which clearly and in many instances recognises that the pertinent legal provisions (also) aim at protecting the *interests* of depositors.

The second reason which provides fertile ground in order to depart from the *Peter Paul* case relates to the objective pursue by the CJEU. The court adopted the restrictive approach with the view to limit the liability of the financial authorities and thus their obligation to compensate aggrieved parties. However, this objective can already be achieved *via* the strict statutory conditions laid down to establish the non-contractual liability under the EU law and the sufficiently serious breach test of the case-law.

[1006] This approach is generally followed by the Member States despite the variation in the level of protection afforded to depositors which ranges from statutory immunity to more enhanced depositor protection afforded to depositors for gross negligence and bad faith in the actions of financial authorities.

[1007] Tison (2005).

[1008] *Ibid.* See also Tridimas (2001).

[1009] It could be argued that legislation enacted in the 'public interest' requires the financial authorities bound by such legislation to take into account the protection of depositors as such protection strengthens the financial system and effectively ensures the upholding of the public interest.

The third and very critical reason why *Peter Paul* is no longer good authority is that compensatory immunity in cases in which aggrieved parties have recourse to a guarantee scheme, encroaches to both legal and policy reasons. This dimension will be thoroughly elaborated on in Section 2.5 further below.

Overall, exiting from the *Peter Paul* era seems to be the appropriate way forward in the field of banking supervision and protection of depositors dictated by reasons of maturity of banking legislation and effective legal protection of aggrieved parties.

2. Evaluation – Proposals

Having laid down a synthesis of the non-contractual liability regime in the EU and national jurisdictions, this section will critically reflect on current legal framework and the relevant case-law pertaining to the non-contractual liability of the financial authorities on national level and EU level, while it will set forth proposals towards a more effective liability regime which, at the same time, pays due regard to the peculiarities of the financial authorities' status and activities.

As mentioned in the beginning of this Chapter, this section will focus on the questions of '*to be or not to be liable?'* and *'too much or too little'* liability. It will further critically assess the 'sufficiently serious breach test' and will identify three keys to the riddle allowing financial authorities to break out of the '*liability escape room*'.

2.1. To be or not to be liable?

On the first level, the question that needs to be explored and answered is whether financial authorities should be held liable for their actions, or they should rather be granted immunity for their wrongdoings. Liability effectively means that the financial authorities are accountable for their actions. Granting to the financial authorities complete immunity from liability, would very hardy be tolerable from a constitutional point of view.

First, complete immunity would lame the judicial scrutiny of the financial authorities actions and inactions and thus would render the accountability mechanism weaker. The absence of a robust judicial tool, which would ensure the scrutiny of the financial authorities' decisions and effectively lead to their non-contractual liability, would – in its turn – question the democratic legitimacy of the financial authorities. Democratic legitimacy is a *conditio sine qua non* for the operation of the financial authorities as independent public authorities in view of the architecture of public administration in contemporary democratic societies. Therefore, weakening the accountability mechanism would fade the democratic legitimacy of financial authorities thereby moving their actions outside the constitutional boundaries.

Second, accountability is an inherent constituent of a delegation relationship. Hence, the delegation of state powers to independent authorities would only be possible from a constitutional perspective provided that vigorous safeguards are in place. Such safeguards include the necessary accountability mechanisms which the financial authorities must be subject to, so as a channel of communication and control between the delegator and the

delegee is ensured, whereas at the same time the courts are able to monitor whether the financial authorities exercise their powers appropriately and do not misuse them.

In addition, liability serves another very important cause. It contributes to enhancing the quality of the supervisory and resolution action. It would not be an exaggeration to parallel liability with the sword of Damocles. As thoroughly discussed in Chapter 1, liability, as another sharpened sword hanging directly above them, can incentivise the financial authorities to act more diligently and cautiously when discharging their duties in order to avoid the financial and reputational consequences of being held liable. This role of the liability is not merely a theoretical wishful thinking but has been tested and proved to be efficient in practice.

On a European level, one could draw some conclusions from the monetary policy world by observing the reaction of the ECB to the judgment of the German Constitutional Court in Weiss regarding the PSPP. Although the judgment was by no means binding upon the ECB, it is interesting how it influenced the ECB to pay particular attention to duly justify the proportionality of the PEPP programme. Such enhanced justification was clearly purporting to lay down a robust ground for the ECB action which could shield the ECB's decision in case of judicial review. Although this example does not relate to non-contractual liability, it can nevertheless serve as evidence that judicial accountability, a manifestation of which is the non-contractual liability, can contribute to the improvement of the quality of supervision and resolution as it increases the degree of diligence and care with which the supervisory and resolution authorities exercise their powers.

On a national level, the Greek liability cases against the HCMC can provide evidence of the role of liability as an incentive so the public authority shows outmost diligence in exercising its duties. As discussed in Chapter 4, section 2.1.3, the HCMC was found liable in the *Hedley Finance* case of 2010 for defective supervision and was ordered by the court to compensate the aggrieved third parties which incurred losses. Later, in a sequence of cases between 2011-2016, the HCMC was very active in terms of supervisory actions in relation to many supervised entities. Eventually, based on the information it collected during its supervisory actions, the HCMC decided to withdraw the license of some of these entities between 2011-2016. Although the parties that suffered losses on account of such withdrawals brough actions for damages against the HCMC, the Greek courts found that the latter had acted diligently and had undertaken all the necessary supervisory actions based on the knowledge and information it had at the time it acted. To a certain extent this could be conjunctural, it nevertheless constitutes some evidence that liability could deter the supervisor from acting negligently. The HCMC case shows that HCMC was 'responsive' to the 'liability threat'. Once it was held liable for shortcomings in its supervisory actions in 2010, it clearly showed a different stance during the years that followed by being proactive and comprehensive in its supervisory approach. Such approach yielded results in terms of its liability as the Greek courts were satisfied that the HCMC's supervisory action met the required standard of a diligent supervisor.

The above can provide some evidence that liability breeds diligent authorities which are 'responsive' to the 'feedback' provided to them through the liability route. Liability, as an evolving process, delineates the outer limits of the financial authorities' actions.

Effectively, the quality of the supervisory and resolution action becomes better as the financial authorities 'learn' which are the limits they should not cross so as their decisions are based on sound ground and are not to be overturned in case of judicial review.[1010]

In view of the above, the concept of non-contractual liability is a natural component of the financial authorities' function. Thus, the dilemma 'to be or not to be liable' seems to have a natural and clear response. It is beyond doubt that financial authorities should not enjoy complete immunity, but instead they should be liable for their wrongdoings when discharging the extensive powers assigned to them for two principal reasons. On the one hand, liability is part of the mechanism that ensures their democratic legitimacy. On the other hand, liability can serve as a springboard towards a more effective, more diligent and of a higher quality supervisory and resolution action.

2.2. Limitation of financial authorities' liability – Too much or too little?

Having chosen the first limb of the dilemma 'to be or not to be liable', the second question that follows is whether the non-contractual liability of financial authorities should be limited or not. A global tendency to limit the liability of financial authorities is clearly observed.[1011] Such tendency should be justified from both a policy and legal perspective.

While there are arguments both against and in favour of limiting the financial authorities' liability, there seems to be a clear choice from a policy standpoint which is the limitation of the non-contractual liability as an indispensable element for the smooth functioning of the financial authorities. Financial authorities are very often called to make tough decisions which require fine assessments and balancing between various interests involved. Such decisions may also be taken without all the necessary information being available to the financial authority. For instance, supervision is exercised on a prudential basis effectively requiring the supervisor to prevent situations which could lead to the collapse of a bank on a micro level, or to banking crisis on a macro level. Supervisors are not merely required to punish illegal behaviour, but to also adopt and implement a forward-looking supervisory action in order to prevent the occurrence of future and uncertain illegalities and unsound practices of the regulated entities. Such forward-looking supervision requires that supervisors are 'courageous' enough to take hard decisions which would potentially affect both the supervised entities and private individuals, such as creditors and depositors.

Equally on the resolution front, the resolution authority is required to make fine assessments regarding the existence of public interest, while it could well face hurdles

[1010] In this regard, the point raised in Chapter 1, about the evolving accountability should be recalled. In particular, in Steinhoff case, the CJEU pointed that the "individuals are entitled to expect the ECB to draw attention to the breach of [the violation of the right to property] when exercising its powers". Effectively, the CJEU set a benchmark against which the conduct of the ECB must be assessed, i.e., that it should point to potential violation of a fundamental right when opining on draft national laws. It is expected that in future the ECB could be held liable in case it fails to point in its opinions a possible violation of fundamental rights given the clear stance of the CJEU with regard to the matter.

[1011] Busch, Gortsos, & Gerard (2022b); Dijkstra (2015), pp. 13-34; Nolan (2013), pp. 195-198.

when implementing the agreed resolution plan as the balance sheet of the ailing credit institution might have changed and thus the resolution plan might not correspond any more to the optimal resolution action at the time the credit institution in question is being subject to resolution.

Should the actions of the financial authorities be subject to unlimited liability, this could hinder them from taking decisive action where necessary, in fear of the non-contractual liability they would be exposed to, the reputational effects this would entail as well as the likely huge damages they would be required to pay to aggrieved parties and the budgetary consequences thereof.

In view of the complexity of the supervisory and resolution action, the various interests that the financial authorities should balance[1012] when exercising their duties, as well as the wide discretion they enjoy, the most optimum policy option appears to be a model in between complete immunity from liability and unlimited liability, i.e., a model where the liability of financial authorities is subject to limitations.

It has also been argued that "the purpose of financial supervision is not to eradicate financial institution failures, any more than the purpose of criminal law enforcement is to eliminate the commission of criminal acts".[1013] On the contrary, financial supervision aims to prevent the materialisation of risks.[1014] According to this line of argument, financial supervisors should be spared from full liability as this would run against the very purpose of prudential supervision which aims to ensure (without providing a guarantee) that circumstances are such that supervised entities will not become ailing. [1015]

Whereas there are clear policy grounds requiring the limitation of the non-contractual liability of the financial authorities, it should also be examined whether such limitation is legally possible as well. From a constitutional point of view and as a matter of legal principle, it is undisputed that financial authorities, as public institutions, should be held liable and make good for any damage they caused to third parties. Any limitation, therefore, should be able to achieve the policy purpose pursued but withing the redlines posed by the constitution. Overly limiting the financial authorities' liability thereby making it extremely hard or even impossible for aggrieved parties to be compensated for supervisory or resolution could not be tolerable under the principles of *état de droit*, the rule of law[1016] and

[1012] such balancing primarily involves the clash between preserving financial stability as a public interest and protecting rights of individuals such as the right to property.

[1013] Athanassiou (2011), p. 31.

[1014] See in this regard Burton (2009).

[1015] Smits (1997), p. 322.

[1016] with the meaning of the principle of legality.

the principle of 'natural justice'[1017, 1018] The opposite view would equal to striping individuals from judicial redress, thus violating a fundamental constitutional right both on national and European level. This would have further consequences as it will not only violate a procedural right (access to justice) but also a substantive right, that is the right to property.

In view of the above, the next matter that should be explored is to what extent should the non-contractual liability be limited so such limitation is neither 'too much' nor 'too little'. To express it from the opposite side, the matter boils down to one question. Which is the optimal liability standard so the limitation of the fundamental rights of access to justice and to property are proportionately limited in view of the introduced limitations to the non-contractual liability of the financial authorities.

Limitation of liability can be achieved through two mechanisms either in combination or standing alone, i.e., by introducing a strict liability standard and/or by limiting the obligation of the financial authorities to compensate the aggrieved parties. The latter refers to compensatory immunity which could be available to a public institution in situations where the aggrieved parties have resort to a compensation mechanism (e.g., deposit guarantee scheme) for the damage they suffered.

The first mechanism is widely employed in the national jurisdictions of EU Member States as well on the Union level. The legal question surrounding the application of this mechanism is whether the national liability standards are aligned with the 'sufficiently serious breach' liability standard applied by the CJEU. Further, whether the 'sufficiently serious breach' standard is an appropriate liability standard balancing in between 'too much' or 'too little'.

The second mechanism also presents legal challenges on two fronts. First, in terms of its compliance with the protection of individuals' rights due to the fact that pre-determined monetary amount to be granted to aggrieved depositors of investors *via* the guarantee scheme would not always be proportionate.[1019] Secondly, in terms of the purpose of guarantee schemes which is not to compensate losses emerging on account of the financial authorities' failures, thereby protecting the latter against civil liability claims. In this very context, it is further argued that supervised entities are the mandatory financers of such schemes and their resources are not built up by State funds. Thus, it would be impermissible to divert the guarantee scheme funds to cover civil liability claims of third-party claims against financial authorities.[1020]

[1017] Natural justice considerations are discussed in the ancient Greek tragedy play of Sophocles *Antigone.*

[1018] especially where the loss suffered by the aggrieved third party cannot be recovered from an alternative source. In this regard see Athanassiou (2011), p. 34; Anagnostaras (2001), p. 289.

[1019] Floros (2012), pp. 293-297.

[1020] Athanassiou (2011), p. 37.

Both mechanisms and the legal problems associated with their application are examined in the following sections.

2.3. First key to the liability escape room. Criticism of the 'sufficiently serious breach' test as liability standard in specific cases and in the context of the action for damages in general

Having recapitulated the liability standard applicable by the CJEU, i.e., that of the 'sufficiently serious breach' test, in section 1.2 of this Chapter, it is time to turn to a critical evaluation of this test. To this end, one could make the following observations.

In principle, the liability standard of a 'sufficiently serious breach' could be seen to achieve a middle ground between 'too much' or 'too little' liability. It is beyond reasonable doubt that policy reasons require the limitation of liability which is legally possible as explained in the preceded sections of this Chapter. More generally, the rationale for special protection has been described as "*the firm legislative judgment that, in this context, the emergence of liability in damages would be detrimental to the effective exercise of the supervisor's regulatory functions*".[1021] As a consequence, the Union and national courts are increasingly expected to protect financial authorities against litigation by extensively limiting their liability, at least in the absence of any actions on the part of the authorities committed in bad faith.[1022] However, the strand of litigation brought before the CJEU so far and accordingly the way the latter has applied the 'sufficiently serious breach' suggests that the court is leaning towards the 'too little' limb.

This section serves two purposes. First it will evaluate the approach adopted by the CJEU in applying the 'sufficiently serious breach' test in specific and rather exceptional cases associated with the financial crisis, whereas on a second level, this section will examine in a more holistic way the liability standard the CJEU applies in general in the actions for damages in order to assess whether the action for damages provides an effective legal remedy and thus an effective protection to aggrieved parties in the context of non-contractual liability of financial authorities.

2.3.1. 'Sufficiently serious breach' test in exceptional cases of financial crises.

It is true that the complexity of the supervisory and resolution duties, the significant importance of the pursued objective of the financial stability as well as the significant importance and role of the financial sector they regulate distinguish the action of the financial authorities from the action of other public authorities. Adding to the above the

[1021] Hadjiemmanuil (1996), p. 339; See e.g., the following observations made during the passage of the Financial Services and Markets Act 2000 through the UK Parliament: 'It is important for the good of the financial services industry, as well as for good regulation, that regulators are not deterred from taking regulatory action by the […] risk of ending up with all kinds of challenges in court' (House of Lords Debates (HL Deb) 16 March 2000, column (col) 1773 (Lord Bagri)); 'Financial supervision requires a lot of difficult judgements and if everything the regulator does is subject to threats of legal action, over-regulation and excessive caution will ensue' – ibid, col 1786 (Lord Burns).

[1022] Of particular note in this regard are the Core Principles for Effective Banking Supervision laid down by the Basel Committee on Banking Supervision which advocate the protection of supervisors.

inherent difficulties in defining 'financial stability' and accordingly measuring the performance of the financial authorities against quantifiable benchmarks, are factors that should weigh when it comes to assessing the liability standard which must be applied to the financial authorities.

However, one could argue that the way the CJEU has, thus far, implemented the 'sufficiently serious breach' test, not only in cases of non-contractual liability of the financial authorities as supervisors but equally in cases concerning monetary policy, leans towards the "too little" limb. So far, on Union level, neither the ECB in its supervisory role (but also in its capacity as monetary policy authority), nor the SRB have ever been held liable for damages and ordered to compensate aggrieved parties in the context of non-contractual liability. It appears that in practice, in cases in which the ECB and SRB enjoy discretion, the CJEU will not find them to have committed a 'sufficiently serious breach' of EU law. Effectively, it seems that only in cases where the authorities have gravely and manifestly disregarded the limits of said discretion or where a member of staff of the ECB and the SRB has acted in bad faith purposefully causing damage to the claimant, the conduct of the authorities would satisfy the 'sufficiently serious breach' test. Indisputably, this narrows down the cases in which the ECB and the SRB could be held liable setting a rather high threshold based on which it is likely that negligent conduct (even gross one) could well fall outside the perimeter of the 'sufficiently serious breach' test. It could possibly be argued, therefore, that the CJEU's approach leads to an over-protection of the financial authorities on the EU level, which is not always justified, thereby limiting 'too much' their liability. Such favourable approach towards the financial authorities is also observed on national level, being either more or less stringent compared to the CJEU approach.

To better assess the CJEU's approach and whether the court applied a rather high liability standard thereby setting a 'safety net' around the financial authorities, one should closely examine the factual background of the cases referred to above. It is true that, thus far, the CJEU has been tested on the application of the 'sufficiently serious breach' liability standard in cases involving actions for damages against the ECB (both as supervisor and monetary policy authority) and the SRB, which emerged from the severe financial (and in some cases sovereign debt) crisis in Greece (*Steinhoff* and *Accorinti* cases), Cyprus (*Chrysostomides* cases) and Spain (*Banco Popular*).

In all these cases, the CJEU ruled in favour of the EU authorities and dismissed the actions for damages. The court did not find that the ECB or the SRB had manifestly erred when discharging their duties. Neither did it find that the principle of proportionality was violated in any of these cases especially when it came to assess the limitation of the right to property of the claimants in *Chrysostomides* and *Banco Popular* cases, or even the right to be heard in the *Banco Popular* case.

More specifically, the purpose of the Greek PSI, which was implemented in March 2012, was to alleviate the Greek sovereign debt burden and ensure its sustainability amid the severe pressures the Greek economy was then undergoing. In a similar vein, in Cyprus the measures adopted (bail-in) were design to contribute to the recapitalisation of the two Cypriot banks, i.e., Cyprus Popular Bank Public Co Ltd ('Laïki') and the Trapeza Kyprou Dimosia Etaireia LTD ('BoC')). In the absence of such measures, the banks would have been exposed to a risk of a deposit run and thus they were facing imminent threat to cease

their operations and undergo a disorderly default.[1023] Therefore, the measures were adopted with the critical view to ensure the stability of the financial system in Cyprus and in general of the euro area. Finally, *Banco Popular* was the first and rather 'unpopular' case on Union level where the EU resolution framework was applied to avoid a disorderly insolvency of one of the biggest banks in Spain.

In view of the facts of the cases, it should not be surprising that the proportionality assessment of the measures in Greece, Cyprus and Spain had only one winner; that is the public interest. The CJEU took into account the acute and most likely irreversible financial consequences that would have arisen in the absence of the measures which severely restricted the rights of individuals. Besides, it is the Commission, the ECB and SRB which act as interpreters of the concept of public interest whereas the courts review the interpretation of the former respecting the policy formation role the former enjoy.

Effectively, the outcome of the proportionality assessment, which leads to a decision to award damages or not, depends on one 'primordial' question; is it the protection of public interest or the protection of the right to property that should prevail? Undeniably, in a scenario, like the ones in Greece, Cyprus and Spain, the public interest appears to weight heavier in the scale of the proportionality assessment. The apparent simplicity of this answer is based on one fundamental acknowledgement; if the public interest is not safeguarded, then there is no space so private property rights flourish either on a long or short term. In other words, in a scenario in which a whole state was to financially collapse, then it would not be possible to protect property rights (deposits and investments even in a partial way through a guarantee scheme).

The litigation strand before the CJEU against measures of the ECB and the SRB adopted in Greece, Cyprus and Spain to address the effects of the financial (and in some cases sovereign debt) crisis cannot lead to safe conclusions regarding the "sufficiently serious breach" test given the vital public interests at stake involved in these cases resembling the EFTA court judgment in *Icesave* case.

Having assessed the CJEU's approach in such exceptional cases, it is time to turn our attention to scrutinising the CJEU's overall stance in cases of action for damages against EU authorities in order to evaluate whether this legal remedy affords to aggrieved parties effective protection.

2.3.2. 'Sufficiently serious breach' test in the action for damages in general

Save exceptional situations, if someone takes a step back and examines the way in which the CJEU generally applies the test of the "sufficiently serious breach", a glooming conclusion seems to emerge as regard to the level of protection of aggrieved parties. It appears that where the Union law affords to EU authorities (including financial authorities) a wide margin of discretion, the CJEU would hardly ever find such authorities to incur non-contractual liability against third parties.

[1023] *Chrysostomides* judgment, para. 294.

The Paris and Rome Treaties had already introduced the curt provision of TFEU, governing the non-contractual liability of the EU authorities, and since then this provision remains unchanged.[1024]Article 340 TFEU makes direct reference to the "general principles common to the laws of the Member States". The CJEU has moulded the content of Article 340 by developing relevant rules and principles.[1025] However, it appears that overall, these rules put the threshold for a successful liability claim very high. Based on the data available[1026] the average rate of success of liability claims reaches 8%.[1027]

Academic literature has opened fire against the CJEU by heavily criticizing the latter's approach. In this regard, it has been emphasised that "*the hurdles that must be surmounted by applications in order to obtain compensation [...] remain high*",[1028] whereas it has also been suggested that the CJEU through its case-law has made "*only a modest contribution to breaking down immunities of [EU] bodies*".[1029] Some authors have gone as far as to suggest that "*the liability in damages of the EU can hardly be treated as an effective remedy protecting individuals*",[1030] whereas others are harsher critics of the CJEU saying that "*the Court is, in effect, only paying lip service to its commitment to individual protection. A right cannot be properly called a right [...] unless it is capable of being enforced*".[1031] The test of the "sufficiently serious breach" has also attracted much criticism as setting the threshold too high by requiring "proof of special and abnormal damage".[1032] This high threshold of liability standard is further underpinned by the fact that when the EU authorities enjoy discretion in their decision-making, the CJEU will hardly ever find them to have crossed the limits of their discretion and thus hold them liable. It transpires, therefore, that the cases in which the financial authorities would be found to incur non-contractual liability are *particularly exceptional*.

Effectively, the CJEU's approach seems to lead to a sacrifice of the protection of the right to property, equating almost to a 'denial' in granting compensation and thus judicial protection in cases of discretion which reasonably raises the question of whether the

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[1024] Półtorak (2016), p. 430.

[1025] Mańko (2018), p. 9.

[1026] Półtorak (2016), p. 439.

[1027] This figure refers in general to actions for damages and not only to those actions for damages in relation to financial authorities. See also Van Dam, 2013, p. 50, who has pointed that "*the loud barking of the principle of liability rarely leads to a bite. In practice, the claimant has many hurdles to overcome [...] and it is, therefore, not surprising that most runners never reach the finish line*".

[1028] Gutman (2011), p. 750.

[1029] Van Dam (2013), p. 533.

[1030] Półtorak (2016), p. 439. In the same vein see Van Dam (2013), p. 50, who argues that the test for succeeding in an action for damages is so rigorous that "*calls into question the effectiveness of the rules of liability for breach of EU law*".

[1031] Biondi & Farley (2009), p. 162.

[1032] Antoniolli (2008), p. 238.

"sufficiently serious breach" test leans towards an over-protection of the EU authorities (including the financial authorities).

The above considerations are further intensified by the following aspect. Non-contractual liability of EU financial authorities is part of the public tort law universe. By their very nature, public tort rules contain a strong element of political influence. As described in the literature, this political dimension is present in the universe of the public tort rules as "*the problem is not only to look for a fair compensation of the damages that apply the principles of commutative justice or to find the best corrective sanction […] Public liability [such as that under Article 340 TFEU] is a decision about how we wish to be governed because it always involves an idea of how to design checks and balances between public powers and how to build a suitable relationship between norms*".[1033] In light of these, the principles governing the non-contractual liability of EU authorities are formulated by the CJEU not only based on a comparative and purely legal analysis of the general principles common to the laws of the Member States, but predominately with reference to political choices influenced by a principal consideration, that of the budgetary implications involved in the action for damages.[1034]

This approach of the CJEU also contains an element of contradiction. The court has explicitly acknowledged that the salient EU legislation encompasses the protection of individuals' interests (depositors and shareholders) and thus that the supervisory and resolution authorities when performing their duties should pay due regard to the individuals' interests and not only to the public interest of preserving the stability and soundness of the financial system on both a macro- and micro-prudential level.[1035]

However, taking into account the analysis in the preceding paragraphs, the acknowledgement that the pertinent legislation is enacted also with the purpose to protect the rights of depositors and shareholders seems as if it is almost recognised only on a 'declarative level' without applicability in practice. The way that the CJEU has formulated and, thus far, has applied the rules governing non-contractual liability of EU authorities, and hence to financial authorities, leading to an over-protection of the latter, appears to 'forget' that the law itself requires that depositors and shareholders' rights should be protected by the financial authorities when the latter perform their duties deriving from their mandate.

Save exceptional cases of financial crises with system-wide destabilising effects, the general approach of the CJEU seems to also turn the blind eyes to the fact that the protection the interests of depositors, shareholders or other third-party stakeholders contributes to the overall protection of the public interest pursued by prudential supervision which broadly is to ensure the stability of financial system and preserve the trust in it. [1036]

[1033] Letelier (2009), p. 289.

[1034] Półtorak (2016), p. 430; Letelier (2009), p. 301, who argues that "*public tort law is a mechanism for allocation of economic resources and this type of allocation is precisely one of the tasks of the political process*".

[1035] Athanassiou (2011), p. 33.

[1036] Athanassiou (2011), p. 33.

The above demonstrates the general reluctance[1037] of the CJEU[1038] to award compensation for pure economic loss and thus creates doubts as to whether aggrieved parties enjoy an effective judicial remedy in cases of damages they sustained on account of supervisory or resolution failures. Overall, the conclusion that emerges is that CJEU confers a judicial over-protection to EU authorities, especially to the EU financial authorities. The low rates of success of actions for damages before the CJEU constitute evidence which can support this view.

2.3.3. Additional evidence of the CJEU's effort to limit the non-contractual liability of EU authorities

Further to the above considerations, a general reluctance of the CJEU to hold EU authorities liable can be inferred by the court's stance in *Chrysostomides* case. Although this case belongs to the saga of the Cypriot bail-in cases which cannot serve as a solid ground to evaluating the CJEU's stance, as discussed above in section 5.1. of the Chapter, it can, nevertheless, reveal a conservative approach of the CJEU and a general tendency to over-protect the EU authorities. Such tendency could be inferred based on the ruling of the CJEU in *Chrysostomides* case in relation regarding the legal nature of Euro Group. It is noted *ab initio* that the purpose of the following analysis and evaluation is not to exhaustively present the legal arguments put forward by the General Court and the ECJ and the respective legal arguments available to refute the ECJ's stance, but instead the objective is to offer an insight in the CJEU's reasoning and its hinted effort to cast a protective net around Euro Group shielding it from non-contractual liability.

To start from the beginning of the spool of thread, it should first be mentioned that the General Court on first instance ruled that the Euro Group possesses legal personality. More specifically, it held that the concept of "institution" found Article 340(2) TFEU does not only refer to the EU institutions listed in Article 13(1) TEU. On the contrary, it must be interpreted broadly so as it subsumes under its scope "all other bodies established by the Treaty and intended to contribute to achieving the EU's objectives". The General Court succinctly premised this idea on the following reasoning. The scope of Article 236 TFEU is not identical with the one of Article 340 TFEU in relation to which actions are admissible, because the two mechanisms of judicial redress serve different purposes, i.e., the annulment of an act and the request for compensation. Thus, the fact that an act is not amenable to an action for annulment under Article 263 TFEU cannot exclude the possibility that the said act can trigger the non-contractual liability of its author. In the same vein the General Court highlighted that non-decision-making conduct capable of giving rise to the non-contractual liability of the European Union can form the basis for an action for damages, although it cannot be the subject of an action for annulment.

The General Court underscored that its position does not contradict the CJEU's ruling in *Mallis* case where the latter held that the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the EU, as this assessment was laid down by the CJEU for the purposes of an action for annulment under Article 263 TFEU,

[1037] Nolan (2013), p. 24.

[1038] The same holds true also for national courts.

and could not "be automatically transposed to the current, Article 340 TFEU case", in the light of the different and complementary purposes of those two types of action.

Following these clear thoughts, the General Court proceeded in a rather bold assessment whereby it held that in light of (a) Article 137 TFEU and Protocol No 14, of 26 October 2012, on the Euro Group, annexed to the TFEU, make provision, inter alia, for the existence, the composition, the procedural rules and the functions of the Euro Group, and (b) Article 1 of that protocol provides that the Euro Group is to meet 'to discuss questions related to the specific responsibilities [the ministers composing it] share with regard to the single currency', whereas these questions to be discussed in the Euro Group context, concern, under Article 119(2) TFEU, the activities of the European Union for the purposes of the objectives set out in Article 3 TEU, which include the establishment of an economic and monetary union whose currency is the Euro, it follows that the Euro Group is a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union. Such acts and conduct of the Euro Group in the exercise of its powers under EU law are therefore attributable to the European Union. Any contrary solution would clash with the principle of the Union based on the rule of law, in so far as it would allow the establishment, within the legal system of the European Union itself, of entities whose acts and conduct could not result in the European Union incurring liability.

At the end of the story, the General Court dismissed the action for damages by concluding inter alia that the harmful measures which had caused damage to the applicants were not imputable to the Euro Group but instead to the Cypriot government, and thus. The reasoning behind this conclusion was that the measures were decided by Euro area ministers of finance operating in the context of the ESM under the rules of the latter and not in their capacity as members of the Euro Group.

Despite this conclusion, the General Court was brave in recognising that the Euro Group is an institution if the EU and thus an action for damages can be brought against it. As expected, the judgment of the General Court was appealed against before the ECJ. Both the AG Pitruzzella and the ECJ found that the General Court erred in law when it decided upon the legal nature of Euro Group and thus no action for damages could admissibly be brought against Euro Group under Article 340 TFEU.

It would not be an overstatement to argue that this decision is as if almost the CJEU buried its head into the sand by choosing to shield Euro Group against non-contractual liability disregarding the extensive *de facto* powers that the Euro Group enjoys.

The ECJ put great emphasis on the informality of the Euro Group, without however realistically explaining why such informality situates Eurogroup outside the permitter of EU bodies established by the Treaties. In justifying its view on the legal nature of the Euro Group, the ECJ also denoted the origins of the Euro Group which point, according to the court, to an interpretation of Article 137 TFEU and Protocol No 14 whereby the latter refer to Euro Group as an entity outside the EU institutional framework. However, literature convincingly suggests that this approach and interpretation could be seen as rather formalistic and unpersuasive as to why the Euro Group is not an EU "institution", in view inter alia of the understanding that the TFEU refers only to entities put within the EU institutional framework with the mere exception of the national parliaments.

The ECJ decision could be seen as "masking" the Euro Group *de facto* powers. It has also been argued that it creates a rather uncomfortable situation where the Eurogroup is effectively recognised to be "immune to judicial accountability mechanisms" in the EU, which inevitable poses further alarming questions pertaining to effective judicial protection and the rule of law.

The judgment in Chrysostomides case in relation to the legal nature of Euro Group could be understood as an effort added in the long series of similar case-law whereby the CJEU pursues to substantially limit the non-contractual liability of the Union. Returning to the initial question posed, one could sense the conservative approach of the CJEU and a general tendency it is inclined to in relation to over-protecting the EU authorities.

2.3.4. Conclusions

From the analysis that preceded, a fairly clear picture arises in relation to the 'sufficiently serious breach' test. The CJEU has developed the test in a rather conservative way which – together with the other liability conditions, and especially the one of the causal link – considerably restricts the chances of aggrieved parties to successfully pass all hurdles and establish their right to receive compensation. Arguably, there seems to be a 'deficit' in the level of protection of aggrieved parties in the context of the action for damages, which cannot be justified, at least for cases which are not classified as 'exceptional' ones.

It seems unlikely that the CJEU will depart from its well-established case-law according to which the court will hardly ever find an EU authority to be liable in cases in which the latter enjoys discretion. However, from the preceded analysis it emerges that the protection of aggrieved parties in the context of an action for damages clearly calls for enhancement. The enhancement of the protection could be achieved if the CJEU was to apply a stricter assessment of whether an EU authority has crossed the limits of its discretion, especially when fundamental rights are involved.

Naturally, stepping towards such stricter assessment should not disregard the fine balances that financial authorities are required to make and the complex nature of their tasks. In addition, the intensity of scrutiny of the CJEU should not stretch up to the point where the court is substituted for the financial authorities in the decision-making process. This would not be legally permitted under the principle of the separation of powers, but it could neither be accepted for the pragmatic reason that the court does not possess the expertise to step into the shoes of any of the Union policymakers.

Bearing in mind the above, a more rigorous assessment, which would not result in the court substituting for the EU authorities in the decision-making process, could be achieved if the EU authorities were required to justify in a detailed manner their decisions, present a thorough proportionality assessment of their choices, and support them by ample evidence and assessments of alternative scenarios. It is expected that when the court is presented with a comprehensive analysis and elaborated justification of the policy choices made, it will be in a position to better assess (without stepping outside the perimeter of its powers and impermissibly substituting for the authority) whether the authority's actions under judicial review fall within the limits of the latter's discretion, or not. The better informed the court is, the more enhanced the protection of aggrieved parties could be.

Furthermore, in light of the evaluation regarding the CJEU's ruling on the Euro Group nature and the glooming ramifications of the ECJ ruling in *Chrysostomides* case, it should be argued that the CJEU should reconsider its approach and become more open to ascertaining the non-contractual liability of EU bodies. The evolution in the court's case-law regarding non-contractual liability is a pressing need so the latter keeps up with the evolution that has taken place silently, yet conclusively, through the last decades in the decision-making process in the EU, which now includes many *fora* (Eurogroup, Euro Summit) which develop EU policies and take respective decisions.[1039] Such case-law evolution will not only cease to turn the blind eye to reality, but it will also move towards a more enhanced protection of individuals, whereas it will further and most importantly become a solid ground for upholding the rule of law in the continuous-changing landscape of decision-making process in the EU. Although this proposal does not suggest that the CJEU in *Chrysostomides* case should have accepted the non-contractual liability of the Euro Group on the merits of the case considering the extreme circumstances involved, it clearly advocates that the CJEU would be aligned with the rule of law and the reality if it had sided with the General Court in recognising the Euro Group as an EU "institution".[1040]

2.4. Liability standard in cases of violation of procedural rights vs. substantive rights

Both the SSMR and SRMR explicitly lay down due process rights binding upon the ECB and SRB, which reflect the rights to be granted to individuals affected by the decisions of public authorities in the context of the good administration principle.

In cases in which financial authorities are not taking decisions which involve the exercise of discretions, the test of 'sufficiently serious breach' is differentiated requiring the proof of a mere breach of law[1041] in order to establish non-contractual liability of the financial authorities.

However, even in cases in which the financial authorities would not enjoy discretion, the CJEU lays a protective veil over the authorities by being conservative in its interpretation of the concept of 'illegality'. As discussed in Chapter 2, the CJEU has interpreted narrowly the concept of illegality. For instance, the Court has held that incorrect interpretation of a

[1039] Karatzia & Markakis (2022), p. 29.

[1040] *Ibid.*

[1041] *Laboratoires pharmaceutiques Bergaderm* judgment, paras. 42–44; *Fresh Marine* judgment, paras. 26–27; Judgment of the Court of 10 December 2002, *Commission of the European Communities v Camar Srl and Tico Srl*, C-312/00 P, ECLI:EU:C:2002:736, at paras. 54–55; Judgment of the Court of First Instance (Fifth Chamber) of 26 June 2008, *Comafrica SpA and Dole Fresh Fruit Europa Ltd & Co v Commission*, T-198/95, 171/96, 230/97, 174/98, and 225/98, ECLI:EU:T:2001:184, at paras. 134–136; Judgment of the Court of First Instance (Fourth Chamber) of 16 March 2005, *EnBW Kernkraft GmbH v Commission of the European Communities*, T-283/02, ECLI:EU:T:2005:101, at para. 87; Judgment of the Court of First Instance (Fifth Chamber) of 3 February 2005, *Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co. v Commission of the European Communities*, T-139/01, ECLI:EU:T:2005:32, para. 142.

regulation[1042] or absence of diligence by the EU Commission when applying EU law[1043] do not constitute illegality. Thus, the narrow interpretation of 'illegality' elevates the difficulty of proving a mere breach of law under the 'sufficiently serious breach' test.

Principal areas in which the financial authorities would not enjoy discretion are cases involving procedural rights of third parties, as opposed to substantive rights (e.g., right to property).[1044] Procedural rights involve rights of due process, such as the right to be heard,[1045] the right to a statement of reasons in the authorities' decisions,[1046] the right to access to documents,[1047] sound administration and adoption of decisions within a reasonable

[1042] Judgment of the Court (First Chamber) of 28 May 1970, *Denise Richez-Parise and others v Commission of the European Communities*, Joined cases 19, 20, 25 and 30-69, ECLI:EU:C:1970:47.

[1043] *Fresh Marine* judgment, para. 61.

[1044] Substantive rights are most likely to be violated in cases in which the financial authorities enjoy discretion.

[1045] Article 41(2)(a) of the Charter provides that "*the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*". In the same vein Article 22 SSMR provides that, save where urgent action is requires, the ECB is obliged to give the persons concerned the opportunity to be heard, before the ECB takes any supervisory decisions. Equally, Article 31 of the SSMRF lays down the right to be heard to a party whose rights will be adversely affected by the ECB's decision. Equally, Article 40 SRMR lays down the right to be heard of the persons concerned before the SRB takes a decision.

[1046] See Article 22(2) SSMR which states that: "the decisions of the ECB shall state the reasons on which they are based", and the equivalent Article 33 SSMRF which repeats the provisions of SSMR stating that "an ECB supervisory decision shall be accompanied by a statement of the reasons for that decision". In the same vein, Article 40 SRMR states that: "1. Before taking any decision imposing a fine and/or periodic penalty payment under Article 38 or 39, the Board shall give the natural or legal persons subject to the proceedings the opportunity to be heard on its findings. The Board shall base its decisions only on findings on which the natural or legal persons subject to the proceedings have had the opportunity to comment. 2. The rights of defence of the natural or legal persons subject to the proceedings shall be fully complied with during the proceedings. They shall be entitled to have access to the Board's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the Board".

[1047] See Article 22(2) SSMR which states that: "The rights of defence of the persons concerned shall be fully respected in the proceedings. They shall be entitled to have access to the ECB's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information". The equivalent provision under the SSMRF is Article 32(1). Recital 113 SRMR stipulates: "The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU in order to determine the rules for the calculation of the interest rate to be applied in the event of a decision on the recovery of misused amounts from the Fund and to guarantee the rights to good administration and of access to documents of beneficiaries in procedures in respect of such a recovery", whereas Article 90 SRMR states that: "Persons who are the subject of the Board's decisions shall be entitled to have access to the Board's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the Board". It is noted that the right to access to documents are subject to limitations under the pertinent Union legislation.

time frame[1048] which is determined based on the principle of proportionality,[1049] protection against entering business premises during the exercise of investigatory powers.[1050]

Procedural rights neither involve the exercise of any discretion nor require the financial authorities to enter into fine assessments balancing various conflicting interests as the case may well be where substantive rights are involved. Instead, procedural rights are rights inherent to the principle of good public administration which all public authorities must abide by. Given the afore-mentioned qualitative differences between the violation of procedural rights versus substantive rights, the liability standard for breach of procedural rights should be that of strict liability, i.e., a no-fault liability where the claimant will not be required to prove any fault in the behaviour of the financial authority (not even simple negligence).

Requiring such a strict liability standard is an avenue towards strengthening the judicial protection of aggrieved parties in the context of an action for damages. Undeniably, one could not disregard the reality and the fact that once again, it would be very hard even in such cases of procedural rights violations to establish causality between said violation and the allegedly damage suffered by the claimant. Nonetheless, the CJEU should not be overly restrictive in the assessment of the existence of such causal link given the absence of discretion when the EU authorities are called to respect procedural rights and also given the clear perimeter of such rights.

2.5. Second key to the liability escape room. Criticism of compensatory immunity

In light of the preceding section, another significant aspect that should be explored in the liability universe of financial authorities is whether the latter should enjoy compensatory immunity from both a legal and policy perspective. To answer this question, it is material to distinguish between two situations, that is (a) a situation in which an alternative compensation mechanism exists and (b) a situation in which such mechanism is absent.

[1048] In this regard, see Judgment of the Court of 18 March 1997, *Guérin automobiles v Commission*, C-282/95 P, ECLI:EU:C:1997:159, para. 37: “the Commission’s definitive decision must, in accordance with the principles of good administration, be adopted within a reasonable time after it has received the complainant’s observations”; Judgment of the Court (First Chamber) of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04, ECLI:EU:C:2006:592, para. 49: “the excessive duration of the first phase of the administrative procedure may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence in the second phase of the procedure”.

[1049] D’Ambrosio (2020), p. 237. For instance, banking legislation provides for specific time limits in relation to the ECB’s sanctioning powers in Article 4 of Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions OJ L 318, 27.11.1998, p. 4–7, and Articles 130 ff. of SSMRF.

[1050] See Article 13 SSMR which stipulates that “*1. If an on-site inspection provided for in Article 12(1) and (2) or the assistance provided for in Article 12(5) requires authorisation by a judicial authority according to national rules, such authorisation shall be applied for*”.

2.5.1. Legal Perspective

2.5.1.1. Compensatory immunity in the absence of a compensation mechanism

From a legal standpoint, compensatory immunity should be examined under the prism of the constitutional redlines and the requirement for effective legal remedy. Pursuant to the Article 340 TFEU,[1051] the 'constitutional text' of the EU legal, the Union bodies – in the context of their non-contractual liability – must make good any damage caused to third parties while performing their duties. In this setting, clearly, the starting point for the relevant discussion is that compensatory immunity is afforded to financial authorities where compensation is ensured for aggrieved parties through a compensation mechanism (e.g., a guarantee scheme). Compensatory immunity of financial authorities in the absence of any compensation mechanism would constitute a direct violation of constitutional requirement that the Union bodies must make good any damage they have caused. The same consideration arises under the respective national constitutional laws which establish the obligation of the state to make good for the damage a state organ has caused. It is legally undeniable, therefore, that the absence of any kind of compensation to aggrieved parties would disregard the explicit constitutional demands requiring compensation to be granted to parties who suffered losses on account of defective actions of the financial authorities.

In addition, the constitutional principle of the rule of law which requires that effective judicial remedies must be available to individuals is also violated if compensatory immunity is granted in the absence of a guarantee scheme. More specifically, the objective of the action in damages is to afford to aggrieved parties a judicial remedy where an action for annulment is not available in their case. If legislation or case-law were to grant immunity from compensation to the financial authorities (in the absence of a compensatory mechanism being in place), this would be tantamount to 'negating' the purpose of the action in damages and thus would deprive the individuals from enjoying access to effective judicial remedy. National law as well as the ECHR and the Charter require the states to grant to individuals effective judicial remedies.[1052]

[1051] Article 340 TFEU: "[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

[1052] More specifically, the Charter provides in its article 47 that "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article", whereas Article 6 ECHR provides that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Article 13 ECHR states that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity effective remedy before a tribunal in compliance with the conditions laid down in

As regards the ECHR, the ECtHR has shaped the content of "effective remedy" in its extensive case-law by holding that a remedy is effective when it is capable of directly remedying the impugned situation.[1053, 1054] The domestic courts assess the effectiveness of the remedy on a case-by-case basis. In a recent key case,[1055] the ECtHR noted in relation to the access to effective judicial remedies:[1056]

> *193. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief.*
>
> *194. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.*

Equally, on the EU level, the requirement for an effective remedy was recognised as a general principle of EU law,[1057] deriving from the common legal traditions of the Member States.[1058] This general principle lays down an obligation for the Member States to ensure a judicial relief to an individual whose rights have been violated. Later, the right to effective

this Article". As a way of a national law example, in Greece Article 20 of the Greek Constitution stipulates that judicial protection before the courts must be granted to every person.

[1053] Commission decision of 1989, *Pine Valley Developments Ltd and Others v. Ireland*, Application No. 12742/87.

[1054] It is noted that the ECHR affords to the Contracting States a margin of discretion in relation to the manner in which they fulfil the requirement of Article 13. In this regard see Case of Kaya v. Turkey, Application no. 158/1996/777/978, Judgment of 19 February 1998, para. 106.

[1055] Case of Darboe and Camara v. Italy, Application no. 5797/17, Judgment of 21 July 2022.

[1056] *Ibid,* paras. 193-194.

[1057] Such general principle of EU law is a fundamental legal principle common in most of the Member States of the EU. See, Tridimas (2006) who distinguishes the general principles into those principles which derive from the rule of law and relate to the relationship between the individual and the Union; and those principles relating to the relationship between the Union and its Member States.

[1058] See Judgment of the Court of 15 May 1986, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, Case 222/84, ECLI:EU:C:1986:206, para 18; Judgment of the Court of 15 October 1987, *Unectef v Heylens*, Case 222/86, ECLI:EU:C:1987:442, para. 14; Judgment of the Court (Grand Chamber) of 8 September 2010, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, C-409/06, ECLI:EU:C:2010:503, para. 58.

remedy was enshrined in Article 47 of the Charter.[1059] Effective judicial remedy involves two aspects, a procedural and a substantive one. More specifically, it requires that the Member States grants to individuals the procedural right to an effective access to justice, whereas at the same time they ensure that individuals enjoy the substantive right to an adequate relief.[1060] In the landmark case of *Johnston*,[1061] the CJEU noted the following:

> *Member states [are obliged] to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'. It follows from that provision that the member states must take measures which are sufficiently effective to achieve the aim of the directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned.*

Having shed some light on the concept of effective judicial protection, it is appropriate to turn to the question at hand. In light of the above, it transpires that the requirement of granting "effective judicial remedy" or "appropriate relief" would not be satisfied in a situation in which an action for damages and a right to compensation would not be available to aggrieved parties, whereas at the same time any other effective remedy and of an alternative compensation mechanism would be absent. Therefore, from a constitutional law perspective, it is beyond any doubt that compensatory immunity would be impermissible in cases in which a guarantee mechanism is not in place to compensate aggrieved parties.

2.5.1.2. Compensatory immunity where a compensation mechanism is in place

Having established that compensatory immunity is not permissible from a legal standpoint in cases where an alternative compensation mechanism is not present, the next question to be explored is whether such immunity is legally permitted in cases individuals have recourse to a guarantee scheme. This appears to be far from being a straight-forward question as it involves rather perplexed constitutional law aspects. In particular, two primary issues should be explored to answer the question at hand. *First,* whether the compensatory immunity in combination with an alternative compensation system satisfies the requirement of the "effective remedy" concept under Article 47 of the Charter (referred to above). *Second*, whether a pre-determined compensatory amount to be granted to aggrieved parties

[1059] For reasons of completeness, it is noted that Article 47 of the Charter and Article 13 ECHR do not have identical scopes. An individual can invoke Article 47 of the Charter not only where a Charter right is violated but also where any of his/her rights granted under Union law is breached. On the opposite side, Article 13 ECHR refers to an effective judicial remedy only in relation to a violation of the rights protected under the ECHR. This difference is justified in view of the fact that the Charter is part of the greater body of Union law, thus a 'cross-reference' to other Union legislation is possible, whilst the ECHR is an 'isolated' piece of legislation, a stand-alone system which cannot oblige Contracting States to apply an effective judicial remedy for rights beyond those capture under the ECHR.

[1060] Casarosa, Moraru, & Lazzerini (2016).

[1061] See Judgment of the Court of 15 May 1986, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, Case 222/84, ECLI:EU:C:1986:206, para 17.

irrespective of the amount of damage they sustained, and the identity of the wrongdoer satisfies the requirements of proportionality.

Before turning to examining these two points, it should be clarified that not all creditors of a credit institution have recourse to a guarantee scheme. Therefore, the following analysis applies to creditors who benefit from such a scheme (i.e., depositors), whereas for those not falling under the beneficial scope of a guarantee scheme, the financial authorities should not enjoy compensatory immunity for the reasons explained in section 6.6.1 of this Chapter.

2.5.1.2.1. Effective remedy

In order to examine the first point, the stating basis should be to explore in further detail the notion of "effective remedy" under Union law. Based on the case-law of CJEU, the judicial remedies should be "effective, dissuasive and proportionate".[1062] [1063] Although the three requirements are closely intertwined, the CJEU has provided ample of guidelines which may serve to obtain some clarity as it the content of each one. It is noted that the CJEU has traditionally employed these principles to evaluate legal remedies granted under national law. However, these principles can serve as a tool providing guidance to answer the question at hand.

The effectiveness of the legal remedies is assessed with reference to whether they are capable of achieving the goal set by the legislature. This means that if the substantive legislation requires the protection of consumers, or the protection of property rights, the procedural law should grant to individuals such legal remedies which allow the protection of the rights conferred to the latter under the substantive legislation.[1064] For the question at hand, it should be recalled that the substantive banking and investors legislation aims at protecting individuals from the defective supervision or resolution. Such protection effectively boils down to one main objective, that is the protection of the right to property, i.e., of the deposits and investments of the depositors and investors respectively. Hence in case of a failure of the financial authorities when performing their duties, the remedy should be capable of restoring the monetary damage sustained by aggrieved parties on account of such failure.

As regards proportionality, the remedy should be suitable, i.e., capable of attaining the legitimate objective pursued, whereas the remedy should also be necessary in the sense that it should employ the least restrictive means to achieve the pursued objective. Finally, "the effects of the penalty on the person concerned must be proportionate to the aims

[1062] Casarosa, Moraru, & Lazzerini (2016), p. 22.

[1063] As regards the requirements of effectiveness and dissuasiveness, these are premised on the test that the CJEU developed in the infamous *Rewe* case (Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*. Judgment of the Court of 16 December 1976, ECLI:EU:C:1976:188) in which the court referred to the principles of equivalence and effectiveness, where the first entails that the judicial remedies provided to individuals under national law for claims not involving an EU law dimension, should be equivalent to those remedies available for claims involving an EU law dimension, and the second requires that the conditions laid down under national law so individuals pursue EU law based claims should not make impossible or extremely difficult to pursue such claims.

[1064] Casarosa, Moraru, & Lazzerini (2016), pp. 24-25.

pursued"[1065] (*stricto sensu* proportionality). Regarding the question at hand, it seems that the proportionality dimension is also fulfilled.

The aspect of dissuasiveness is admittedly the most important of the three elements of an "effective remedy" as it involves the purpose of deterrence. A remedy will be effective when it achieves dissuasiveness in the sense that it is capable to prevent an authority from a purported violation. Dissuasiveness has a double effect.[1066] It deters the author of a violation from breaching the law in the future, but equally daunts potential wrongdoers from committing a violation of law in view of the prospective penalties.[1067] For the question at hand, there is no possibility to choose between *restitutio in integrum* and compensation for damages, as only the latter is available to provide relief to parties who suffered losses on account of defective supervision or resolution. Therefore, it should be examined whether compensatory immunity in combination with a guarantee scheme achieve deterrence and thus constitute an "effective remedy".[1068]

[1065] Opinion of Advocate General Kokott delivered on 14 October 2004, Joined cases C-387/02, C-391/02 and C-403/02, Criminal proceedings against Silvio Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Utri and Others (C-403/02). References for a preliminary ruling: Tribunale di Milano (C-387/02 and C-403/02) and Corte d'appello di Lecce (C-391/02) – Italy, ECLI:EU:C:2004:624, para 90.

[1066] Casarosa, Moraru, & Lazzerini (2016), p. 27.

[1067] *Ibid.*

[1068] To shed some light on which remedies the CJEU would consider as to be capable of achieving dissuasiveness, one could refer to the CJEU's preliminary ruling on Crédit Lyonnais (C-565/12 *LCL Le Crédit Lyonnais SA v Fesih Kalhan*, Judgment of the Court (Fourth Chamber), 27 March 2014, Request for a preliminary ruling from the tribunal d'instance d'Orléans, ECLI:EU:C:2014:190) where the CJEU was called to rule on the application of a national system of penalties to banks which failed to fulfil their obligation to assess the creditworthiness of borrowers who later did not repay the loan. Article 8 of the Consumer Credit Directive (Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC OJ L 133, 22.5.2008, p. 66–92) lays down an obligation for the Member States so as the latter requires creditors to examine the borrower's creditworthiness both based on information provided by the borrower as well as based on the relevant borrowers' databases. In case the creditor violates this obligation, Article 23 of the Consumer Credit Directive requires that Member States impose on creditors effective, proportionate and dissuasive penalties. By transposing this obligation, French legislation provided as a penalty, in this context, that the creditor would be forfeited of the entitlement to interest. The French Cour de cassation, though, interpreted this legislation in a restrictive way, by applying the penalty of forfeiture only to contractual interest and not to the statutory interest rate. This entails that the borrower would have to pay the statutory and not the contractual interest. In the case at hand, this restrictive interpretation would result in favouring the creditor bank since the contractual interest rate amounted to 5.60% whilst the statutory one was increased at 5.71% (with the increase being due to the fact that the loan was not fully repaid within two months following the court's decision becoming enforceable). The question referred from the French court to the CJEU was whether such remedy was effective in dissuading the creditors from violating their obligation to check the creditworthiness of their borrowers, so as irresponsible lending is prevented. It came as no surprise that the CJEU ruled that the penalty envisaged under French law was not compliant with the objective of the Consumer Credit Directive which was to discourage irresponsible lending and through this to reduce risks of over-indebtedness and bankruptcy. In this context, the CJEU upheld in paras. 52-53 that: "[…] given the importance […] of the objective of consumer protection inherent in the creditor's obligation to assess the borrower's creditworthiness, the penalty of forfeiture of entitlement to contractual interest cannot be regarded, more generally, as being genuinely deterrent if the referring court were to find […] that — in a case such as that which has been brought before it, in which the outstanding amount of the principal of the loan is immediately payable as a result of the borrower's default —the amounts which the creditor is likely to receive following the application of that penalty are not significantly less than those which that creditor

The three criteria are generally overlapping with each other. In *Berlusconi* case, the Advocate General Juliane Kokott has described in an elaborated manner when a legal remedy satisfies the three elements:[1069]

> *A penalty is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Community law. What is decisive in this regard is not only the nature and level of the penalty but also the likelihood of its being imposed. Anyone who commits an infringement must fear that the penalty will in fact be imposed on him. There is an overlap here between the criterion of dissuasiveness and that of effectiveness.*
>
> *A penalty is proportionate where it is appropriate (that is to say, in particular, effective and dissuasive) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous. Moreover, the effects of the penalty on the person concerned must be proportionate to the aims pursued.*
>
> *The question whether a provision of national law contains a penalty which is effective, proportionate and dissuasive within the meaning defined above must be analysed by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises.*[1070]

Applying the theory to the question at hand, one could make the following observations. In a scenario of compensatory immunity where a guarantee scheme is present, the latter constitutes the remedy afforded to aggrieved parties. To assess whether such guarantee scheme qualifies as an "effective remedy", it should be evaluated whether the three relevant elements referred to above are fulfilled.

As regards the effectiveness of the remedy, it could be argued that the guarantee scheme fulfils this requirement as it is, in principle, capable of protecting depositors and investors since it provides to the latter monetary compensation for the monetary loss such depositors or investors have suffered on account of defective supervision or resolution.

The guarantee scheme does not seem to raise issues as regards the proportionality element. The guarantee scheme could be deemed proportionate as it is suitable to provide relief to aggrieved parties and thus attain the legitimate objective pursued which is the protection of depositors and investors. It is indeed the least restrictive of remedies to be adopted against the financial authorities as it involves no burden for the budget of the latter and cannot be deemed to violate *stricto sensu* proportionality.

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could have received had it complied with that obligation." Thus, the CJEU concluded that "[i]f the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive."

[1069] *Ibid*.

[1070] *Ibid*, paras. 89-92.

The major obstacle in considering the guarantee scheme as an "effective remedy" appear when assessing the dissuasiveness of such remedy. It is questionable that compensatory immunity coupled with a guarantee scheme could efficiently serve the dual purpose of dissuasiveness, i.e., to ensure deterrence of the financial authorities from committing (again) a violation of their obligations. Arguably, though, such deterrence effect cannot be achieved given that the financial authorities do not have "skin in the game". Compensatory immunity shields the authorities from any monetary risk and thus budgetary consequences, thereby breaking the link between an illegal and harmful behaviour and the consequences of such behaviour. In the absence of such link which could keep the financial authorities on their toes, it should be deemed that the guarantee scheme fails to meet the dissuasiveness element. Any associated reputational risks which the authorities are exposed to, should not be considered a sufficient deterrence from a future and/or repetitive illegal behaviour on the part of the financial authorities.

In light of the above, it seems appropriate to consider that the guarantee scheme does not achieve dissuasiveness and thus does not constitute an "effective legal remedy" available to third parties which sustained losses arising from failures of the financial authorities during the performance of their supervisory and resolution duties.

2.5.1.2.2. Proportionality of pre-determined guarantee amount and Purpose of guarantee schemes

Regardless of the above, the use of guarantee schemes as compensatory mechanism in case of damages due to supervisory or resolution failures, pose two puzzling and – to a certain extent – interrelated legal concerns, namely (a) whether partially compensation *via* a guarantee scheme is a proportionate limitation of the right to property, and (b) whether diverting the funds of a guarantee scheme to compensate damages caused by financial authorities is permitted in view of the purpose of the guarantee scheme.

The first concern relates to whether compensating aggrieved parties only partially and not fully by granting a pre-determined monetary amount to them, irrespective of the amount of the damage they have suffered, is a *proportionate* limitation of the latter's right to property. The analysis that follows purports to provide an answer to this much-debated question by employing the traditional assessment of the *suitability*, *necessity* and *stricto sensu proportionality* of this measure towards the pursued objectives.

As discussed in Chapter 1, the limitation of the non-contractual liability of financial authorities serves *inter alia* two fundamental objectives. First, it purports to avert a situation where the financial authorities would face a flood of compensation claims since this situation could entail excessive budgetary repercussions. Such repercussions would very likely hamper the authorities' financial position and consequently their ability to carry out their mandate. In addition, given that the fear to be held liable and compensate aggrieved parties could well inhibit the financial authorities from being proactive, the limitation of liability aims to ensure that the financial authorities are not hesitant to 'bare their teeth' and take tough decisions. Both these objectives could be considered to serve the public interest as they allow the financial authorities to exercise their functions and discharge their vital mission in one of the most heavily regulated services areas, that of financial services.

Against this background, awarding only partial compensation to aggrieved parties is indeed an efficient means to limit the authorities' liability, thus it could be deemed to constitute a *suitable* measure to achieve the pursued objectives referred to in the preceding paragraph. Having overcome the first hurdle of suitability, the assessment journey becomes more turbulent, when it comes to assessing the *necessity* and *stricto sensu proportionality* elements. There could be no straight-forward answer regarding these two elements.

Awarding only partial compensation to aggrieved parties appears to be a necessary limitation to the right to property.[1071] In other words, it appears to be the least restrictive measure in order to protect financial authorities from being exposed to severe budgetary consequences which would result in fettering their margin of discretion and ultimately inhibit them from fulfilling their vital mission.[1072] Other measures in place, such as the strict liability conditions do not appear to be sufficient on their own to protect the financial authorities in the case the latter are found to be liable and thus ordered to compensate the aggrieved parties. Therefore, the limited compensatory amount serves as a last 'line of defence' against excessive budgetary burdens.

However, the question that remains is whether the predetermined amount of EUR 100,000 is a *necessary* limitation of the right to property, or the aggrieved parties should be entitled to further reasonable compensation not covered by the guarantee scheme. It could be fairly argued that protecting financial authorities from being over-exposed to budgetary consequences could still be achieved even if the courts were allowed to evaluate the facts of a particular situation and based on a case-by-case assessment decide to award or not supplementary (yet reasonable) compensation to the aggrieved parties beyond the amount covered by the guarantee scheme. The proportionality assessment could stop at the *necessity* point, yet it is appropriate to examine the third and final step of the proportionality test, that of the *stricto sensu* proportionality.

One should first delineate the perimeter of the *stricto sensu* proportionality element. The assessment of *stricto sensu* proportionality involves a cost-benefit analysis, namely a balancing between the advantages and disadvantages that a particular measure entails. For the question at hand, the cost-benefit analysis is a rather perplexed one as at the core of it lies the clash between the protection of property right and the protection of the financial authorities from extensive budgetary burden.

Whereas limiting the compensatory amount clearly offers more advantages which outweigh the ensuing disadvantages, it is doubtful that the pre-determined compensatory amount of EUR 100,000 would always be *stricto sensu* proportionate to the pursued objective of protecting the financial authorities. The primary reasons for this lie in the fact that awarding

[1071] See in this regard, Scarso (2006), p. 114.

[1072] Athanassiou (2011), p. 31, who also notes that "As the UK Government argued in Case C-224/01 *Köbler* v *Austria* [2003] ECR I-10239, accepting that they will sometimes make errors that cannot be appealed against or corrected by compensation is inherent in the freedom granted to financial supervisors to decide on matters of prudential supervision. That has always been considered acceptable and is inherent in the allocation of supervisory tasks in a State". See also Judgment of the Court of 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECLI:EU:C:2003:513.

a pre-determined amount for compensation disregards the amount of damage that the aggrieved party suffered, whilst it also does not take into account the behaviour of the financial authority which may well have acted with gross negligence and thus it may have committed a sufficiently serious breach of law.[1073] In the latter case, shielding financial authorities from the obligation to compensate aggrieved parties could be deemed as resulting into encouraging moral hazard on the part of the financial authorities and thus outweighing the advantages pursued. In addition, such pre-determined compensatory amount ends up resembling with the situation in which financial authorities enjoy compensatory immunity, which is neither permissible from a legal standpoint nor desirable from a policy perspective as discussed in section 8.2. below.

In conclusion, it appears that should aggrieved parties have recourse only to a pre-determined amount covered by the guarantee scheme, this would fail to meet the proportionality test. It should be open to the court to decide whether the particular characteristics of the case justify a supplementary, yet still reasonable, compensation to be awarded to the parties which suffered damage on account of defective conduct of the financial authorities.

Turning to the second matter, that of diverting the funds of a guarantee scheme to cover damages that arose on account of supervisory or resolution failures, the impending question that arises is whether this is acceptable from a legal and policy perspective given the purpose that the guarantee schemes serve and the fact that such schemes are funded by supervised entities (credit institutions and investment firms) and not by the financial authorities themselves.

It has been argued that the purpose of guarantee schemes is to “ensure the immediate partial recuperation of deposits entrusted to the failing bank” instead of protecting financial authorities “from pressure arising from potential liability claims”.[1074] In addition, deposit guarantee schemes have been operating, so far, only at a national level protecting savings of up to €100,000 per depositor per bank. Such schemes are exclusively funded by credit institutions which ‘undertake’ – by way of contributions to the guarantee scheme – the risk their business model ensues, rather than the State.[1075]

In view of the above, it could be maintained that taking into account the rationale of guarantee schemes and the source of their financing, the funds of the guarantee schemes should not be channelled into covering liability claims of aggrieved party which suffered losses on account of supervisory or resolution failures.[1076]

1073 For instance, the financial authority became aware of rumours that a supervised entity did not comply with the law but nevertheless the authority did not take any action to investigate such rumours which happened to be true and led to the collapse of the supervised entity.

1074 Athanassiou (2011), p. 37.

1075 Dragomir (2010), pp. 316-317; Tison (2003), pp. 5-6.

1076 Athanassiou (2011), p. 37.

As legitimate as these arguments may be, they could be rebutted in light of a broader interpretation of the objectives of the guarantee schemes. The operation of credit institutions involves various risks with the most prominent one being the credit risk. With the ultimate purpose of preserving the stability of the financial system, guarantee schemes assume part of this credit risk by ensuring that depositors will receive all or at least part of their deposits in case of a bank failure.[1077] As a result, guarantee schemes create trust in the banking system and prevent deposit runs at times of stress as well as a possible strengthening of the shadow banking system. In addition, the EU Deposit Guarantee Scheme Directive[1078] in its recital 3 provides that "[t]his Directive constitutes an essential instrument for the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services in the field of credit institutions, while increasing the stability of the banking system and the protection of depositors". From this it could be deduced that the guarantee schemes serve the broader objective of preserving financial stability and compensating aggrieved depositors regardless of the author of the acts which caused damage to the aggrieved parties so trust in the banking system is preserved.

Therefore, from a legal perspective, it could be supported that it is permissible to divert the guarantee scheme's funds to compensating damages caused by financial authorities even though such schemes are not funded by the financial authorities or the state jointly with the supervised entities. Besides triggering such schemes to cover damages caused by the financial authorities will only take place in the case of depositors and investors, since no such schemes exists for other parties such as shareholders or creditors of the ailing credit institution. Nonetheless, the matter is multi-dimensional and cannot be exhausted on the above observations. A further consideration associated with the present discussion is that offloading the costs of defective supervision or resolution to the supervised entities which fund the guarantee schemes could be said to run against the principle of good administration.[1079] In any case, the diversion of the guarantee scheme's funds does not appear to be desirable from a policy perspective for the same reason as discussed in the proportionality assessment, since it again provides a comfort net to the financial authorities creating moral hazard as discussed in section 8.2. below.

2.5.1.3. Conclusions on the legal and policy perspective of compensatory immunity

In principle, therefore, it is debatable whether compensatory immunity, even where a guarantee scheme is in place, is permissible from both a legal and policy perspective. Both proportionality considerations and the purpose of the guarantee schemes provide arguments against limiting the right to property to the extent that the damage is covered only by the pre-determined amount of the guarantee scheme. The granting of indiscriminate compensatory immunities that do not reflect the specificities of the mission and tasks of the financial authorities and of the inherent litigation risks could be hardly seen as

[1077] Guarantee Systems. Keys for their implementation (2015), p. 20.

[1078] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (recast) OJ L 173, 12.6.2014, p. 149–178.

[1079] See similar discussion in D'Ambrosio (2020), p. 72.

appropriate.[1080] Even if someone would lean towards the legal permissibility of compensatory immunity, strong policy reasons justify why such immunity should not be afforded to financial authorities.

2.5.2. Policy perspective

Save the legal considerations surrounding the compensatory immunity, strong policy reasons suggest that such immunity should not be granted to the financial authorities even if a guarantee scheme is in place and is considered to be an "effective legal remedy". The underlying theory of the 'incentives argument', as discussed in Chapter 1, section 5.2.1., offers some 'cradle' thoughts in this respect. The incentives argument cannot justify a policy choice which would lead to a liability standard which is not subject to any limitation, it nevertheless provides a solid ground against the compensatory immunity of financial authorities. The risk of being held liable and the ensuing reputational and budgetary risks associated with compensating aggrieved parties, constitute a cogent motive for the financial authorities to perform their duties *de lege artis,* i.e., by demonstrating the optimal level of due care.

Evidence of this function of the 'incentives argument' can be found, as already suggested in Chapter 1 section 5 and Chapter 5 section 1, both on a Union level and on a national level.

On a Union level, it is again briefly recalled, that the ECB paid particular in justifying its monetary policy instruments in the context of PEPP following the judgment of the German Constitutional Court on the PSPP. Again, it is noted that this example derives from the monetary policy universe and does not relate to the non-contractual liability of the ECB but instead to the limits of its mandate, yet it constitutes evidence that in light of the 'incentives argument' a policy choice which would grant to financial authorities compensatory immunity would remove the incentive of the financial authorities to discharge their duties with the optimal level of care and diligence. Equally, the Greek cases concerning the non-contractual liability of the Hellenic Capital Market Commission provide evidence supporting that financial authorities are "kept on their toes"[1081] when they face the possibility of being required to compensate aggrieved parties as a result of the damage they caused to the latter. Effectively, compensatory immunity avails the financial authorities from the consequences of their actions and thus arguably renders the accountability mechanism ineffective. The immediate consequence of this is the moral hazard in the behaviour of the financial authorities which would not have a strong incentive to act diligently.[1082]

Arguably, therefore, compensatory immunity even in cases in which an alternative compensation mechanism is available to the aggrieved parties, does not appear to be a wise

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[1080] Athanassiou (2011), p. 38.

[1081] Busch, Gortsos, & McMeel (2022b).

[1082] Shavell (1979); Shavell (1980); Shavell (2005); Dijkstra (2015), pp. 51-52.

policy stance as it would be the primary suspect for causing moral hazard to financial authorities.

2.6. Unspoken loopholes. Limiting non-contractual liability of financial authorities by limiting fundamental rights – Public interest vs right to property when applying the bail-in tool in resolution action

From the preceded analysis, it emerges that the limitation of non-contractual liability of supervisory and resolution authorities is justified from both a policy and legal perspective for the reasons set out in Chapters 1 and 5. Nonetheless, the limitation of the financial authorities' liability comes at the price of limiting the right to property of the aggrieved parties which sustained loss because of supervisory or resolution failure. This section will focus on critically evaluating the limitation of the right to property which is effected by the application of the bail-in tool in the context of resolution action in situations of system-wide crises which was discussed in Chapter 3, section 7.2. above.

First, it is noted that the Charter of Fundamental Rights has emerged as a significant tool underpinning the reasoning of the CJEU when it reviews acts of EU authorities in the EBU. Evidence of this reasoning is available in the *Ledra* and *Steinhoff* cases. In the first, the CJEU clarified which acts of EU authorities are due to be examined towards their compliance with the Charter.[1083] In this regard, the court ruled that the ECB may be held liable even if it merely indirectly acts on behalf of an international organisation. In a similar vein, *Steinhoff* judgment adds to the 'reach' of the Charter the cases in which the ECB only acts on an advisory and consultative manner.

In the clash between the public interest and property rights, the CJEU, so far, has uphold the public interest. Examples of this stance includes the judgments in *Ledra, Chrysostomides*, and *Kotnik* cases. Whereas in these cases the advantages stemming from the limitation of the right to property outweighed the disadvantages, it is questionable whether the same would hold true in a situation of a system-wide crisis in which the resolution authority would apply the bail-in tool in a great number of banks in a jurisdiction thereby subjecting unsecured deposits to a haircut. As it was discussed in Chapter 3, section 7.2., such situation should hardly be justified under the third limb of the proportionality test, but also even under the first limb, since it would most likely trigger profound distrust in the banking system which would lead to a deposit outflow with grave consequences in relation to the soundness and capital robustness across the banking system. Eventually,

[1083] See Poulou (2017), p. 127; Dermine (2017); Adamski (2019).

applying the bail-in tool would cause an abrupt economy recession,[1084] which would clearly outweigh the benefits of the bail-in tool.[1085]

As noted before, it is reasonably expected that applying the bail-in tool to a great number of banks and accordingly creditors and retail depositors (especially corporate depositors) in situations of a system-wide crisis, would be a "poisonous mix",[1086] which would ultimately severely undermine and defeat the very purpose of the resolution framework, that is financial stability.

In light of the above, it is submitted that subjecting uncovered deposits to bail-in in cases of system-wide crises would entail such acute, if not irreversible, effects on the economy and the financial system that consequently the resolution of failing credit institutions *via* the route of the bail-in that the bail-in measure would ultimately seem to fail to be suitable on a macro level to achieve the objective pursued, whereas at the same time the disadvantages would outweigh the benefits of such resolution measure. Therefore, should the bail-in be implemented in a scenario of a system-wide crisis, this would hardly pass the proportionality and thus it would entail an impermissible limitation of the right to property.

Consequently, *de lege ferenda* the protection of the right to property in the above cases should be strongly enhanced with amendments in the EU resolution framework in conjunction with the courts applying a stricter proportionality test when assessing the permissibility of the limitation of the right to property.

The stricter test could be achieved if the courts require the competent resolution authorities to demonstrate that the effects of the application of haircuts to uncovered deposits is an appropriate resolution measure[1087] that does not indeed undermine the pursued purpose of financial stability, and that the benefits of the resolution measure contribute to attaining said purpose. Effectively, competent resolution authorities should provide sufficient evidence, explanations, and justification for the resolution measures they chose to implement as well as to assess counter-scenarios, namely to assess the effectiveness of the application of other resolution measures as well as the advantages and disadvantages of such alternative scenarios.

[1084] Ventoruzzo & Sandrelli (2020), p. 51. The authors note that: "Some authors have convincingly argued that, had the authorities applied the Directive's requirement whereby a minimum 8% private sector involvement must be enforced before any public funds are injected into a bank, then senior debt and even deposits would have been affected, with the consequent trigger of a downward spiral generating an even grimmer crisis and domino effects for the other banks".

[1085] Gortsos (2016a), p. 22.

[1086] *Ibid.*

[1087] It is noted that resolution tools are not triggered in three exceptions including the case of precautionary recapitalisation (see Recital 41 BRRD).

The stricter proportionality test could be combined with *de lege ferenda* changes in the EU resolution framework.[1088] The changes can be effected by expanding the use of tools already in place. More specifically, it should be underlined that the EU legislator seems to have recognised the likely destabilising effects in the banking sector and broadly in the economy which the application of bail-in in system-wide crises could entail. In this vein, the BRRD provides in Articles 37(10) and 56-58 the possibility for the Member States to make use of 'government financial stabilisation tools' (the 'GFSTs') and grant 'extraordinary public financial support' in the 'extraordinary situation of a systemic crisis'.[1089] The use of GFSTs is a measure of last resort, whereas their activation is not mandatory but only a discretionary power afforded to the Member States in cases of banks which have been declared FOLTF.[1090] The use of GFSTs is subject to the proviso that the competent resolution authority has applied a bail-in of 8% of equity and liabilities, including uncovered deposits has taken place and that the activation of GFSTs will be approved under the Union state aid framework.[1091, 1092]

It is submitted that the protection of the right to property could be enhanced by rendering the activation of GFSTs mandatory in a scenario of a system-wide crisis, without even the prior implementation of a bail-in of 8%. Such exclusion of uncovered deposits from the bail-in in system-wide crises would be efficiently applied if it was accompanied by other legislative reforms. One such reform would be that banks are required to build more bail-inable liabilities so as they improve their loss-absorbing capacity. A further reform has been suggested by the IMF and is directed towards the injecting more flexibility into the EU resolution framework. The IMF's proposal consists of two limbs; first Member States' options to apply "more relaxed burden-sharing requirements under the 2013 Banking Communication" must be restricted.[1093] The second limb comes as a counter-balance to the first limb and requires the introduction of "alternative flexibility, in the form of a financial stability exemption, under which departure from the 8% bail-in requirements for public support would be allowed at times of severe financial stability risk, and subject to strict criteria and appropriate governance arrangements."[1094] The IMF aptly points out that this flexibility would be a necessary compound of the EU resolution framework which only grants flexibility through the 'precautionary recapitalisation' which is available for solvent

[1088] Anastopoulou (2023), pp. 372-373.

[1089] For a comprehensive analysis on the GFSTs see Gortsos (2016a), p. 4.

[1090] All the criteria of Article 32(1) BRRD should be met.

[1091] Gortsos (2016a), p. 10. See also Recital 8 and Article 37(10) BRRD.

[1092] *Ibid,* p. 5. The author points out that "some Member States, including Germany, have not incorporated Articles 56-58 BRRD into their national legislation, on the basis of the argument that these provisions contradict with Article 6(6) SRMR" which provides that "[d]ecisions or actions of the Board, the Council or the Commission shall neither require Member States to provide extraordinary public financial support nor impinge on the budgetary sovereignty and fiscal responsibilities of the Member States".

[1093] Anastopoulou (2023), p. 373.

[1094] IMF, Euro Area Policies: Financial System Stability Assessment (2019), p. 7.

banks, whereas there is no flexibility "when it is really needed, that is during a system-wide crisis when banks are typically undercapitalized". [1095]

The necessity for a change in the EU legal framework governing resolution is also evident from the general reluctance observed of the EU and national authorities to widely apply the bail-in tool.[1096] Such reluctance seems to be attributed to the severe political cost that the implementation of bail-in will most likely trigger. It is common ground that the application of the bail-in tool results in a grave interference with the right to property of shareholders, creditors and depositors. The results of this interference are not confined in the 'micro-world' of the ailing credit institution but involves extensive socio-economic effects. Therefore, the EU resolution framework should be revisited, and EU policy makers should not continue to stand idle in front of the difficulties surrounding the resolution of banks and the drawbacks of the current resolution rules.

2.7. Filling the gaps in the accountability chain: (a) The absence of fully-fledged accountability links between the Union and national authorities in the SSM and (b) The case of composite procedures

2.7.1. Accountability Gaps in the SSM

The complex decision-making processes on the SSM level, involve a plethora of actors. This construction raises questions as to who actor is responsible for which actions at which stage in the decision-making process and in what degree. This can be described as "the problem of many hands".[1097] The inherent difficulty in allocating accountability and thus liability between the several actors in the SSM is further increased by the lack of comprehensive vertical accountability links between these actors. The triggering point of the accountability gaps is the operation of the SSM across two separate legal orders, the Union and national legal order. In other words, although macro-prudential tasks with regards to banks are accumulated on the Union level, the implementation of such tasks is allocated between Union and national authors, thereby spreading the implementation between two separate legal orders.

In order to examine the gaps in the accountability arrangements in the SSM ecosystem and the possible solutions to such gaps, it is appropriate to briefly recall the discussion in Chapter 2 section 5 relating to the vertical accountability links. As analysed in Chapter 2, it emerges from the L-Bank judgment that by virtue of the SSMR *all* prudential supervisory *tasks* have been transferred on Union level and are vested exclusively in the ECB and not to both the ECB and to the NCAs. At the same time, the SSMR provides that the NCAs are responsible for carrying out the tasks in relation to the supervision of the LSIs. Therefore, in the SSM ecosystem there is a double delegation structure. One delegation of all prudential supervisory tasks (including the supervision of LSIs) by operation of law from the NCAs to the ECB, and a second one, a reverse delegation, from the ECB to the NCAs specifically in

[1095] Anastopoulou (2023), p. 373.

[1096] e.g., failing Greek banks in 2015, Banco Populare and Banco Veneto in Italy.

[1097] Bovens (2007), p. 457. See also Thompson (1980); Bovens (1998).

relation to the exercise of the tasks pertaining to the supervision over LSIs.[1098] It should be emphasised that only the responsibility of exercising the supervisory tasks over LSIs is delegated to the NCAs and not the task of supervision itself which is exclusively assigned by the SSMR to the ECB. In the context of the reverse delegation structure, the ECB acts as the delegating authority, whereas the NCAs as the delegees. Within this structure, there is a clear lack of an effective vertical accountability chain between the ECB and the NCAs, which would allow the former to review the actions of the latter and hold them accountable for any wrongdoings during the performance of their responsibilities.

The absence of such chain seems to contradict the very objective of the SSMR which in its Recital 55 expressly recognises that "[a]ny shift of supervisory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements". A clear vertical accountability nexus between the ECB and the NCAs would be a salient feature of the ECB's operation as supervisory authority for the following reason. The ECB is the ultimate recipient of all powers in the SSM ecosystem, and it is accountable for its operation towards the EU Parliament and the Union courts. The accountability arrangements currently in place to review the ECB's actions would be effective only if a fully-fledged accountability mechanism which would include vertical checks allowing the ECB to hold the NCAs accountable for their decisions and punish them accordingly.

Setting such vertical accountability links requires first to assess the nature of instructions that the ECB addresses to the NCAs in the context of the reverse delegation structure. The critical point in this regard is whether the NCAs are bound by the instructions provided by the ECB, or they enjoy discretion in implementing such instructions. This aspect is sufficiently clear on Union level, as the current legal framework provides for the instances where the ECB's instructions are binding upon the NCAs.[1099] What is lacking from the current legal framework is a rectification toolkit available to the ECB in cases in which the NCAs fail to follow the former's instructions.[1100] The NCAs' accountability before its national parliament may not be sufficient to offset the weak accountability link between the ECB and the NCAs.[1101]

Despite the lack of a proper sanctioning toolkit, the ECB has two options to address poor performance or non-compliance of the NCAs with the ECB's instructions. First, it can resort to legal remedies under Article 271(d) TFEU[1102] against the NCAs for non-fulfilment of the

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[1098] Karagianni & Scholten (2018), p. 186.

[1099] e.g., under the common procedures (granting or revoking of banking license, assessment of qualifying holdings).

[1100] Bovens (2007).

[1101] Karagianni & Scholten (2018), p. 193.

[1102] Article 271(d) TFEU stipulates that "The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning: [...] (d) the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a

latter's obligations deriving from the Treaties and the Statute of the ESCB and of the ECB. The second tool is the power of the ECB to take over the supervision of an LSI. Both tools are essential but should be considered insufficient in order to establish a fully-fledged accountability mechanism between the ECB and the NCAs.

2.7.2. Third key to the liability escape room. Liability in cases of composite procedures – jointly and severally liable

2.7.3. General

A system of composite procedures which includes 'many hands', and various consecutive decisions could be said to resemble the mysterious mazy jungle of bureaucratic traps in Franz Kafka's prose, *The Trial.* This system involves the paradox that two different legal orders, the national and Union one, are merged into one in the decision-making process, yet the judicial review of shared administration is still premised on a two-level construction. This creates a dual uncertainty; first as regards which level (national or Union) constitutes the competent *forum* for individuals in order to obtain judicial protection,[1103] and second regarding which acts are amendable to judicial review in the competent level, having due regard to the primacy of EU law and the exclusive competence of the CJEU to rule on acts stemming from EU bodies. Inevitably a mist spreads around which body (Union or national) should be held accountable and thus liable.

Despite the radical evolution of EU substantive administrative law, with the establishment of shared administrations involving composite procedures, greatly geared by the birth of the EBU, it is remarkable that the pertinent EU legislation did not equally get matured in terms of procedural rights addressing the issue of judicial protection of individuals affected by decisions adopted in the context of composite procedures.[1104] Instead, the EU legislator remained silent in this regard and relied on the general principles of Union law,[1105] leaving all the hard work to the CJEU. It has even been aptly pointed out that "the administrative reality of shared administrations still seems ahead of the legal and judicial reality".[1106] Therefore, this system questions the effectiveness of judicial protection afforded to individuals and urgently calls for enhancement.

Given that both the SSM and SRM do not enjoy legal personality, any decisions adopted in their context must be attributable either to the EU authorities (ECB or SRB) or to the

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national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court".

[1103] Prechal (2015).

[1104] Eckes & Mendes (2011).

[1105] Wissink (2021).

[1106] *Ibid.*

national authorities (NCAs or NRAs).[1107] Composite procedures stand at the spotlight as they involve the greatest risk of ineffective judicial protection in relation to preparatory acts or measures adopted either by the ECB/SRB or by the relevant NCA/NRA.[1108] The landmark rulings in *Berlusconi* and *Iccrea Banca* cases elaborate on the *Borelli* case and constitute the Bible on judicial protection in case of composite procedures. Although it is not clear whether *Berlusconi* and *Iccrea Banca* effects extend beyond the EBU realm, it seems that they have established principles which enrich the EU administrative law general principles and "will have a lasting impact in other articulate arrangements in which EU and national authorities cooperate closely".[1109] In both cases, the CJEU "sided with efficiency and a unitary approach towards judicial review of resolution decisions". [1110]

The principal criterion put forward by the CJEU in cases of composite procedures is that if the national authorities enjoy discretion, then the act is attributable to the national authority and consequently the jurisdiction for judicial review rests with the national courts. In the opposite scenario, where the EU authority decides over "the crux of the matter"[1111] and is not bound by the preparatory acts or the advice of the national authority participating in the composite procedure, the CJEU is competent to adjudicate over the matter.

2.7.4. CJEU case-law

The CJEU has gradually moulded in its case-law the rules for the judicial protection of individuals in composite procedures. In relation to the SSM, the CJEU in its primeval judgement in *L-bank* case laid down the permitter of the SSM function. The court held that the ECB is vested with the ultimate responsibility of the SSM operation, whereas it provided a clear interpretation of Article 4 of the SSMR by stating that all prudential supervisory tasks are conferred upon the ECB which has the power to exercise such tasks, whereas NCAs are vested with the power to exercise these tasks in relation to LSIs.[1112]

Later, in *Berlusconi* case, the CJEU held that the SSMR's purpose is to establish unity in the decision-making power instead of dividing the powers among the ECB and the NCAs.[1113] Therefore, where the ECB is exclusively competent to adopt a decision (in the

[1107] D'Ambrosio (2020), p. 53.

[1108] e.g. in the sphere of bottom-up composite procedures in the SSM see Wissink (2021), p. 277, who points "[a] preparatory measure may take the form of an NCA draft decision addressed to the ECB, which in common procedures is a formal step and in ongoing supervision a step that may be made. NCA preparatory measures may also be measures carried out by NCA staff, who then usually are NCA members of the Joint Supervisory Teams and on-site inspection teams, in preparation of a final ECB decision. When participating in Joint Supervisory Teams, NCA staff remain national staff and will thus use their powers under national law, while they may use powers laid down in Union law when joining an on-site inspection team".

[1109] Sarmiento (2019b).

[1110] *Ibid.*

[1111] *Ibid.*

[1112] *L-bank* appeal judgment, paras. 37-41.

[1113] *Berlusconi* judgment, para. 56 in conjunction with paras 43-44.

case at hand, the approval of acquisition of qualifying holdings in a credit institution), then it is the ECB to be held accountable and thus its actions are to be exclusively reviewed by the CJEU. Although, as a general rule, decisions adopted by national authorities are reviewed by national courts, *Berlusconi* case introduces an exception to this by holding that the judicial review of national preparatory acts or non-binding proposals put forward by NCAs rests with the CJEU.

Overall, the *Berlusconi* ruling enhances the judicial protection of individuals and reduces the uncertainty and the risk of long proceedings on both EU and national level[1114] as it lays down the perimeter of competence of the Union and national courts. By defining this perimeter, the CJEU ensures that there will be no contradictory judgments on Union and national level, whereas it also bridges the gap with regard to the judicial review of the national preparatory measures.[1115]

In the same vein, *Iccrea Banca* judgment shed some light regarding which acts are amenable to the CJEU's review in the SRM realm.[1116] The judgment clarified the SRB's decision on the calculation of the *ex-ante* contributions of credit institutions to the SRF is amenable to CJEU's judicial review by virtue of Article 263 TFEU. Such decision is addressed to the respective NRA which subsequently impose on the relevant bank the obligation to contribute to the SRF, nevertheless it cannot escape the judicial review as it is 'unquestionably' of direct and individual concern to the credit institution concerned. The affected credit institution can challenge the SRB's decision directly before the EU courts. If the time limit for challenging the SRB's decision under Article 263 TFEU has expired, then the affected credit institution cannot circumvent the time bar and seek to challenge the decision indirectly *via* the preliminary reference route.

Although *Iccrea Banca* case refers only to the decision on the *ex ante* contributions of credit institutions its 'reach' appears to subsume cases in which the SRB adopts a decision following the consultation by the NRA or a national preparatory measure or proposal.[1117]

2.7.5. How to sail in the uncharted waters of SSM and SRM composite procedures

The relevant rulings of the CJEU with regard to the judicial protection in composite procedures are essential in light of the fact that such procedures are more and more common in the EU administration. Indisputably, the rulings strengthen the legal certainty and the effectiveness of judicial protection as they lay down rules regarding the competent court and the acts to be subject to judicial review thereby reducing some uncertainties in the already highly complex systems of SSM and SRM.

[1114] Wissink (2021), p. 171.

[1115] *Ibid.* See also, *Berlusconi* judgment, para. 49.

[1116] See further Wissink (2020).

[1117] Markakis (2020) who notes as an example the drawing up of resolution plans for the entities and groups within the SRB's remit (Article 8 SRMR), or when the SRB applies simplified obligations in relation to the drafting of resolution plans, or waives the obligation to draft those plans (Article 11 SRMR).

Despite the valuable guidance that *Berlusconi* and *Iccrea Banca* judgments offer, certain aspects of the judicial protection in composite proceedings (concerning both the SSM and SRM) warrants further clarification so individuals seeking judicial protection (including in the form of compensation) do not sail anymore in uncharted waters.

Berlusconi case offers an important guidance for the judicial protection in the realm of composite procedures. Nonetheless, it does not provide a clear picture as to (a) which NCA's preparatory acts are amendable to judicial review, (b) how to treat cases in which the EU bodies and the national authorities are jointly liable for the damage caused, (c) the depth of the review of the NCAs' draft decisions, (d) as well as regarding the 'legal fate'[1118] of the invalid national preparatory measure. Given that *Iccrea Banca* judgment follows the *Berlusconi* rational, it equally leaves unanswered similar ambiguities.

As regards the first uncertainty, the scope of the judicial review could be inferred by the *Berlusconi* judgment which stipulates that national preparatory measures fall within the scope of the CJEU's exclusive review *to the extent they affect the validity of the ECB's decision*.[1119]

It is true that the CJEU in its *Berlusconi* judgment uses different terminology varying among 'any involvement of the national authorities',[1120] 'acts adopted by national authorities'[1121] and 'preparatory acts adopted by national authorities'.[1122] This could be rather confusing and is open to interpretation as to which national acts could fall under the CJEU's scrutiny. Three possible interpretations have been suggested as to the national acts falling within the CJEU's exclusive review;[1123] (a) a broad interpretation which would entail that all preparatory acts will be reviewed by the CJEU, even if such act would be separately reviewed by a national court if it was not part of the EU composite procedure, (b) the middle-ground interpretation would entail that the CJEU reviews only those preparatory acts which could not be separately subject to judicial review before national courts, and finally (c) the narrow interpretation according to which the CJEU is competent to review only those national preparatory measures which are directed to the ECB, such as NCA draft decisions, "but no general preparatory measures such as requesting and establishing information".[1124]

Arguably, the broad interpretation could ensure effective judicial protection as it would entail that there are no holes in the judicial protection net since no act would escape judicial review. On the opposite, the middle-ground interpretation deteriorates the effectiveness of

[1118] Markakis (2020).

[1119] Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*. Reference for a preliminary ruling, Judgment of the Court of 22 October 1987, ECLI:EU:C:1987:452.

[1120] See para. 43 in *Berlusconi* judgment.

[1121] See para. 47 and 48 in *Berlusconi* judgment.

[1122] See para. 51 in *Berlusconi* judgment.

[1123] Wissink (2021).

[1124] *Ibid.*

judicial protection as it would open the door to lengthy judicial proceedings on both the Union and national level, whereas the narrow interpretation would equally question the effectiveness of judicial protection as it creates the risk that national preparatory measures which are neither directed to the ECB nor separately subject to judicial review before national courts, would escape judicial scrutiny.

Considering the aim of effective judicial protection, the CJEU's stance in *Berlusconi* judgment should be understood to adopt the broad interpretation. This could fairly emerge from the wording of the judgment mentioned above which stipulates that the CJEU has competence "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".[1125] The court's statement should be interpreted as encompassing that all acts, regardless of whether they are directed to the ECB or are separately reviewed by national courts, fall under the CJEU's scrutiny if they affect the validity of the final decision adopted by an EU institution.

In order to ensure that the CJEU effectively reviews the national measures, it has been correctly suggested that a reverse preliminary reference mechanism could be established whereby the CJEU could refer to the respective highest national court and inquire about the validity of the national measure in view of the applicable national law.[1126] [1127] This could be achieved by a respective amendment of the Rules of Procedures of the CJEU based on the general duty of the Member States to cooperate with the Union bodies enshrined in the Treaties. The reverse preliminary reference mechanism however would be premised on a safer legal ground if it was directly provided for in the TFEU following its amendment. A more radical approach that has been put forward is to vest the CJEU with exclusive competence to review cases involving the liability of both EU bodies and national authorities by introducing a corresponding amendment to the TFEU.[1128] Although this could arguably solve the problems associated with the judicial protection in the cosmos of composite procedures, it appears hard to be implemented in practice, given the inherent tendency of Member States to wish to preserve their powers and assign less of them to the Union bodies.

The reverse preliminary ruling mechanism would be valuable for the second uncertainty, that is when the CJEU needs to adjudicate on cases in which the EU bodies and the national authorities are jointly liable for the damage caused. For the more effective judicial protection, it would be optimal to hold the EU and national body severally and jointly liable. In case the aggrieved party chooses to seek full compensation from the EU body, the latter

[1125] See para. 44 in *Berlusconi* judgment.

[1126]On the application of national law by the ECB and the EU courts see Annunziata & de Arruda (2023).

[1127] Wissink (2021).

[1128] Busch, Gortsos, & McMeel (2022b), p. 508.

should be able to enjoy internal recourse to the national authority and claim reimbursement based on the proportion of the latter's liability.[1129]

Turning to the third uncertainty, namely the intensity of the review of national preparatory acts, the case-law thus far has left open the issue regarding which irregularities of the national acts would be subject to judicial examination.[1130] Although this remains to be clarified by the CJEU, some observations can, nevertheless, be made in anticipation of such clarification.

The ECB and in some instances the SRB put great reliance on national preparatory acts in order to adopt their decisions Thus, in light of their importance, such national acts deserve an in-depth judicial scrutiny by the CJEU. Besides, there are cases in which the ECB is called to apply national law, thus the review of national preparatory acts by the CJEU could be deemed to constitute a natural evolution of the expansion of the ECB's mandate. The Advocate General in *Berlusconi* case, AG Campos Sánchez-Bordona, seems to have recognised this point. In his opinion noted that "[i]n order to safeguard the right of interested parties to an effective remedy, […] the EU Courts will have to decide whether preparatory measures taken by NCAs that are subsequently adopted by the ECB contained defects that rendered them void in a way that has inevitably contaminated the entire procedure",[1131] whilst he further underscored that "the ECB is entrusted with applying national law that transposes directives and, in exceptional cases, regulations that deal with the banking union, underpinning the extension of the jurisdiction of the Court of Justice to review such cases".[1132]

This very point on the expansion of the ECB's mandate and the ensuing expansion of the CJEU's competence to review national preparatory acts have also been discussed in the literature. In this regard, on the occasion of *Berlusconi* judgment, it has been noted that:

> *"…only time will tell if the ECJ will consider the ECB's new mandate as an expansion of its own jurisdiction in order to apply national law, or if it will continue to follow the previous understanding that national law is beyond its reach. In the former case, the ECJ will have revolutionized the boundaries of its jurisdiction and even abandoned the old tenet of the autonomy of EU law that EU measures cannot be invalid on grounds of national law. In the latter case, it*

[1129] *Ibid,* p. 508-509.

[1130] Markakis (2020).

[1131] See para. 112 in Opinion of Advocate General Campos Sánchez-Bordona delivered on 27 June 2018, C-219/17 *Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*. Request for a preliminary ruling from the Consiglio di Stato ("AG Opinion in *Berlusconi* judgment") available at: https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=CELEX:62017CC0219.

[1132] See para. 114 in AG Opinion in *Berlusconi* judgment.

will have rendered the ECB immune to judicial control whenever it applies national law in one of the SSM's decision-making procedures".[1133]

The fourth uncertainty concerns the legal fate the national actors whose errors have been found by the CJEU to have contaminated the decision of the Union body. The principle of good administration as well as the duty of cooperation between Union and national bodies would require that the national act in question is declared invalid on national law level and thus it is disappeared from the legal world or is replaced by a valid act.[1134]

In view of the persisting uncertainties and until the CJEU clarifies them, it is reasonably expected that claimants will bring proceedings before both the Union and national courts challenging the same acts to hedge the risk of choosing a judicial *forum* which is not the competent one to adjudicate on their issue and thus eliminate the risk of being time barred from pursuing their claim should their actions for damages be dismissed on the Union or national level as the case may be.

A final point to be discussed relates to the problem of many hands[1135] and the criterion of discretion based on which the CJEU determines whether an act or omission is attributable to the Union or national authorities.

In the context of large and multi-level public organisations, accountability can be structured based on different models to surpass the obstacles associated with the problem of many hands, that are the models of 'corporate accountability' (the organisation as actor), the 'hierarchical accountability' (one for all), 'collective accountability'(all for one) and 'individual accountability'(each for himself).[1136] Using these models by way of parallelism in the context of the SSM and SRM universe, one could say that the CJEU applies collectively the model of 'hierarchical accountability' and the model of 'individual accountability'.[1137] The first applies in the cases in which the national authorities are instructed by the relevant Union bodies to act in a certain way and do not enjoy discretion, then the act is ascribed to the Union body, whereas the latter applies in cases in which the national authority does enjoy discretion or in a situation where it does not enjoy discretion but violates the instructions of the Union body, the act or omission is to be imputed to the national authority.

[1133] Brito Bastos (2019).

[1134] Dermine & Eliantonio (2019), pp. 251-252.

[1135] The problem of many hands is generally present in the EBU and in particular the supervision of credit institutions regarding their compliance with anti-money laundering rules (see for instance the Danske Bank case).

[1136] See by analogy Bovens (2007), pp. 457-459.

[1137] *Ibid.*

Even though the test of discretion appears to provide some clear-cut answers, it is subject to further improvement in cases where "there are discretional and non-discretional decisions bundled together in a complex single act" adopted by the Union or national authorities.[1138]

3. Epilogue

This journey across the turbulent sea of the non-contractual liability comes finally to end. Despite the shadows still casted above certain aspects of the legal framework determining the non-contractual liability of the ECB and the SRB, as well as of the NCAs and NRAs, one could reach a rather solid conclusion; establishing the financial authorities' liability both in the Union and national sphere proves to be a hard-to-solve aenigma for aggrieved parties who suffered damages on account of defects in the exercise of the supervisory or resolution powers of the Union bodies.

The hurdles such aggrieved parties are facing are multi-faceted and predominately owe to two reasons. First, the hurdles are attributed to the very strict non-contractual liability conditions laid down by the case-law primarily of the CJEU but also of the national courts, as well as the lax stance of the courts towards the liability of financial authorities especially in the cases they enjoy discretion. Second, the hurdles arise because of the difficulties inherently present in the SSM and SRM universe with regard to the allocation of competence among the Union and national authorities, and in particular the complexities arising in the context of the mazy composite procedures.

Unequivocally, reasons pertaining to the democratic legitimacy of the financial authorities as independent administrative authorities, in combination with policy reasons require that the financial authorities be held accountable and liable for damages they cause during the performance of their duties. It is true that again policy reasons require that the financial authorities are protected against excessive liability claims so as such authorities are not hampered from effectively exercising their mandate. Hence, the limitation of the non-contractual liability of the financial authorities is an indispensable component of the legal framework governing their non-contractual liability.

Yet, both on Union and national level, this limitation could be seen to be going beyond what is necessary to achieve the pursued objective, that is the protection of financial authorities against a floodgate of compensation claims. The CJEU has created a protective veil over the ECB and the SRB by interpreting the conditions for establishing the non-contractual liability of Union bodies in a very restrictive way making it almost impossible for aggrieved parties to successfully prove that these conditions are met. The national courts follow closely the CJEU's case-law and thus afford to the national financial authorities the same level of protection as the CJEU, whilst in some instances this level might be even higher.

At the frontline stands the test of the 'sufficiently serious breach' of EU law which serves as a first key to the riddle allowing financial authorities to break out of the 'liability escape room'. The CJEU has moulded the concept of a sufficiently serious breach in a series of cases including cases relating to the non-contractual liability of the ECB and SRB. From this line of case-law it evidently emerges that the threshold of establishing the sufficiently

[1138] Markakis (2020).

serious breach is rather high, whereas it seems that it is almost impossible to satisfy the test in cases the ECB and SRB enjoy discretion in their decision making. Therefore, the likelihood that the aggrieved parties to establish their claim seeking compensation appears to be remote. Even if aggrieved parties successfully pass through the minefield of the sufficiently serious breach test, it is most likely that their case will fail as the CJEU will not be satisfied that there is a causal link between the unlawful conduct and the damage sustained by the applicant.

Ultimately, it is questionable whether the action for damages remains an effective judicial remedy available against defective supervision and resolution, or instead it constitutes a merely theoretical and eventually scatheless weapon in the hands of aggrieved parties.

As if the liability conditions were not strict enough, in some jurisdictions the financial authorities enjoy compensatory immunity when a guarantee scheme is available and aggrieved parties have recourse to such schemes, serving as the second key to the riddle allowing financial authorities to break out of the ‘liability escape room’. As it was discussed, compensatory immunity should be excluded in such cases as it is impermissible for both legal and policy reasons, relating to ensuring an effective legal remedy, attaining the principle of proportionality and avoiding a situation in which moral hazard on the part of the financial authorities is favoured.

The considerations regarding the limitation of the liability of the financial authorities become more intense when examined under the light of the fundamental right to property. In this context, an area which deserves particular attention and warrants legislative changes is the application of the bail-in tool under the EU resolution framework in cases of system-wide crises. It is submitted that applying the bail-in in such cases would fail to meet the proportionality test given that it would very likely create destabilising effects and therefore defeat the very purpose of the resolution framework which is the protection of the financial stability and the robustness of the banking system.

The difficulties associated with the non-contractual liability of the ECB and SRB are intensified given the labyrinth of the decision-making process in the context of the SSM and SRM and the emerging problem of ‘too many hands’ which serves as the third key to the riddle allowing financial authorities to break out of the ‘liability escape room’. In this regard, it is submitted that the CJEU should conduct an in-depth judicial review of the national preparatory measures adopted in the context of a composite procedure so as to ensure effective judicial protection of aggrieved parties, whereas in this very context a reverse reference for a preliminary ruling from the CJEU to the relevant national court could be established to assist the CJEU in this in-depth review.

Overall, it should be argued that the action for damages does not constitute an effective legal remedy in light of the current interpretation and application of the relevant conditions of the non-contractual liability of Union bodies. Without disregarding the precious policy reasons which require the protection of the financial authorities and thus the limitation of their non-contractual liability, the CJEU needs to proceed to a fine-tuning of relevant liability conditions. The CJEU should not stand idle in front of the inherent difficulties of this task, neither should it continue to cast a protective net over the ECB and SRB with the practical effect that the latter will hardly ever be found to be liable. Ultimately, ensuring that the

action for damages is an effective legal remedy should be of primary concern to the CJEU as effective judicial accountability constitutes an essential part of the democratic legitimacy of the ECB and the SRB whose role is of increasing importance in the realm of the EBU and in general of the European Union. After all, effective accountability is the ultimate manifestation of strong democracies and is much needed in the universe of the European Union where the various Union bodies as international actors with incremental powers, risk of becoming a bureaucracy distant from the channels of democratic answerability.

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