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THE EUROPEAN CENTRAL BANK (ECB) POWERS AS A CATALYST FOR CHANGE IN EU LAW. PART 2: SSM, SRM, AND FUNDAMENTAL RIGHTS

Marco Lamandini[*]
David Ramos[**]
Javier Solana[***]

Abstract

The new financial and supervisory architecture in the EU has put the European Central Bank (ECB) on center stage as a bulwark of the system's stability. In relation to the architecture's initial design, the critical questions concern the insertion of the ECB's mandates in the constitutional balance of the EU Treaties. Yet, as the new structure settles, the more pervasive questions will concern its fit within the framework of fundamental rights, as these will determine the ECB's legitimacy and accountability on an on-going basis. Any balance will have to resolve the conundrum between the conception of fundamental rights as "trumps" of government policies, and the design of financial stability and central bank policies as "trumping policies." This Article examines the EU framework of fundamental rights, including its scope of application, substantive rights, and procedural rights, in relation to the ECB's supervisory policies and powers under the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). The picture shows that there are undesired "dark corners." Major uncertainty surrounds critical issues, such as: to what extent property rights can limit the ECB's functions as a "lender of last resort" and its supervisory interventions; to what extent the ECB is bound by the non-discrimination principle in the exercise of its functions; to what extent the principles of certainty and legality of penalties have any bearing in the situations of banking groups; and the actual meaning and extent of judicial review of ECB acts. A major construction effort is needed for the sake of fundamental rights and to provide a

[*]Professor of Commercial Law, University of Bologna.

[**]Senior Lecturer in Commercial Law, Carlos III University of Madrid.

[***]Lecturer in Commercial Law, University of Glasgow. A working version of this Article was prepared for the ECB Legal Research Programme. The views expressed in this Article are those of the authors and do not necessarily represent those of the ECB.

sound orientation in the implementation of the SSM/SRM framework.

INTRODUCTION

The European Central Bank (ECB) has acquired a fundamental role as a bulwark of stability in the Monetary Union and of the safety and soundness of the Banking Union. This raises fundamental questions about the constitutional insertion of new powers in the delicate equilibrium of mandates and competences between the EU and Member States.[1] Nevertheless, as this new architecture settles, more pervasive questions are likely to challenge the ECB's legitimacy, including the friction between supervision and fundamental rights under the EU Charter of Fundamental Rights (EU Charter) and the European Convention on Human Rights (ECHR).

The EU Charter and the ECHR form the backbone of the EU's own image as a union based on the respect for the rule of law and shared values. In fact, as we saw when we examined the mandates of the ECB, the initial case law of the CJEU, which used the concept of "institutional balance" as a limit to excess of power, based it on two grounds: (1) the need for equilibrium between EU institutions; and, (2) the need to prevent an abuse of power that could harm individual rights.[2] The subsequent case law on this issue gradually focused more on the element of institutional equilibrium,[3] whereas case law on fundamental rights developed separately and acquired its own importance.[4] However, the initial case law on institutional balance is a good reminder that the limits to mandates based on institutional equilibrium and the prevention of abuse of individual rights are two pieces of the *legitimacy* puzzle.

Thus, for an institution like the ECB, which combines broad powers with less pronounced democratic credentials, it is imperative to exercise its powers in a manner that does not deviate from the common understanding of the rule of law and the values underpinning it. Yet this is controversial for two reasons. First, the *common* understanding of the rule of law is more aspiration than reality. Fundamental rights can have different meanings, from a narrow yet uncontroversial core of safeguards (common denominator), to more expansive *values* which apply in more instances and borrow from different constitutional traditions, yet have unclear and controversial boundaries (common multiple). Second, the choice between narrower and broader notions of *rights* and their balancing with the policies that can act as a limit to those rights, is particularly difficult in the case of the ECB, especially when it pursues the goal of *financial stability*. Fundamental rights are often characterized as *political trumps* held by individuals, which prevail over collective goals justified by

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[1] We examine these matters in the preceding part of this article. *See* Marco Lamandini, David Ramos & Javier Solana, *The ECB as a Catalyst for Change in EU Law. Part I: The ECB's Mandates*, 23 COLUM. J. EUR. L. 1 (2016).

[2] *See, e.g.,* Meroni & Co., Industrie Metallurgique, SpA v. High Authority of the European Coal and Steel Community, Case C-9/56, EU:C:1958:7, ¶ 11.

[3] *See, e.g.,* European Parliament v. Council, Case C-70/88, EU:C:1990:217, ¶¶ 21–22. *See also* Industrie- en Handelsonderneming Vreugdenhil BV v. Comm'n, Case C-282/90, EU:C:1992:124, ¶¶ 20–22. *See also* Jean-Paul Jacqué, *The Principle of Institutional Balance*, 41 COMMON MKT. L. REV. 383, 383–391 (2004).

[4] This began with the recognition of fundamental rights as part of EU Law's "general principles," as in Erich Stauder v. City of Ulm, Case 26-69, EU:C:1969:57; International Handelsgesellschaft v. Einfuhr – und Vorratsstelle Getreide, Case 11-70, EU:C:1970:114; and J. Nold Kohlen v. Comm'n, Case 4-73, EU:C:1974:51, and ended with the Charter of Fundamental Rights of the European Union, Dec. 12, 2007, 2007 O.J. (C 303) 1 [hereinafter Charter].

consequentialist—often utilitarian—considerations.[5] Yet financial stability has become a sort of *trump* policy that justifies granting a high degree of discretion to the institutions that safeguard it. Overcoming this apparent contradiction requires pause and reflection. This Article aims to tread the first steps in that direction.

The rest of the Article is structured as follows. In Part I, we lay the methodological ground by discussing the difficulty of characterizing fundamental rights as *trumps* or *conclusive reasons* in case of conflict with policy, and the trend towards treating them as *powerful reasons* that require strong justification if they are to be limited. We also discuss the elements that European courts could use in the context of supervisory acts by the ECB or the National Competent Authorities (NCAs) to *specify* (that is, to determine the scope), or *calibrate*, (that is, to determine the intensity of) fundamental rights as a prior step to their *balancing* against ECB/NCAs actions. Additionally, we give examples of the treatment of *financial stability* as a sort of *trumping* policy, where courts tend not to delve deep in its justification when assessing its limits.

In Part II, we analyze the interplay between supervisory competences and fundamental rights. We focus first on substantive rights, which group fundamental freedoms and property, and examine other *property* limits that could be used by courts to mitigate the deficit of protection. Second, we focus on procedural rights, including rights of general application and rights that are more specific to the procedures for the imposing penalties. Then, we focus on the review of supervisory acts. In Section IV, we explore how supervisory competences can clash with fundamental rights contemplated in national constitutions. We conclude the Article in Section V with a reflection on the need for the supervisory competences arising from the Banking Union to fit seamlessly into the core of the EU legal order, where fundamental rights stand.

I. APPLYING, CALIBRATING, AND BALANCING FUNDAMENTAL RIGHTS: KEY METHODOLOGICAL QUESTIONS

A. From Rights as "Trumps" to Rights as "Reasons": Their Balancing and Proportionality

Our idea is not to discuss the philosophical foundations of fundamental rights, but to provide an analytical framework that helps us understand how these rights might interact with public policies. Dworkin, for example, defined rights as "trumps"; that is, rights are claims against the State that cannot be sidestepped by merely appealing to the collective good, or utility, as they are a direct consequence of the person's standing as equally entitled to concern and respect.[6] However, even this "anti-utilitarian" view has to admit that rights can be curtailed in some circumstances (for example, to prevent substantial harm to others or to society).[7] This caveat has led some authors to reformulate rights as trumps over collective goals that lack a sufficient justification.[8]

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[5] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).
[6] *Id.* at 199.
[7] *Id.* at 170.
[8] Paul Yowell, *Critical Examination of Dworkin's Theory of Rights*, 52 AM. J. JURIS. 93, 95 (2007).

Critics characterize this view as a mere combination of two truisms: that rights are important, and that they may defeat other considerations.[9] Advocates retort that the aforementioned position highlights the dimension of rights as powerful reasons which, in turn, raises numerous questions, including: from where do those reasons come?;[10] how do they vary among rights?;[11] and whether they are conclusive. If they are conclusive, as the treatment of rights as *trumps* could suggest, the only consequence would be to re-characterize the cases where rights appear to yield to other rights or public interests as cases outside the area of the right: that is, it would redefine the "conflicts" between rights/interests as "problems of specification," where the difficulty lies in determining the scope of application of the right.[12] However, this could attract the criticism that the true content of rights would then be unknowable. On the other hand, if rights are merely powerful *prima facie* reasons, they are susceptible to "balancing" with other rights or interests.[13] However, this interpretation could be regarded as arbitrary or, at best, not more than utilitarianism in disguise.[14]

The Courts' approach to fundamental rights tries to incorporate the above elements. First, it involves a process of "calibration" or "specification," which determines the scope of application as well as the strength and intensity of the right on an *ex ante* basis; that is, before it is confronted with another right or a policy.[15] Second, it involves a "balancing" exercise, where the right is weighed against another right or a public interest. For the European Court of Human Rights (ECtHR), limitations of rights are admissible if they are "necessary in a democratic society."[16] This test has been reformulated as requiring that the interference corresponds to a "pressing social need," that it is "proportionate to the legitimate aim pursued," and that the reasons given by public authorities to justify it are "relevant and sufficient."[17]

Critics have suggested that, while the underlying rationale of this test is the same as that of other courts applying a proportionality test, its structure emphasizes too much the "balancing" element, and is otherwise too vague and lacks transparency.[18]

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[9] Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123, 123–26 (1978).

[10] In the framework of Hohfeld, usually employed as a background reference for construction, "rights" entail the existence of "duties." These duties may have a certain structure, but not a predetermined force. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28 (1913). *See also* Gopal Sreenivasan, *A Hybrid Theory of Claim-Rights*, 25 OXFORD J. LEGAL STUD. 257, 257–274 (2005).

[11] Dworkin acknowledges that not all rights are equally important. DWORKIN, *supra* note 5, at 366.

[12] *See* John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127, 127–146 (2008).

[13] Alexy is a major proponent of this view. *See* ROBERT ALEXY, TEORÍA DE LOS DERECHOS FUNDAMENTALES (Carlos Bernal Pulido trans., 2nd ed. 2007) (viewing rights as "optimization mandates").

[14] DWORKIN, *supra* note 5, at 198.

[15] The cases on the scope of protection of different privacy rights, enshrined in the European Convention on Human Rights, art. 8, June 1, 2010, CETS 194 [hereinafter ECHR] or the Charter, *supra* note 4, art. 7, are examples. *See, e.g.*, Société Neptune Distribution v. Ministre de l'Èconomie et des Finances, Case C-157/14, EU:C:2015:823 (providing the scope of application of the freedom of expression in relation to commercial communications). *See also* Halford v. The United Kingdom, app. no. 20605/92, ECHR:1995:0302DEC002060592 (stating that the right to private life covers conversations, whether business or private).

[16] Although the test is based on the language of the ECHR, arts. 8–11, the Court has considered its application of general application. *See* Janneke Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, 11 INT. J. CONST. L. 466, 467 (2013).

[17] *See* Sunday Times v. United Kingdom, app. No. 6538/74, CE:ECHR:1980:1106JUD000653874.

[18] *See, e.g.*, Gerards, *supra* note 16.

These critics advocate[19] for the application of a four-step test, such as the CJEU's, which requires the existence of a "legitimate aim in the general interest," the "suitability" of the measure to achieve the proposed aim, the "necessity" of the measure (that is, the absence of a less intrusive alternative), and the "balancing *stricto sensu*" (that is, that there is an adequate balance between the interest served and the curtailment of rights).[20] Still, some courts have held that, despite having the same formal structure, the proportionality tests may differ in important respects; for example, the CJEU tends to be more stringent with domestic law that restricts fundamental rights than with restrictive EU measures.[21]

Notwithstanding the criticisms, there seems to be a common methodology to the approaches to conflict between fundamental rights and public policies, which includes: first, the specification of the former's applicability and the intensity of protection; and, second, the justification of the latter. Thus, we begin by (1) specifying fundamental rights protection in composite situations involving the ECB and NCAs, (2) calibrating their intensity in the instances that are presumably relevant for supervisory action, and then (3) briefly discussing the *prima facie* reasons why a policy of financial stability may be a cause for concern regarding fundamental rights protection.

B. Specifying Fundamental Rights in Composite Situations: ECB and NCAs

The first and most fundamental question is whether fundamental rights texts apply to the *composite* situation where both the ECB and NCAs exercise competences under the SSM and SRM frameworks. According to Article 51 of the EU Charter: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity *and to the Member States only when they are implementing Union law*."[22]

The applicability of the EU Charter to the ECB is clear: the ECB is an EU institution. However, to consider NCAs an "institution of the Union" when they are allocated responsibilities on micro-prudential tasks is a stretch.[23] Instead, it would seem more reasonable to focus on the second part of Article 51, which makes the EU Charter applicable to Member States "only when they are implementing Union law."[24] The NCAs' application of provisions of the regulatory framework formed by the

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[19] *See id.* The author indicates that the lack of structure of the ECtHR test causes it to miss the "suitability" and "necessity" elements, which would be extremely useful.

[20] Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, EU:C:1995:411. *See also* Centros Ltd. v. Erhvervs- og Selskabsstyrelsen, Case C-212/97, EU:C:1999:126; Int'l Transport Workers Federation v. Viking Line ABP, Case C-438/05, EU:C:2007:772 (on EU freedoms); Sky Österreich GmbH v. Österreichischer Rundfunk, Case C-283/11, EU:C:2012:341 (outlining the rights enshrined within the EU Charter).

[21] *See, e.g.*, the UK Supreme Court's view in R (on the application of Lumsdon and others) v. Legal Services Board [2015] H.R.L.R. 12 (UKSC) (appeal taken from Eng.).

[22] Emphasis added, Charter, art. 51.

[23] Article 6(4) of the SSM Regulation confers micro-prudential tasks upon NCAs in relation to less significant credit institutions. Council Regulation 1024/2013/EU, Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions, art. 6(4), 2013 O.J. (L 287) 63 [hereinafter SSM Regulation].

[24] Charter, art. 51.

Capital Requirements Directive[25] and Regulation[26] (CRD IV/CRR) would clearly be regarded as an implementation of EU law.[27] Whether such an interpretation holds in those cases where NCAs are exercising some of the domestic choices given by the CRD IV/CRR framework (for example, regarding the liquidity ratio) is less clear.

An analysis of CJEU case law seems to support the application of the EU Charter to these cases too. The CJEU has refused application of the Charter to domestic authorities only when the domestic provisions lacked a sufficient connection to EU law.[28] Conversely, the NCAs' exercise of micro-prudential tasks in the context of the SSM and SRM is an act of "enforcement" of EU law. In this latter type of situations, the CJEU has interpreted Article 51 of the EU Charter, and its reference to "implementation," in wider terms. For example, in *Fransson*, which concerned domestic proceedings for the imposition of administrative penalties and criminal sanctions, entirely subject to domestic law, the CJEU nonetheless considered that domestic authorities were "implementing EU law."[29] The CJEU based its conclusion on the broad reference, under the VAT Directive, to the Member States' obligation to "take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion."[30] In so doing, the Court validated a previous line of case law,[31] which considered fundamental rights

[25] Parliament and Council Directive 2013/36/EU, On Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms, 2013 O.J. (L 176) 338 [hereinafter CRD IV].

[26] Council Regulation 575/2013/EC, On Prudential Requirements for Credit Institutions and Investment Firms, 2013 O.J. (L 176) 1 [hereinafter CRR].

[27] CRD IV, *supra* note 25; CRR, *supra* note 26.

[28] In *McB*, for example, the CJEU applied the EU Charter exclusively to EU provisions on recognition and enforcement of foreign judgments in matrimonial matters, and rejected the proposition that national laws on the acquisition of custody rights could be regarded as implementing EU law. In particular, the CJEU only recognized the applicability of the EU Charter to Council Regulation 2201/2003/EC, Concerning Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Matrimonial Matters and Matters of Parental Responsibility, art. 2(11), 2003 O.J. (L 338) 1, and rejected its application to the Irish law implementing the Regulation. In *McB*, the mother removed the children from Ireland to Britain after Mr. McB had initiated proceedings before the Irish courts to obtain an order securing custody rights, but before the process was completed. Article 2(11)(a) of Regulation 2201/2003 stipulated that rights of custody were to be acquired (and, thus, subject to recognition and enforcement) "by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention." The CJEU held that Article 2(11)(a) could not be considered incompatible with the Charter or the ECHR (the case law of the ECtHR on article 8 of the ECHR was used to integrate the meaning of article 7 of the Charter on private and family life). *See* J. McB v. L.E., Case C-400/10, EU:C:2010:582. In *Magatte Gueye*, the compatibility of a mandatory stay-away injunction set forth under Spanish law against offenders in crimes of violence within the family was examined in light of Council Framework Decision 2001/220/JHA, On the Standing of Victims in Criminal Proceedings, 2001 O.J. (L 82) 1. The Court held that this was a matter of domestic law and that the Council Decision on the *procedural standing* of victims did not intend to harmonize the *substantive* laws in respect of the forms and levels of criminal penalties. Magatte Gueye & Valentín Salmerón Sánchez, Joined Cases C-483/09 & C-1/10, EU:C:2011:583.

[29] Åklagaren v. Hans Åkerberg Fransson, Case C-617/10, EU:C:2013:105.

[30] *Fransson*, EU:C:2013:105, ¶¶ 25–27.

[31] Vereinigte Familiapress Zeitungsverlags- un vertriebs GmbH v. Heinrich Bauer Verlag, Case C-368/95, EU:C:1997:325. *See also* Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, Case C-112/00, EU:C:2003:333.

applicable when States were "within the scope of application" of EU Law, thus closing the debate, by assimilating "implementing" and "within the scope of application."[32]

Although the CJEU's position in *Fransson* was controversial,[33] NCAs' acts would also be subject to the EU Charter under a more restrictive application. Unlike *Fransson*, where there was arguably a division between VAT provisions, which are subject to EU law, and sanctioning procedures, subject only to domestic law, in our case, NCA acts would be adopted under the SSM or the SRM framework. Thus, NCAs would not only be "enforcing EU provisions," as in *Fransson*, but would also be enforcing them *under a framework* provided by EU law (for example, on authorizations, inspections, sanctions, or adoption of decisions in general). The CJEU has held that, even if a Member State were exercising discretionary powers, when such discretion is granted by EU law, as it would be under the CRD IV/CRR Framework, the Member State is subject to the EU Charter.[34] Therefore, in our view, the only instances where the EU Charter does not apply to NCAs are those where NCAs apply domestic banking laws that lie beyond the scope of harmonization and are still within the exclusive remit of domestic legislation.

The exercise of micro-prudential powers in the context of the SSM and the SRM, under the aegis of the European Stability Mechanism (ESM), may also raise controversial questions. For example: would the EU Charter be applicable if the ECB and NCAs were to take specific actions as part of a rescue package of the banking sector agreed via a Memorandum of Understanding (MoU)? In *Pringle*, the CJEU held that the Charter was considered inapplicable when Member States take collaborative action outside the EU legal order.[35] There would be a strong argument in favor of applying the EU Charter if the supervisory measures were implemented under the regime of "close cooperation" with non-euro States envisaged in SSM;[36] such cooperation would be outside the core structure of the SSM, but still *within* EU law.

The problem arises because some acts under the SSM or SRM may simply implement decisions adopted within the framework of the ESM, with the joint input of the ECB and the Commission, and specified in a MoU. The ECB, for example, would be an "EU institution" under the EU Charter.[37] Given the fundamental character of the EU Charter in the scheme of EU law, one would expect the EU Charter to apply

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[32] *Fransson*, EU:C:2013:105, ¶ 18. For a discussion of these aspects, and the arguments in favor of the interpretation of "implementation" in light of previous case law, see Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MKT. L. REV. 1267, 1274–278 (2013).

[33] The opinion by Advocate General Cruz Villalón was contrary to the application of the EU Charter and was thus not followed by the Court. Opinion of Advocate General Cruz Villalón, Åklagaren v. Hans Åkerberg Fransson, Case C-617/10, EU:C:2012:340. This opinion stirred up controversy in some Member States. *See* Judgment of the First Senate of the German Federal Constitutional Court in BVerfG, 1 BvR 1215/07, Apr. 24, 2013, where the Court, deciding a case about the compatibility of a German counter-terrorism database with German Basic Law, stated that this was a purely internal matter, and that the distribution of competences between EU and domestic authorities had not been altered by the *Fransson* ruling. *See also* UK HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE, THE APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS IN THE UK: A STATE OF CONFUSION, 2013-14, HC 979, ¶¶ 43–49.

[34] *See* N.S. v. Secretary of State for the Home Department & M.E. & Others v. Refugee Applications Commissioner, Joined Cases C-411/10 & C-493/10, EU:C:2011:865.

[35] Thomas Pringle v. Government of Ireland, Case C-370/12, EU:C:2012:756.

[36] SSM Regulation, *supra* note 23.

[37] Charter, art. 51.

to any such decisions, and its inapplicability to be an exception to be interpreted narrowly. However, the problem is not only how to apply the Charter, but what actions would be available to the aggrieved parties, since the annulment action requires "acts" by EU institutions "other than recommendations."[38] NCAs, on the other hand, would only be "implementing EU Law" when applying specific EU supervisory (SSM) or resolution (SRM/BRRD) rules, and not when concluding an MoU.

In light of the difficulty of the matter, the CJEU recently adopted a conservative approach in *Ledra Advertising*[39] and *Mallis*.[40] Those cases concerned the adoption of measures by Cypriot authorities for restructuring the banking sector, including a write-down and conversion of equity and a debt bail-in.[41] These measures were adopted following a statement by the Eurogroup and the negotiation and implementation of a MoU within the framework of the ESM, where the ECB and, especially, the Commission, played a significant role. The CJEU held that the Eurogroup was not a decision-making body, and thus its acts were not regarded as measures intended to produce legal effects with respect to third parties and could not be challenged. The acts of the ECB and the Commission leading to the MoU were circumscribed by the ESM Treaty, which did not confer the power to make decisions of their own and thus were not subject to annulment actions. The ESM, on the other hand, was not an EU institution or body.[42] Furthermore, Member States are not considered to be "implementing EU Law" in the context of the ESM Treaty, and thus the Charter is not addressed to them in that context.[43] The only window left by the Court was an action for compensation pursuant to Articles 268 and 340 TFEU, because the tasks conferred upon the ECB and the Commission "do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties."[44] Thus, the fact that they act within the umbrella of a non-EU set of rules, such as the ESM, does not free EU institutions from their duty to check the conformity of their acts with EU law, especially the Charter.[45] However, the only available action, that is, the action for compensation, requires a "sufficiently serious breach" of EU law, damages, and a causal connection between damages and the unlawful act.[46] It is understandable if individual parties potentially affected by restructuring measures under the ESM do not feel particularly relieved at the sight of such a narrow window.

Still, we cannot consider *Pringle, Ledra*, or *Mallis* as the last word on the issue. None of these cases was decided with the legislative and regulatory framework of the Banking Union in place. It would be much harder to argue that a Member State's NSAs or NRAs are not "implementing EU Law" if the implementing measures are adopted pursuant to SSM or SRM/BRRD rules—even if the authorities follow the terms of a

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[38] Treaty on the Functioning of the European Union, art. 263, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU].

[39] Ledra Advertising Ltd. & Others v. Comm'n and European Central Bank, Joined Cases C-8/15 & C-10/15, EU:C:2016:701.

[40] Konstantinos Mallis & Others v. Comm'n and European Central Bank, Joined Cases C-105/15 & C-109/15, EU:C:2016:702.

[41] *See infra* Part II.A.2.

[42] *Mallis*, EU:C:2016:702, ¶¶ 49–61. *Ledra*, EU:C:2016:701, ¶¶ 49–54.

[43] *Ledra*, EU:C:2016:701, ¶ 67.

[44] *Id*. ¶ 56.

[45] *Id*. ¶¶ 59–60. This was particularly stressed for the Commission as "guardian of the Treaties."

[46] *Id.* ¶¶ 64–65.

MoU subject to the ESM Treaty. In such a scenario, the question is whether the fact that the MoU itself, and the acts leading to its adoption, are unchallengeable, provides some protection for the actions of State authorities. As per the ECB or the Single Resolution Board, the findings of the Court in *Ledra* and *Mallis* concerning the unchallengeable nature of ECB and Commission acts within the ESM refer to acts leading to the adoption of a decision, such as the conclusion of an MoU, because that role is attributed to the ESM. Once the MoU is concluded, and it has to be implemented via acts subject to the SSM/SRM framework, it would be wrong, in our view, to argue that the ESM mandate creates a *de facto* cloak for implementing acts by EU institutions and bodies.

The application of the ECHR poses the opposite problem: while Member States, and thus NCAs, are subject to it, the ECHR is not formally part of EU law.[47] The ECHR expressly indicates its relevance for the purpose of EU law.[48] It also contemplates the accession of the EU to the ECHR.[49] However, the CJEU has recently put on hold a draft accession treaty on grounds that certain parts of the ECHR, as well as the draft accession treaty, were incompatible with EU law.[50] As a result, the ECHR is not binding upon EU institutions and the ECtHR has no jurisdiction over their actions.

Member States, however, are bound by the ECHR, and the relevant NCAs will not be able to elude their potential liability for breach of the ECHR by arguing that they were simply giving effect to EU law.[51] This is particularly true in cases where EU law grants the relevant national authorities a wide margin of "discretion" for implementation.[52] This, of course, calls for the interpretation of "discretion," or

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[47] However, specific references are made in Charter, art. 52(3) and Treaty on European Union, arts. 6(2)–(3), Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

[48] *See* European Convention on Human Rights, arts. 6(3), 52(3), June 1, 2010, CETS 194.

[49] *Id.* art. 6(2).

[50] Opinion 2/13 of the Court, EU:C:2014:2454. The main reason behind that decision seemed to be the impingement that the new powers of the European Court of Human Rights ("ECtHR") would have upon the CJEU's own powers. Some objections had to do with article 53 of the ECHR, which permits Member States to protect fundamental rights more rigorously than the ECHR does. Such powers seem incompatible with the *Melloni* doctrine, which holds that where a matter has been fully harmonized under EU law, Member States are not able to extend their competences. Moreover, such powers would also be incompatible with the absence in the draft agreement of the "mutual trust" principle in justice and home affairs, which applies in EU law. Nevertheless, most objections were related to the new powers that the ECtHR would gain, such as those under Protocol 16, which permits Member States' courts to send questions to the ECtHR. The CJEU regarded this as an opportunity for the ECtHR to rule on matters of EU law (thereby circumventing the preliminary reference procedure), and creating an implicit possibility that the ECtHR could rule on inter-State disputes, which are reserved to the CJEU pursuant to article 344 TFEU. Additionally, both the EU and a Member State could be sued in proceedings before the ECtHR under the co-respondent system. According to the CJEU, the ECtHR should not have the power to allocate responsibility between them. *See* Opinion 2/13 of the Court, EU:C:2014:2454.

[51] Tete v. France, app. no. 11123/84, CE:ECHR:1987:1209DEC001112384 ; Cantoni v. France, app. no. 17862/91, CE:ECHR:1996:1115JUD001786291; Bosphorus Airways v. Ireland, app. no. 45036/98, CE:ECHR:2005:0630JUD004503698 .

[52] *Cantoni*, CE:ECHR:1996:1115JUD001786291. The ECtHR has reviewed the States' exercise of discretion when giving effect to EU law in light of Convention rights in numerous occasions. *See* Van de Hurk v. the Netherlands, app. no. 16034/90 , CE:ECHR:1994:0419JUD001603490; Procola v. Luxembourg, app. no. 14570/89, CE:ECHR:1995:0928JUD001457089; *Cantoni*, CE:ECHR:1996:1115JUD001786291; Hornsby v. Greece, app. no. 18357/91, CE:ECHR:1998:0401JUD001835791; Pafitis & Others v. Greece, Case C-441/93, EU:C:2000:150; Matthews v. United Kingdom, app. no. 24833/94, CE:ECHR:1999:0218JUD002483394; S.A. Dangeville

"appreciation," which can be particularly problematic in the context of the SSM.[53] Still, as long as the implementation of EU law lets Member States, or NCAs, opt between several options, one of which would not breach the ECHR, a State should be found liable if it breaches it.

In cases where Member States *execute* specific acts under EU law, the ECtHR has stood ready to forego its usual analysis of compliance of the act with the ECHR and *presumes*, instead, that EU acts respect the ECHR because there is a general "equivalence" between the level of protection granted under EU law and the ECHR.[54] In *Bosphorus Airways v Ireland*,[55] the ECtHR held that an interference with property—an aircraft—by Member State authorities, when done in compliance with obligations under EU law, served a legitimate interest[56] and could be presumed to be ECHR-compliant;[57] the presumption was not rebutted in the case.[58] Unfortunately, the ECtHR did not include an assessment of proportionality, as is customary in cases involving the right to property. Given such limited review, it is difficult to know when and how the presumption could be rebutted. The ECtHR may be less accommodating in the future, particularly if accession by the EU to the ECHR fails to materialize. For the moment, however, NCA acts executing the ECB's instructions would seem to be shielded by a strong presumption of compliance with the ECtHR.

C. "Calibrating" Fundamental Rights: Principles, Legal Persons, Waivers, and "Criminal" Proceedings

Having examined the application of the EU Charter and the ECHR to acts by the ECB and the NCAs under the SSM and SRM, we must now determine whether the fundamental rights recognized in the former two instruments will be applied with a different degree of intensity, and, if so, on what grounds. Such a different degree of intensity might stem from four variables.

The first variable is whether the particular rights are directly enforceable before a court or whether they require legislative specification. The question is relevant for the EU Charter, where Article 51 distinguishes between "rights" and "principles."[59] The

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v. France, app. no. 36677/97, CE:ECHR:2002:0416JUD003667797; *and* Société Colas Est and Others v. France, app. no. 37971/97, CE:ECHR:2002:0416JUD003797197.

[53] *See* Lamandini, Ramos, & Solana, *supra* note 1.

[54] M & Co. v. Federal Republic of Germany, app. no. 13258/87, CE:ECHR:1990:0209DEC001325887.

[55] *Bosphorus*, CE:ECHR:2005:0630JUD004503698.

[56] *Id.* ¶ 150.

[57] *Id.* ¶¶ 159–165.

[58] *Id.* ¶ 166.

[59] Article 51 states that EU institutions and bodies, and States implementing EU law, shall *respect* the rights, *observe* the principles, and *promote* the application thereof in accordance with their respective powers. Charter, art. 51. The SSM Regulation uses similar language. For example, Recital 58 stipulates that "in its action the ECB should comply with the *principles* of due process and transparency," a matter further regulated under Article 22 of the SSM Regulation, *supra* note 23. Recital 63 states that "the ECB should *respect* the fundamental rights and *observe* the principles recognized by the [EU Charter], in particular the right to an effective remedy and to a fair trial." (Emphasis added.) Moreover, Recital 86 affirms that "the Regulation *respects* the fundamental rights and *observes* the principles recognized 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." (Emphasis added.) To that end, the European Central Bank

choice of words is not coincidental,[60] but there are several reasons why the distinction need not be problematic: (i) the distinction responds partly to concerns, notably in the United Kingdom, about judicial activism based on "social" rights;[61] (ii) the CJEU has applied the distinction only to rights that need a further specification from the legislature to be effective, such as the workers' right to collective representation,[62] while (iii) the same court has shown no qualms about enforcing rights that can also be characterized as "principles," such as non-discrimination,[63] but that have a clear tradition of direct application; and (iv) that in the SSM context we will be dealing with rights/principles such as ownership, privacy, fair trial, or legality, which are clearly recognized as directly applicable without further legislative specification.

A second source of calibration is the lack of clarity surrounding the recognition of legal persons, including supervised credit institutions, as holders of fundamental

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Regulation 468/2014/EU, 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), arts. 80-84, 2014 O.J. (L 141) 1 [hereinafter SSM Framework Regulation] warrants specific guarantees, in particular in Part III, Title 3, and in relation to sanctions, in Part X, Title 2.

[60] Traditional views distinguish between "principles" and "rules" based on their level of generality and need for interpretation. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823–854, 838 (1972). Given that applying even the most concrete rule requires a process of interpretation, the difference is one of degree, not of kind. Alexy, *supra* note 12, at 64–67; *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). Dworkin offers a useful categorization for understanding the reference. According to Dworkin, "principles," in general, differ from rules in that they have a sense of "weight and importance," which means they can be weighed, and yield in certain cases, and yet remain valid. However, this category of "principles" encompasses two other concepts. On the one hand, "policies" define broader "goals" (i.e. ends), whose realization is the domain of the legislature and have a more limited enforceability before the courts. On the other hand, "principles," in a stricter sense, define *rights* that can be directly enforceable before, and interpreted by, the courts. *See* Dworkin, *supra* note 5, at 22. The way the CJEU has interpreted the reference of the EU legislature to "principles" suggests that such reference was to the narrower category of "policies," which require legislative specification.

[61] UK HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE, THE APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS IN THE UK: A STATE OF CONFUSION, 2013-14, HC 979, ¶¶ 33–34.

[62] In the *AMS* case, the CJEU held that "to be fully effective, [the right of collective representation relied upon by the company's workers association] must be given more specific expression in European Union or national law." Association de médiation sociale (AMS) v. Union locale des syndicats CGT, Case C-176/1245, EU:C:2014:2, ¶ 45.

[63] In the same case of *AMS*, the CJEU also held that: "the facts of the case may be distinguished from those which gave rise to Kücükdeveci in so far as the *principle of nondiscrimination* on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in to confer on individuals an individual right which they may invoke as such." *Id.* ¶ 47. Thus, the fact that the CJEU had no problem using the same word "principle" to refer to a right directly enforceable, and to a right not directly enforceable, suggests that the relevant distinction is not between "rights" and "principles," but between principles that need legislative development (or policies) and those that do not.

rights.[64] Unlike in the German Fundamental Norm,[65] there is a paucity of detail in the EU Charter and the ECHR.[66] Although in some cases the CJEU and the ECtHR have applied fundamental rights protection to legal persons, they have not attempted a general construction.[67] An analysis of such cases suggests that: (i) legal persons do not enjoy fundamental rights with the same intensity of natural persons;[68] (ii) the extent of the protection may depend on the wording of the specific right, its place within the text, and the *purpose* of the provision;[69] and (iii) in some cases, such as privacy, the rationale has oscillated between the need to limit public authorities' "arbitrary or disproportionate intervention,"[70] and the importance of the rights of the legal entity,[71]

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[64] A separate, but related, matter is standing to sue. Although ECHR, *supra* note 15, art. 34 grants legal persons standing, the question is whether, in the case of an ECB/NCA action against a bank, the bank's shareholders could sue for interference with their ownership rights over shares. The ECtHR has adopted a restrictive stance. In Agrotexim v. Greece, app. no. 14807/89, CE:ECHR:1995:1024JUD001480789, the ECtHR disagreed with the Commission on Human Rights and rejected the possibility of shareholders claiming a diminution in the value of their shares resulting from the expropriation of the land of their company. The Court held that, in light of the frequent disagreements between board and shareholders, as well as among shareholders, accepting this construction could create problems as to who would have the right to bring a claim.

[65] Article 19(3) of German Fundamental Norm states that "The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits." GRUNDGESETZ [GG] [Basic Law], art. 19(3), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.

[66] Neither text includes a general reference to "legal persons". Terms such as "everyone" or "no one" are not useful as interpretative tools, as they are also used for rights in the domain of natural persons (life, physical integrity, etc). *See, e.g.,* ECHR, arts. 2–4 and Charter, arts. 1–5. The EU Charter only includes specific references to legal persons in the right to access documents, the right to refer to the European Ombudsman, and the right to petition (arts. 43–45), and the ECHR, in the right to the enjoyment of possessions (article 1 Protocol 1), and in article 34, which regulates the *standing* of legal persons and cannot be used to determine the applicability of the substantive protection of the rights.

[67] Except for the DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, Case C-279/09, EU:C:2010:811 ¶¶ 38–40 (due process rights), the CJEU has generally tiptoed around the broader issue. On the other hand, the ECtHR has expressly acknowledged the applicability of different fundamental rights to legal persons, e.g.: due process rights (Stran Greek Refineries and stratis Andreadis v. Greece, app. no. 13427/87, CE:ECHR:1994:1209JUD001342787), property rights (Lithgow v. United Kingdom, app. no. 9006/80, CE:ECHR:1986:0708JUD000900680), non-discrimination rights (Pine Valley Development Ltd v. Ireland, app. no. 12742/87, CE:ECHR:1993:0209JUD001274287), privacy rights (Societé Colas Est and others v. France, app. no. 37971/97, CE:ECHR:2002:0416JUD003797197; Niemietz v. Germany, app. no. 13710/88, CE:ECHR:1992:1216JUD001371088), freedom of association (Sunday Times v. United Kingdom (No 1), app. no. 6538/74, CE:ECHR:1980:1106JUD000653874) and expression (Autronic v. Switzerland, app. no. 12726/87, CE:ECHR:1990:0522JUD001272687). However, it has not tried to provide an analytical framework.

[68] *See Societé Colas*, CE:ECHR:2002:0416JUD003797197; *DEB*, EU:C:2010:811 ¶¶ 23, 41–42.

[69] *DEB*, EU:C:2010:811, ¶ 63.

[70] The CJEU held in its early *Dow* cases that the inviolability of domicile was typically a right of natural persons and did not protect legal persons. The latter only had protection against "arbitrary or disproportionate intervention." Dow Benelux et al. v. Commission, Case 85/87, EU:C:1989:379, ¶ 28; and Dow Chemical Iberica, Joined Cases 97-99/87, EU:C:1989:380, ¶ 14. The Court also cited ECHR, art. 8, which refers to "private and family life." In *Hoechst*, however, the CJEU combined a finalistic assessment of the public authority's competences (i.e., the powers must serve the purpose of complying with the competences entrusted by the Treaty) with a broader need for certainty (*e.g.*, the need to specify the subject-matter and purpose of the investigation). Hoechst AG v. Commission, Joined Cases 46/87 & 227/88, EU:C:1989:337, ¶¶ 19–24.

[71] In *Societé Colas*, the ECtHR held that references to "home" could not be interpreted rigidly and could encompass the corporate domicile. *Societé Colas*, CE:ECHR:2002:0416JUD003797197, ¶ 41; *see also* Buck v. Germany, app. no. 41604/98, CE:ECHR:2005:0428JUD004160498 *and* Kent Pharmaceuticals Limited and others v. UK, app. no. 9355/03, CE:ECHR:2005:1011DEC000935503. The ECtHR has also

the latter approach being more protective. In the context of the SSM, with large, sophisticated legal entities, the courts may resort to a more restrictive interpretation of privacy rights or defense rights, and they may see problems with specific safeguards in criminal procedures (such as the right against self-incrimination).[72]

A third source of calibration is the possibility of a waiver of rights. The ECtHR has been suspicious about the sincerity of such waivers and has required that they are made in an *unequivocal* manner.[73] However, the approach is not uniform, and we can expect the courts to be more flexible during the investigative stage. In *Strinzis v. Commission*, the General Court held that, in spite of the absence of a warrant or police order, there had not been an excessive interference because the company's employees did not oppose the investigation definitively and the company did not bring an action afterward.[74] Yet, it is debatable whether these elements constitute an unequivocal waiver. In the SSM context, the courts will need to weigh several additional factors. On the one hand, a large and sophisticated financial institution, typically represented by counsel, is not easily intimidated into waiving its rights in general. On the other hand, in cases where a financial institution is in a delicate position, or the market is more volatile, the reputational cost of opening proceedings could be substantial, and this could be used to obtain a waiver.

A fourth source of calibration could be the application of traditional safeguards of criminal law (such as legality, *ne bis in idem*, and the privilege against self-incrimination) in administrative proceedings for the imposition of penalties. Both the ECtHR and the CJEU interpret the term "criminal" autonomously under the *Engel* test, which takes into account (i) the legal classification of the offence under national law, (ii) the nature of the offence, and (iii) the degree of severity of the penalty.[75] The characterization of the penalty has been given less relevance, however: both the

considered a company's communications as "correspondence." ECHR, art. 8. *See* Association for European Integration and Human Rights v. Bulgaria, app. no. 62540/00, CE:ECHR:2007:0628JUD006254000, ¶ 60. Later on, in *Roquette Freres* the CJEU chose to revise its earlier *Hoechst* doctrine in light of the ECtHR's case law. Roquete Frères SA, Case C-94/00, EU:C:2002:603.

[72] Due to the specificity of the arguments pertaining to the "nature" of self-incrimination, its calibration with regard to legal persons is addressed below, in Part II.C.3.

[73] Colozza v. Italy, app. no. 9024/80, CE:ECHR:1985:0212JUD000902480; Barberá, Messegué & Jabardo v. Spain, app. no. 10590/83, CE:ECHR:1994:0613JUD001058883. In Deweer v. Belgium, the owner of a shop in breach of price regulations was ordered to provisionally close his shop, then offered a friendly settlement of paying a relatively low fine. The Court held that the settlement was tainted by duress, because the person concluded it under threat of closure of his shop, and the existence of a written settlement was considered only partial evidence of a waiver. *See* Deweer v. Belgium, app. no. 6903/75, CE:ECHR:1980:0227JUD000690375.

[74] Strinzis Line Shipping SA v. Comm'n, Case T-65/99, EU:T:2003:336.

[75] Engel & Others v. the Netherlands, app. no. 5100/71, CE:ECHR:1976:1123JUD000510071, ¶ 82. *See also* Öztürk v. Germany, app. no. 8544/79, CE:ECHR:1984:0221JUD000854479, ¶ 52; Jussila v. Finland, app. no. 73053/01, CE:ECHR:2006:1123JUD007305301; Sergey Zolutukhin v. Russia, app. no. 14939/03, CE:ECHR:2009:0210JUD001493903. For the CJEU, see Åklagaren v. Hans Åkerberg, Case C-617/10, EU:C:2013:105, ¶ 35; Łukasz Marcin Bonda v. Comm'n, Case C-489/10, EU:C:2012:319, ¶ 37.

ECtHR[76] and the CJEU[77] have considered administrative fines in competition proceedings to be "criminal" in nature despite statutory language to the contrary.[78] Therefore, the use of a similar language in the SSM and SRM rules[79] should not act as a great obstacle to the application of safeguards for criminal proceedings. In practice, the Courts tend to analyze the nature of the offence carefully and use the penalty's severity as a tie-breaker. In *Grande Stevens*, for example, which concerned penalties for market abuse, the ECtHR paid particular attention to (i) the fact that the interests protected by the norm were *all general interests of society, usually protected by criminal law*; (ii) the fact that the penalties were intended to punish and deter, not to compensate; and (iii) the severity of the penalties that *could be* imposed *ex ante*, rather than those actually imposed.[80]

However, in the context of the SSM, the application of the rationale in *Grande Stevens* could be controversial. First, this test might leave little ground for *non-criminal*, administrative penalties since, under the SSM/SRM rules, most provisions enforceable through administrative penalties protect general interests, with penalties designed to be "dissuasive." Second, since the test hinges primarily on the severity of the penalty, its application could result in supervisory actions that the SSM/SRM rules do not even consider *penalties* (including the withdrawal of an authorization followed by resolution,[81] or a refusal to grant the suitability qualification to bank directors or key managers) regarded as *criminal*.[82] Yet, despite the inconsistency with the statutory framework, given the drastic consequences of these measures, the Courts' instinct might be right. Attention must be paid to the context of the action. For example, if the withdrawal of a license is part of the resolution of the entity/group, which is intended to maximize investors'/savers' return, the treatment should be different from a case where it is used as part of a broader "sanctions package." The same can be said about a declaration of suitability, although, in light of the severe consequences, it would be more difficult to avoid the characterization of the action as *criminal*.[83] In *Capital Bank v Bulgaria*,[84] the review deprivation of a bank's license was examined under the

[76] *See* Didier v. France, app. no. 58188/00, CE:ECHR:2002:0827DEC005818800 (financial markets); Messier v. France, app. no. 25041/07, CE:ECHR:2011:0630JUD002504107 (financial markets); Dubus S.A. v. France, app. no. 5242/04, CE:ECHR:2009:0611JUD000524204 (banking rules); Lilly France S.A. v. France, app. no. 53892/00, CE:ECHR:2003:1014JUD005389200 (competition rules).

[77] Aalborg Portand & Others v. Comm'n, Joined Cases C-204/00P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P & C-219/00 P, EU:C:1989:379, ¶¶ 338–340; Toshiba & Others v. Comm'n, Case C-17/10, EU:C:2012:72.

[78] Council Regulation 1/2003/EC, Implementing the Rules on Competition laid down in Articles 81 and 82 of the Treaty, art. 23(5), 2003 O.J. (L 1) 1.

[79] SSM Regulation, *supra* note 23, art. 18; Parliament and Council Regulation 806/2014/EU, 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, art. 110, 2014 O.J (L 225) 1 [hereinafter SRM Regulation], (referring to "administrative" penalties).

[80] Grande Stevens v. Italy, app. no. 18640/10, CE:ECHR:2014:0304JUD001864010 , ¶¶ 96–98.

[81] SSM Regulation, *supra* note 23, art. 14(5); SSM Framework Regulation, *supra* note 59, arts. 80–84; SRM Regulation, *supra* note 79, art. 34(2)(a).

[82] In *Grande Stevens*, one of the penalties considered "criminal" was the withdrawal of licenses. However, the Court assessed the severity by considering all the statutory consequences *as a whole* including monetary fines). *Grande Stevens*, CE:ECHR:2014:0304JUD001864010, ¶¶ 97–98.

[83] The use of disqualification could thus be challenged in light of the presumption of innocence, as long as the loss of the suitability qualification is attached to administrative or criminal sanctions that are still *sub judice* and are not yet definitive.

[84] Capital Bank AD v. Bulgaria, app. no. 49429/99, CE:ECHR:2005:1124JUD004942999, ¶ 105.

"civil" procedural safeguards; but this was due to the fact that public authorities relied on its "administrative" nature, and disputed that judicial review should be allowed. The ECtHR held that Article 6 ECHR civil rights were involved, and did not need to go into the safeguards for "criminal" proceedings to conclude that there had been a breach of Convention rights.

These considerations lead to the question of whether, and how far, the safeguards for *criminal* cases should be calibrated between cases that are more and less serious. The ECtHR, followed by the CJEU, has tended to adopt a liberal approach to ensure that the decisions are subject to scrutiny.[85] However, it has failed to provide further clues about how to calibrate the rights involved, which could undermine legal certainty.

D. "Balancing" Fundamental Rights with Financial Stability: The Difficult Task of Assessing Proportionality

Financial stability offers a test case for the view that rights are reasons that generally trump policies and need a strong justification to be curtailed. Despite its critical importance,[86] the concept remains elusive.[87] As we discuss in the Part I of this Article, financial stability is not a *competence* of the ECB; rather, it is a *goal* that justifies using different competences.[88] Such an important yet vague concept is the worst possible fit for fundamental rights: courts will be keen to see the existence of a legitimate interest, yet wary to question the "necessity" or "suitability" of a measure under a proportionality test,[89] for fear of triggering financial meltdown. The result is compounded by the fact that the independence and credibility of central banks generally calls for an important degree of discretion.[90] Consequently, the assessment of proportionality may result in an almost intuitive exercise.

There are at least three precedents where the CJEU stood ready to uphold the preferential order of financial stability as a policy goal. In its "short selling" judgment, the CJEU upheld the validity of the power of the European Securities Markets Authority (ESMA) to declare a ban on short-selling to protect financial stability.[91] In *Pringle*, the CJEU declared the validity of an amendment to the TEU and TFEU, and a separate Treaty by euro zone Member States that created the ESM, on the grounds that the objective of these measures—that is, to safeguard the stability of the euro area—only had an indirect effect on monetary policy and they should thus be regarded as measures of economy policy.[92] In *Gauweiler*, the CJEU used a similar rationale to conclude that the ECB's program for the purchase of bonds from troubled euro zone

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[85] For example, in *Grande Stevens* the analysis presented above was done when determining the admissibility of the claim. *Grande Stevens*, CE:ECHR:2014:0304JUD001864010.

[86] In the Capital Requirements Regulation, it is used a total of 33 times. CRR, *supra* note 26.

[87] For some attempts at a definition, or a workable "stability agenda," see BANK FOR INTERNATIONAL SETTLEMENTS, MARRYING THE MACRO- AND MICRO-PRUDENTIAL DIMENSIONS OF FINANCIAL STABILITY (2001), http://www.bis.org/publ/bppdf/bispap01.htm; Garry J. Schinasi, *Defining Financial Stability* (IMF Working Paper No. 04/187, 2004), http://www.imf.org/external/pubs/cat/longres.aspx?sk=17740.

[88] *See* Lamandini, Ramos, & Solana, *supra* note 1.

[89] Proportionality is the fourth element of the reference test. *See supra* Part I.A.

[90] *See* Lamandini, Ramos, & Solana, *supra* note 1.

[91] *See* United Kingdom v. Parliament and Council, Case C-270/12, EU:C:2014:18.

[92] *Pringle*, EU:C:2012:756, ¶¶ 54, 56, 97.

Member States was within the realm of monetary policy because its purpose was to restore the "monetary policy transmission mechanism."[93]

Upon closer scrutiny, in its short selling judgment, the CJEU did not give details of the elements that it would use to review ESMA's decision about the existence of a threat to the orderly functioning of markets.[94] In *Gauweiler*, the CJEU showed, for the first time, a willingness to grapple with the real issues, by introducing a proportionality assessment.[95] However, it did not analyze how the "transmission mechanism" worked—an analysis that, *prima facie*, seems important to perform "necessity" and "suitability" assessments under the proportionality test.[96] Instead, it accepted the ECB's arguments about the "transmission mechanism," leaving itself little room in which to work. Although the CJEU's approach was healthier and more robust, its analysis was less an attempt to discuss the legal implications of the relationship between financial stability and monetary policy, and more a "yes-or-no" vote on the ECB's arguments based on a shallow balancing exercise.

In the context of this Article, the issue with these decisions was not whether the correct result was achieved,[97] but whether the Courts left themselves an adequate toolkit to review the proportionality of relevant measures in the future. Although none of these precedents address the possible violation of fundamental rights, they do reveal a pragmatic pattern at a moment when the economy of the euro zone was on the brink of collapse. In such delicate situations, instead of construing the arguments on its own, the CJEU stood ready to accept the authorities' financial stability arguments at face value. In our view, this attitude should be better circumstantiated in future case law to warrant the Court's ability to make an *ex post* proportionality assessment. In the next Section, we explore whether this concern is justified.

II. LIMITS TO THE SSM AND SRM COMPETENCES BASED ON FUNDAMENTAL RIGHTS

A. Limits Based on the Protection of "Substantive" Economic Rights: EU Freedoms, Property, and Supplementary Protection of Property Rights Under Company Law and Investment Treaties

[93] Peter Gauweiler & Others v. Deutsche Bundestag, Case C-62/14, EU:C:2015:400, ¶¶ 50, 55, 62. According to the ECB, the "monetary policy transmission mechanism" is the process through which monetary policy decisions affect the economy in general and the price level in particular, including variables such as asset prices, exchange rates, wage setting, etc. *See* EUR. CENT. BANK, *Transmission Mechanism of Monetary Policy*, https://www.ecb.europa.eu/mopo/intro/transmission/html/index.en.html.

[94] It also failed to state what kind of review it would conduct (*e.g.*, a "rationality" or a "full proportionality" assessment), as the existence of a "high level of discretion" by ESMA, which the UK alleged, was, to a great extent, the flip side of the review undertaken by the Court.

[95] *Gauweiler*, EU:C:2015:400, ¶ 66.

[96] Unless a court examines the *ex ante* fitness of a measure to achieve a stated goal, and the likelihood with which the goal will be met, as compared to the measure's alternatives (which is unlikely, given the need to examine economic evidence), it will be difficult for that same court to gain a sense of weight and importance, and thereby of proportionality. The strict proportionality assessment might turn into an up-or-down vote on the authority's arguments, which will only be rejected if the result looks egregious.

[97] In the case of *Gauweiler*, we actually believe it was. *See* Lamandini, Ramos, & Solana, *supra* note 1.

1. General Overview

We begin our analysis of substantive rights with the freedoms of establishment, services, and capital recognized under the TFEU.[98] There are several ways in which supervision in the context of the SSM and the SRM could undermine these essential freedoms. First, the ECB's and NCAs' interpretation of CRD/CRR rules could discourage certain types of investments, such as long-term investments like infrastructure projects.[99] Second, recent proposals on structural measures for banks[100] require the separation between banking and trading activities, including for hedge funds,[101] and grant competent authorities, including the ECB,[102] the power to prohibit certain activities.[103] Once enacted, an overzealous segregation of banking activities may easily stir controversy over the aforementioned EU freedoms.

The CJEU has given these freedoms ample scope to limit State action, often finding that *domestic* provisions constitute an unjustified interference with EU freedoms without requiring that such measures affect a discrimination between domestic entities and entities from other EU countries.[104] However, in the realm of financial services, the Court has shown surprising reluctance to engage fully in a discussion of the justification of the restrictions under a proportionality assessment.[105]

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[98] TFEU, arts. 49–55 (freedom of establishment), arts. 56–62 (freedom to provide services), and arts. 63–66 (free circulation of capital).

[99] *See*, *e.g.*, European Commission Press Release IP/15/5347, How Revised Bank Capital Requirements Have Affected Lending: Commission Consults (July 15, 2015), http://europa.eu/rapid/press-release_IP-15-5347_en.htm.

[100] *Commission Proposal for a Regulation on Structural Measures Improving the Resilience of EU Credit Institutions*, COM (2014) 43 final (Jan. 29, 2014). The Proposal is inspired by Erkki Liikanen et al, High-level Expert Group on Reforming the Structure of the EU Banking Sector, *Final Report* (October 2, 2012), http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf [hereinafter Liikanen Report], and the *Volcker Rule*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 619, 124 Stat. 1376, 1620 (2010).

[101] *Commission Proposal on Structural Measures*, *supra* note 100, arts. 6, 8.

[102] *Id.* arts. 5 (1), (7).

[103] *Id.* art. 10.

[104] Comm'n v. France, Case C-89/09, EU:C:2010:772 (prohibiting biologists from holding shares in more than two companies formed in order to jointly operate one or more biomedical analysis laboratories); María Julia Zurita García & Aurelio Choque Cabrera v. Delegado del Gobierno en la Región de Murcia, Joined Cases C-261/08 & C-348/08, EU:C:2009:648, ¶ 45 (making the opening of new roadside service stations subject to compliance with minimum distances between service stations); Comm'n v. Portugal, Case C-438/08, EU:C:2009:651, ¶¶ 28–31 (imposing conditions for obtaining authorization to carry on the activity of vehicle inspection, in particular, by making the grant of administrative authorizations subject to the criterion of the public interest, requiring undertakings wishing to establish to hold a minimum share capital of EUR 100 000, limiting the company objects of those undertakings, and imposing incompatibility rules on members, managers and directors).

[105] In several cases, the CJEU has held that domestic provisions requiring permits for the marketing of specific financial services imposed restrictions, but that those restrictions were justifiable in light of reasons of public interest. *See* Comm'n v. Germany, Case 205/84, EU:C:1986:463, ¶¶ 30–33; Société Civile Immobilière Parodi v. Banque H. Albert de Bary et Cie, Case C-222/95, EU:C:1997:345, ¶¶ 21–26; Alpine Investments BV v. Minister van Financiën, Case C-384/93, EU:C:1995:126, ¶¶ 41–44. For an analysis of these cases, see DAVID RAMOS MUÑOZ, THE LAW OF TRANSNATIONAL SECURITIZATION 441–42 (2010). Other cases related to money laundering seem to have confirmed this view. *See* Jyske Bank Gibraltar Ltd. v. Administración del Estado, Case C-212/11, EU:C:2013:270, ¶¶ 62–64. Only in one case did the court find that the prohibition of remuneration of sight accounts was a restriction that could not be justified by consumer protection purposes (the French Government argued that remuneration imposed higher operating costs on banks, which would have to be compensated by charging consumers more for other services. The

It has been ready to accept very broad justifications about the preponderant importance of "consumer protection."[106] An even more lenient view should be expected in the field of prudential supervision, especially since it is based on an EU, not domestic, framework, and the consequences of restricting supervisory action could be even more drastic than in the consumer protection context. These considerations suggest that said EU freedoms should not pose much of a problem for action under the SSM/SRM framework.

The second group of substantive rights that could potentially limit prudential supervision are the rights of property and freedom of enterprise. Albeit separate protections, they are often treated jointly. Beginning with property,[107] the CJEU tends to rely on the coda 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."[108] In practice, after making the above statement, the Court will normally indicate that measures are admissible if they are not disproportionate and do not affect the "essence" of the right. It will then normally conclude that the relevant action is justified, be it in the form of regulations that interfere with property,[109] orders by national courts[110] or EU institutions (such as in abuse of dominant position cases),[111] or regulatory changes that lower the value of a company's interests.[112]

CJEU, however, held that it was better to let consumers decide in such a case). *See* CaixaBank France v. Ministère de l'Economie, des Finances et de l'Industrie, Case C-442/02, EU:C:2004:586, ¶¶ 17–24.

[106] *See, e.g., Société Civile*, EU:C:1997:345, ¶ 22, and *Alpine Investments*, EU:C:1995:126. In *Alpine Investments*, the Court even suggested that the stability of the market was related to consumer confidence in the system (i.e., circumscribing the broader prudential argument also to consumer protection). *Alpine Investments*, EU:C:1995:126, ¶¶ 42–44. In *CaixaBank France*, the alleged justification was consumer protection and the encouragement of long-term saving, but the CJEU held that, on both counts, the rules went beyond what was necessary (proportionality). *CaixaBank France*, EU:C:2004:586, ¶¶ 21–23.

[107] Charter, *supra* note 4, art. 17.

[108] *See, e.g.,* Nold KG v. Comm'n, Case 4/73, EU:C:1974:51, ¶ 14; Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau, Case 265/87, EU:C:1989:303, ¶ 15; Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, Case 5/88, EU:C:1989:321, ¶¶ 18–19, 22; Bosphorus v. Minister for Transport, Energy and Communications, Case C-84/95, EU:C:1996:312, ¶¶ 21–26; Booker Aquaculture and Hydro Seafood v. Scottish Ministers, Joined Cases C-24/00 & C-64/00, EU:C:2003:397, ¶¶ 68, 78–83, 84–86, 93, 95; Alessandrini et al. v. Comm'n*,* Case C-295/03, EU:C:2005:413, ¶¶ 86, 88–91; Van den Bergh Foods v. Comm'n, Case T-65/98, EU:T:2003:281, ¶¶ 170–171; R (on the application of Alliance for Natural Health & Others) v. Secretary of State for Health, Joined Cases C-154/04 & C-155/04, EU:C:2005:449, ¶¶ 126–129; Schindler Holding e.a. v. Comm'n, Case T-138/07, EU:T:2011:362, ¶¶ 187–190; Trabelsi e.a. v. Council, Case T-187/11, EU:T:2013:273, ¶¶ 75, 78–81, 91, 93–96. It is unclear whether this statement is used to determine the proportionality of the intervention (i.e., granting courts a wider margin), or the construction of the right itself (i.e., to calibrate the protection depending on the social function of each type of property).

[109] *See*, *e.g.*, *Alliance for Natural Health*, EU:C:2005:449, ¶¶ 126–129 (Directive 2002/46/EC, on food supplements); Alessandrini v. Comm'n*,* EU:C:2005:413, ¶¶ 86, 88–91 (centralized system of tariff quotas); R v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd. & Imperial Tobacco Ltd., Case C-491/01, EU:C:2002:741, ¶¶ 149–53 (Directive 2001/37/EC Tobacco Directive).

[110] *See, e.g.*, Križan & Others. v. Slovenská inšpekcia životného prostredia, Case C-416/10, EU:C:2013:8, ¶¶ 111–116 (order by a national court in application of EU provisions on environmental protection).

[111] Schindler Holding et al. v. Comm'n, Case T-138/07, EU:T:2011:362, ¶¶ 187–90.

[112] Sky Österreich GmbH v. Österreichischer Rundfunk, Case C-283/11, EU:C:2013:28, ¶¶ 34–35, 38–40 (requesting additional compensation as a result of the reduction in value of exclusive TV rights arising from the entry into force of Parliament and Council Directive 2007/65/EC, On the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 2007 O.J. (L 332) 27).

The approach to the freedom to conduct a business found in Article 16 of the EU Charter is very similar. The Court declares that the right is not absolute[113] and usually upholds public interferences, be they restrictions related to public health,[114] broadcasting rights,[115] price caps on roaming services,[116] or labor regulations.[117] It is difficult to see in this right an effective counterbalance to regulatory/supervisory action.

The ECtHR case law on property, or "the enjoyment of possessions," is more elaborate. The autonomous concept of "possessions" includes clientele,[118] the economic interests associated with the running of a business[119] or with a company's shares,[120] or a bank's license[121]—but not mere future expectations.[122] Protection is based on an assessment of *proportionality* of the State's right to control the use of property,[123] but one that is relatively lenient on public interference. The ECtHR grants national authorities a "margin of appreciation" under the view that they are, in principle, better placed than an international court to determine the existence of a

[113] The well-known reference to the need to understand the right not as an absolute prerogative is widespread in cases predating the EU Charter. *Bosphorus*, EU:C:1996:312, ¶¶ 21–26; Edouard Dubois et Fils v. Council & Comm'n, Case T-113/96, EU:T:1998:11 ¶¶ 74–75; Metronome Musik v. Music Point Hokamp, Case C-200/96, EU:C:1998:172, ¶¶ 21, 23–26; Bocchi Food Trade International v. Comm'n, Case T-30/99, EU:T:2001:96, ¶¶ 80–81.

[114] Association Kokopelli v. Graines Baumaux SAS, Case C-59/11, EU:C:2012:447, ¶¶ 39–40, 43–44, 47–49, 60, 79 (on the Directives 2002/55/EC and 2009/145/EC on the marketing of seeds); Deutsches Weintor eG v. Land Rheinland-Pfalz, Case C-544/10, EU:C:2012:526, ¶¶ 49–53, 55–56, 58, 60 (on a restriction for wine producers on the use of terms such as "digestive"); ATC & Others v. Comm'n, Case T-333/10, EU:T:2014:842, ¶ 190 (restrictions on import of birds caught in the wild); Herbert Schaible v. Land Baden Württemberg, Case C-101/12, EU:C:2013:661, ¶¶ 26, 28, 35, 42, 59, 75 (electronic identification of sheep and goats); R (on the application of: Swedish Match AB & Swedish Match UK Ltd.) v. Secretary of State for Health, Case C-210/03, EU:C:2004:802, ¶¶ 72, 74 (tobacco products).

[115] *Sky Österreich*, EU:C:2013:28, ¶¶ 44–47, 66–68.

[116] *See* R (on the application of Vodafone Ltd. & Others) v. Secretary of State for Business, Enterprise, and Regulatory Reform, Case C-58/08, EU:C:2010:321, ¶ 60.

[117] Only in *Alemo-Herron* did the CJEU hold that freedom of contract was impaired by automatically subjecting the company to collective bargaining agreements it could not negotiate. Mark Alemo-Herron & Others v. Parkwood Leisure Ltd., Case C-426/11, EU:C:2013:521, ¶¶ 30–36. *See also* Spain & Finland v. Parliament & Council, Joined Cases C-184/02 & C-223/02, EU:C:2004:497, ¶¶ 51–52, 56, 58.

[118] *See* Van Marle & Others v. Netherlands, app. no. 8543/79, CE:ECHR:1986:0626JUD000854379, ¶ 41; *Iatridis v. Greece,* app. no. 31107/96, CE:ECHR:2000:1019JUD003110796, ¶ 54.

[119] This includes a situation where a license is revoked. Tre Traktörer Aktiebolag v. Sweden, app. no. 10873/84, CE:ECHR:1989:0707JUD001087384

[120] *Id.*

[121] Capital Bank AD v. Bulgaria, app. no. 49429/99, CE:ECHR:2005:1124JUD004942999.

[122] The right to acquire property in the future or reliance on a specific regulatory *status quo* cannot be considered "possessions." *See* X v. Federal Republic of Germany, app. no. 8410/78, CE:ECHR:1979:1213DEC000841078, ¶ 2(b).

[123] The construction of article 1 of Protocol 1 is based on three "limbs": 1) a general principle of free enjoyment of possessions; 2) protection against expropriation; and 3) States' right to control the use of property. *See* Sporrong & Lönnroth v. Sweden, app. no. 7151/75, CE:ECHR:1982:0923JUD000715175. Most cases involving the specific application of regulatory measures are treated under the third limb. In the case of *AGOSI v. United Kingdom*, where gold coins were actually seized by British authorities, the ECtHR considered that the seizure of the coins was a measure taken for the enforcement of an import prohibition (and, thus, "control," not "expropriation"). AGOSI v. United Kingdom, app. no. 9118/80, CE:ECHR:1986:1024JUD000911880, ¶ 51. However, in *James v. United Kingdom*, the Leasehold Reform Act of 1967, which gave long leaseholders (tenants) the right to buy the freehold (ownership) at less than market value, was considered from the prism of "deprivation" over property. James & Others v. United Kingdom, app. no. 8793/79, CE:ECHR:1986:0221JUD000879379, ¶ 38.

problem of public concern warranting remedial action that may involve a restriction over property.[124] Thus, the proportionality analysis does not tend to involve considering whether the authorities could have found a *better* solution.[125] In light of these considerations, measures of general application adopted by NCAs, in exercise of their own discretion or when instructed by the ECB, should not face strong scrutiny under property rights or, for that matter, freedom of enterprise rights.

2. LoLR, Interventions by Supervisory Authorities, Bail-Ins, and Property Rights

The reforms that spawned the Banking Union were adopted in a context of sovereign risk, but also of moral hazard. A theme common to both the supervisory and resolution frameworks is that banks should not only be subject to closer scrutiny by a strong supervisor, but that banks and their investors should also be forced to internalize the costs of their risk-taking decisions.[126] The idea was that banks and their investors should not expect any provision of public funds, and that in the event of a banking crisis, the recapitalization of the bank should be accomplished with "internal" resources, that is, by writing down or converting capital and debt instruments; hence the term "bail-in," as opposed to "bail-out."[127] This new framework, however, is bound to cause friction with the property rights of the holders of shares and debt instruments in banks subject to these types of actions, and has already given rise to cases by the ECtHR and the CJEU.

The most relevant ECtHR case on property rights and action by financial authorities is *Grainger v UK,*[128] also known as the *Northern Rock* case. In the context of the 2007-2009 financial crisis, given the difficulties of finding a private rescue solution, Northern Rock, an important British lender, was subject to lender of last resort (LoLR) support and eventually nationalized.[129] An expert was appointed to determine the compensation to shareholders, and the expert was expressly instructed to assume, for valuation purposes, that Northern Rock was unable to continue as a

[124] *See, e.g.*, *James,* CE:ECHR:1986:0221JUD000879379; National & Provincial Building Society, Leeds Permanent Building Society & Yorkshire Building Society v. United Kingdom, app. no. 21319/93, CE:ECHR:1997:1023JUD002131993, ¶ 80.

[125] In other words, within the range of options available, public authorities have a margin of appreciation to decide what that solution might be. Clear examples of this are those cases where the ECtHR had to examine the validity of rent control legislation, which imposed restrictions on the property of landowners, or legislation giving a purchase option to long leaseholders. *See* Mellacher v. Austria, app. no. 10522/83, CE:ECHR:1989:1219JUD001052283, ¶ 48; *James*, CE:ECHR:1986:0221JUD000879379.

[126] *See, e.g.*, SSM Regulation, *supra* note 23; SRM Regulation, *supra* note 79.

[127] *See* Parliament and Council Directive 2014/59/EU, Establishing a Framework for the Recovery and Resolution of Banks and Investment Firms, arts. 43–55, 59–62 [hereinafter BRRD]. Bail-in was such a key point of the reform on bank resolution to limit moral hazard that it is available not only as a resolution tool under articles 43–55 BRRD, but also as a tool to be used independently from resolution action in order to avoid resolution, pursuant to articles 59–62 BRRD.

[128] Grainger & Others v. United Kingdom, app. no. 34940/10, CE:ECHR:2012:0710DEC003494010.

[129] The two private sector proposals presented involved continuing financial support from the government, and it was considered that the taxpayer would not receive good value. The power to nationalize Northern Rock was conferred on the Government by the Banking (Special Provisions) Act 2008 ("the 2008 Act"), which was passed into law on 21 February 2008. The nationalization of the company was effected by the Northern Rock plc Transfer Order 2008. *See Grainger,* CE:ECHR:2012:0710DEC003494010, ¶ 13.

going concern and would receive no further public support.[130] On that basis, the expert decided that the residual value of shares was zero and that shareholders should be paid no compensation.[131]

Investors challenged the legality of the instruction by public authorities to the independent expert on the basis of Article 1 Protocol 1 of the ECHR. However, both the UK courts and the ECtHR dismissed their arguments. The case suggests that courts are prepared to accept the arguments of public authorities at face value. The ECtHR, in particular, undertook a limited review. It accorded public authorities a "wide margin of appreciation," meaning that, to breach the Convention, the measures would have had to be "without reasonable foundation"—a standard normally reserved for complex social legislation whose impact is difficult to gauge (such as housing).[132] The ECtHR also dismissed the plaintiffs' claim that regulatory authorities were partly responsible of the Northern Rock debacle[133] and accepted the public authorities' argument that the instructions to the independent expert were necessary to avoid moral hazard,[134] as LoLR is there to protect the system and not to protect specific banks.[135]

Even if the conclusion is right, the decision is open to criticism. First, the ECtHR was not clear about the standard of protection of property to be applied: "expropriation," "control of use," or "interference."[136] There was also a lack of clarity about whether the relevant acts were the public takeover of the institution, the instruction to the valuer not to take the possibility of public support into consideration, the refusal to grant the support that this instruction entailed, or the combination of all of them. Furthermore, the ECtHR did not examine the plaintiffs' argument that

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[130] According to Article 36(5) of BRRD—not in place at the time of Northern Rock's collapse—the valuation of the independent expert "shall be based on prudent assumptions, including as to rates of default and severity of losses. The valuation shall not assume any potential future provision of extraordinary public financial support or central bank liquidity assistance provided in non-standard collateralization, tenor and interest rate terms to the institution or entity." BRRD, *supra* note 127, art. 36(5). An identical provision is set out in Article 20(6) of the SRM Regulation, *supra* note 79.

[131] The assumptions to be made were stipulated in the Northern Rock plc Compensation Scheme Order 2008. *Grainger*, CE:ECHR:2012:0710DEC003494010, ¶ 18.

[132] *See, e.g.*, *James*, CE:ECHR:1986:0221JUD000879379. In *Grainger*, the Court expressly stated that "a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy." *Grainger*, CE:ECHR:2012:0710DEC003494010, ¶ 36.

[133] The Court held that "[t]he applicants have not established that the State authorities acted negligently in their dealings with Northern Rock or, more generally, in their handling of the financial turmoil of the Autumn of 2007. Nor have they established that Northern Rock's liquidity problems were caused by any act of the State authorities. Moreover, even assuming that the applicants could establish some fault on the part of the State, again the Court does not see that the terms of the Compensation Scheme would have prevented the Valuer from taking the equitable approach they advocate if he had considered it appropriate." *Grainger*, CE:ECHR:2012:0710DEC003494010, ¶ 41.

[134] The term "moral hazard" refers to the incentives of an agent to take on more risk because the consequences of such risk will be borne by a different agent.

[135] This is in line with the ECtHR's case law stating that Article 1 of Protocol 1 does not impose any general obligation on the Contracting States to cover the debts of private entities. *See Grainger*, CE:ECHR:2012:0710DEC003494010, ¶ 42, with reference to Kotov v. Russia, app. no. 54522/00, CE:ECHR:2012:0403JUD005452200, ¶ 111.

[136] Given the mandatory transfer of control, the standard of protection in this case could have been one of "expropriation." However, in "expropriation" cases, non-compensation is only permissible in "exceptional circumstances." *See Grainger*, CE:ECHR:2012:0710DEC003494010, ¶ 37, with reference to Jahn & Others v. Germany, app. no. 46720/99, ¶ 117. A possible reason why the ECtHR did not clarify the standard of protection it applied in this case might have been the difficulty in justifying the measure as a mere "interference" or "control of use."

domestic authorities treated Northern Rock differently than HBOS and Royal Bank of Scotland, which were nationalized a year after Northern Rock and allegedly received more continuing support.[137]

The facts of the case suggest that the plaintiffs used the argument of the difference in treatment as a sort of benchmark to support the claim that the measure was disproportionate. Had the plaintiffs claimed discrimination, the case might have raised more interesting questions.[138] The Court probably should have examined the grounds that could justify the extension of LoLR facilities to some entities but not to others, and held that differential treatment could be justified on the basis of the size and interconnectedness of the entity involved. However, this could have enshrined the *too-big-to-fail* or *too-interconnected-to-fail* conventional wisdom as legal precedent. Alternatively, the Court could have held that, one year after Northern Rock had failed, the systemic situation was different, since the system was on the verge of collapse. In this sense, to avoid the risk of moral hazard enshrined in the *too-big-to-fail* wisdom, the Court could have further argued that financial institutions cannot rely on a bail-out by a LoLR. However, such a position would have signaled that LoLR interventions must be unpredictable so as not to give rise to moral hazard, and thus they must be somewhat arbitrary. While this argument might make economic sense, it is at odds with the philosophy underpinning the non-discrimination principle and the view that discretion cannot mean arbitrariness. Yet, the fact that the ECtHR avoided this quagmire only postpones the answer.

The interaction between public liquidity provision, moral hazard, and property rights was revisited more recently, this time by the CJEU, in the *Kotnik* case.[139] In the wake of the crisis, some States began major processes for restructuring their banks, which combined public funds with the writing-down and conversion of instruments. Pursuant to the regime on state aids under Article 107 TFEU, public funding should be exceptional. Yet, its application in the banking sector was very complex. To clarify its future stance on this matter, the European Commission issued the so-called "Banking Communication."[140] In it, the Commission stated that, in order to address the problem of moral hazard, it would make its assessment of the validity of measures of state support based on the existence of "burden-sharing." The recapitalization of the entity should not be accomplished by public funds alone, but also through bail-in. In *Kotnik*, investors in shares and debt instruments of Slovenian entities challenged the restructuring measures promoted by the government for, among other things, being contrary to the right to property under Article 17 of the Charter, and to the principle of protection of legitimate expectations according to CJEU case law. The Court held

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[137] *See Grainger*, CE:ECHR:2012:0710DEC003494010, ¶ 32.

[138] ECHR, art. 14 on non-discrimination is narrow and prioritizes the more serious grounds (*e.g.*, gender, race, origin, religion, or political opinions). But the ECtHR has decided cases of discrimination on grounds of property where the discrimination was justified (*e.g.*, in *James*, CE:ECHR:1986:0221JUD000879379, between landlords with long and short-term leases); or unjustified (*e.g.*, *Chassagnou v. France*, where the Court held that a requirement that small, but not large landowners should join inter-municipality hunters' associations discriminated on grounds of property rights without any objective and reasonable justification. Chassagnou v. France, app. no. 25088/94, CE:ECHR:1999:0429JUD002508894).

[139] Tadej Kotnik & Others v. Državni zbor Republike Slovenije, Case C-526/14, EU:C:2016:767.

[140] *Commission Communication 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 O.J. (C 216) 1.

that, in a context that required "complex economic and social assessments," the Commission enjoyed wide discretion.[141] Expectations worthy of protection could only arise in the presence of "precise, unconditional and consistent assurances, originating from authorised, reliable sources," which were not present in the case.[142] Having laid this framework, the Court concluded that property rights were not breached because the Commission's Banking Communication did not require burden-sharing to be mandatorily imposed on investors, and because the burden-sharing conditions would result in losses no greater than those resulting from insolvency proceedings in the absence of state aid.[143]

The CJEU's findings were categorical, but controversial. As in previous occasions, the Court did not begin its analysis with an examination of the scope of protection of property rights or the principle of protection of legitimate expectations. Rather, the Court began by stating that the powers involved were *discretionary*, which almost predetermined the conclusion that there was no right to expect any particular exercise of those powers. The Court also made a separate, sequential analysis of the right to the protection of legitimate expectations, and then of the right to property, which led to a narrow construction of both. A joint analysis would have clearly established that "property" and "expectations" in this context are mutually reinforcing. The Court's treatment of public liquidity provision as exceptional, and, thus, as something that may be easily refused, withdrawn, or made conditional upon burden-sharing, is also debatable. Money markets are regularly based on public authorities' management of liquidity—not only in times of crisis.[144] Then, the conclusion that property rights were not harmed because the losses would have been the same under insolvency proceedings and bank resolution begs the question of whether harm to property rights can possibly arise from insolvency laws. It looks more like harm can arise in either insolvency or resolution depending on the assumptions made by the courts, or authorities, when dealing with the entity. Finally, the statement that the Commission's Banking Communication did not endanger property rights because it did not require burden-sharing to be imposed on shareholders and debt holders is also subject to criticism. Whether burden-sharing is achieved through mandatory bail-in or through a contractual agreement under threat that public funding will be withdrawn, it is not a fully voluntary process. This does not mean that it is illegitimate—only that it is not voluntary, and the Court's assessment should have proceeded on the basis of that assumption. All in all, the decision hints at the Court's greater willingness to validate the Commission's action than to engage in a thorough examination of the substantive issues.

The problems do not end here. For example, the Bank Resolution and Recovery Directive (BRRD) stipulates that, in implementing tools such as bail-in, write-down, or conversion of capital instruments, resolution authorities can decide to: (a) *cancel*

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[141] *Kotnik*, EU:C:2016:767, ¶ 38.
[142] *Id.* ¶¶ 62–66.
[143] *Id.* ¶¶ 71–78.
[144] Guideline of the European Central Bank 2015/510/EU, On the Implementation of the Eurosystem Monetary Policy Framework (Recast), 2015 O.J. (L 91) 3 (providing 133 pages with the type of tools (open market operations and standing facilities), procedures (tender and bilateral), eligible counterparties, and eligible collateral, which can be used by the ECB for the regular management of liquidity in the market, including liquidity provision and withdrawal).

existing shares or other instruments of ownership or transfer them to bailed-in creditors; or (b) in case there is positive net value, dilute existing shareholders and owners "at a rate of conversion that *severely dilutes* existing holdings of shares or other instruments of ownership."[145] This language suggests that the bail-in tool may, or should, be used somehow to *teach investors a lesson*, and make an example of them in order to limit moral hazard. The "no creditor worse-off" principle should balance the implementation of these provisions by competent authorities with punitive, or deterring, aims,[146] *but only* if that principle is considered applicable to shareholders as well.[147] The question, then, is whether, after the adoption of a valuation and compensation decision (which should try to limit moral hazard), the CJEU or the ECtHR should grant a *blank check* to resolution authorities or instead scrutinize the decision under equality and proportionality principles.

A more nuanced view seems to be present in the even more recent case of *Ledra Advertising*,[148] where several parties challenged the actions of the Commission and ECB in the context of the restructuring of several Cypriot banks under the ESM framework. The CJEU declared inadmissible the annulment action because actions under the ESM were imputed not to the Commission or ECB, but to the ESM itself, which is not an EU body. However, the Court let the action in damages under Articles 268 and 340 TFEU stand.[149] The plaintiffs alleged that the bail-in measures had breached their right to property. The Court undertook a relatively "conventional" analysis where it held that (i) the right to property is not absolute and may be subject to proportionate restrictions in the general interest; (ii) the measures pursued an objective of general interest, such as preserving the stability of the financial system, which is especially important in the presence of spill-over effects; and (iii) the measures were proportionate, as they consisted in the conversion of 37.5% of uninsured deposits into shares, and the freezing of other uninsured deposits, with the commitment that a buy-back of shares would be undertaken if the bank were overcapitalized beyond 9% of the core ratio.[150]

Fundamental rights advocates might point out that the action was dismissed without much discussion. However, unlike previous cases, this time the Court was less emphatic on the authorities' discretion. Moreover, rather than justifying the interference pursuant to some abstract boilerplate language, it pointed, albeit briefly,

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[145] BRRD, *supra* note 127, art. 47(1).

[146] *See* Eur. Banking Authority, *Draft Guidelines on the Rate of Conversion of Debt to Equity in Bail-in*, at 8 (Nov. 22, 2014), https://www.eba.europa.eu/documents/10180/890758/EBA-CP-2014-39+CP+on+GL+on+conversion+rates.pdf.

[147] The principle requires that a party incurring greater losses than it would have incurred in a winding up under normal insolvency proceedings be paid the difference. However, whereas the rule on valuation purposes applies both to creditors and shareholders (BRRD, *supra* note 127, art. 75(1)), as a matter of principle, SRM Regulation, *supra* note 79, art. 15(1)(g) and BRRD, *supra* note 127, art. 34(1)(g) only refer to "creditors." Moreover, BRRD, *supra* note 127, recs. 5, 73, 111 and SRM Regulation, *supra* note 79, art. 20(9), rec. 78 refer to it as the "no creditor worse-off" principle.

[148] Ledra Advertising Ltd. & Others v. Comm'n & European Central Bank, Joined Cases C-8/15 P to C-10/15 P, EU:C:2016:701.

[149] *Id.* ¶¶ 53–61. The Court held that "the tasks conferred on the Commission and the ECB within the ESM Treaty do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties." Thus, even when acting outside the scope of EU Law, these institutions were subject to actions for damages. *Id.* ¶ 56. *See supra* Part I.B.

[150] *Ledra Advertising*, EU:C:2016:70, ¶¶ 69–74.

towards certain aspects of the particular case, such as the "imminent risk of financial losses" for depositors,[151] the actual conversion figure of 37.5%, and the commitment to buy-back in case of overcapitalization. Although the Court could still have engaged in a more thorough analysis of the rationale for intervention, *Ledra Advertising* represents some progress from previous decisions of the Court, such as *Kotnik,* or from the ECtHR caselaw, as in *Grainger*.

Optimists could also point to cases such as *Credit and Industrial Bank v. Czech Republic*[152] and *Capital Bank v. Bulgaria,* [153] where the issue was *not* the *substantive* protection of property rights but the *procedural* safeguards with which authorities interfered. Courts have been bolder and less easily swayed by arguments of financial stability and risk in such cases. Indeed, cases like these suggest an alternative line of development, where checks are based on due process rights rather than subject to the vagaries of balancing and proportionality. We examine this alternative line later.[154] Before rejoicing too much, however, optimists should take note of the fact that the above cases concerned blatant violations of procedural rights, which are not too likely within the legislative framework of the Banking Union.

3. Filling the Gap of Property Protection (I): Rights Under Company Law

The protection dispensed to property rights under the Charter or the ECHR in practice is weak enough to put in question the characterization of this fundamental "right" as a "powerful reason."[155] Courts emphasize that the right to property is not "absolute" and fail to delve deeper into the justification provided by public authorities for their intervention. This dilutes the strength of the proportionality test and blurs the boundaries of the right itself, especially in a context like that of financial entities, where property is intangible and depends on the ability to rely on the protection of the legal institutions underpinning banking and finance.

Apart from outright expropriation, it is unclear what public authorities are constrained from doing in this context. This leads us to seek alternative sources of substantive rights which can act as proxies, or even substitutes, for the fundamental right to property in the context of financial entities. The way courts interpret the limits to public action in relation to these "substitute" property rights could inspire the CJEU or the ECtHR to construct a clearer proportionality test if, in the future, they decide to adopt a more robust approach toward property protection.

We begin our analysis with the rights protected by company law. EU rules that regulate pre-emption rights, for example, grant anti-dilution protection to existing

[151] *Id.* ¶ 74.

[152] Credit and Industrial Bank v. the Czech Republic, app. no. 29010/95, CE:ECHR:2003:1021JUD002901095.

[153] Capital Bank AD v. Bulgaria, app. no. 49429/99, CE:ECHR:2005:1124JUD004942999.

[154] *Infra* Part II.D.1.

[155] *See supra* Part I.A.

shareholders,[156] in case of write-down or conversion of capital instruments (bail-in)[157] and posterior recapitalization. In a series of cases based on public takeovers of failing firms by Greek authorities (*Karelios, Evangelikis, Pafitis, etc*.), the CJEU held that when a private company is taken over by national authorities, new shares issued to re-capitalize the company have to be offered to shareholders first.[158] In theory, shareholders of a bank subject to intervention by the ECB and NCA, and later recapitalized by public authorities in resolution proceedings, could use this as a stalling tactic to obtain a better price for their shares. Yet in *Pafitis*, which involved the takeover of financial institutions, the CJEU held that although domestic courts had jurisdiction to decide whether the pre-emption right had been used in an abusive manner by former shareholders, the Court also held that the finding could not result in a limitation of the scope of shareholder protection.[159]

It is unlikely that the CJEU will maintain this uncompromising stance in case of intervention by ECB/NCAs, or resolution authorities. Unlike in the precedents above, the SSM/SRM rules that would restrict pre-emption rights are part of EU law. [160] The main challenge is the CJEU statement that pre-emption rights apply "as long as the company continues to exist within its own structures," meaning "as long as the company's shareholders and normal bodies have not been divested of their powers,"[161] as happens in "compulsory liquidation." This standard should—and, most likely,

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[156] Parliament and Council Directive 2012/30/EC, On Coordination of Safeguards in Respect of the Formation of Public Limited Liability Companies, art. 33, 2012 O.J. (L 315) 74. The provision has restricted the ability of domestic law to grant pre-emption rights to non-shareholders (*e.g.*, holders of convertible bonds) and to give companies' flexibility as to the issuance price in cases where pre-emption rights have been suppressed. *See* Comm'n v. Spain, Case C-338/06, EU:C:2008:740.

[157] *See* SRM Regulation, *supra* note 79, art. 21; BRRD, *supra* note 127, art. 59.

[158] "[T]he Second Directive provides clearly, precisely and unconditionally that the shares must be offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares." *See* Karelia & Karelins v. Minister of Industry, Energy, and Technology, Joined Cases C-19/90 & C-20/90, EU:C:1991:229; Syndesmos Melon tis Eleftheras Evangelikis Ekklisias & Others v. Greece & Others, Case C-381/89, EU:C:1991:142, ¶39. In *Evengelikis*, the Greek Organization for the Restructuring of Undertakings (OAE) was created as a public-sector body in the form of a public limited company acting in the public interest, and under control of the State, and with the power to take over administration and day-to-day operation of undertakings undergoing nationalization or rationalization. In case of serious financial difficulties, the OAE could decide *to increase its capital, by way of derogation from the provisions in force concerning public limited liability companies* with the approval of the competent minister. Former shareholders had to exercise their pre-emptive rights within a time-limit laid down in the decision granting ministerial approval. The company EPAS was subject to such restructuring, and former shareholders failed to exercise their rights within the month granted to do so. The OAE became the majority shareholder, negotiated with creditors, and approved a debt-to-capital conversion program to keep the company afloat. Then one of the former shareholders sought to annul these decisions. The Court held that then-article 29 of the Second Directive applied to the company, and could not be derogated from by special provisions.

[159] *See* Panagis Pafitis & Others v. Trapeza Kentrikis Ellados AE & Others, Case C-441/93, EU:C:1996:92, ¶¶ 67–68, 70.

[160] This would also reduce the risk that purportedly "exceptional" measures are used to introduce *de facto* carve-outs in EU rules and undermine their *effet utile*, which was a major concern in Syndesmos Melon. *See* Syndesmos Melon tis Eleftheras Evangelikis Ekklisias & Others v. Greece & Others, Case C-381/89, EU:C:1992:142, ¶ 33. Furthermore, the CJEU has grown bolder in crafting a doctrine of abuse of EU law ever since Halifax plc, Leeds Permanent Development Services Ltd., County Wide Property Investments Ltd., v. Commissioners of Customs & Excise (2006), Case C-255/02, EU:C:2006:121, where the defining feature was the existence of a behavior contrary to *the purpose* of the provisions. This signals a greater readiness of the CJEU to engage in teleological interpretation of EU law, which could result in a different equilibrium between the needs of shareholder protection and the needs of financial stability.

[161] *Id.* at 27.

will—be reviewed. The BRRD and SRM Regulation, while not a "liquidation" regime, regulate a "special management" situation[162] where normal bodies are divested of their powers by a decision of *resolution*, not *supervisory*, authorities.[163] Moreover, in "early intervention," supervisory authorities may replace the management body with a temporary administrator,[164] but may not displace the board of directors or the shareholders' meeting.[165]

Court cases so far seem to confirm this view, although, in our view, the arguments chosen by the CJEU may create more problems than they resolve.

Let us consider first the *Kotnik* case, discussed in the previous sub-section. In this case the Court analyzed the Commission Banking Communication. That Communication stated that one of the factors the Commission considered when deciding whether to validate the public provision of funds pursuant to EU state aid rules would be whether such public funds were accompanied by burden-sharing by shareholders. The validity of the Communication was assessed on the basis of the right to property under Article 17 of the Charter, and the *Pafitis* case law on shareholder protection. It was alleged that burden-sharing decisions adopted by authorities without a decision by the shareholders' meeting were contrary to the protections of EU Directives on Company Law.[166] The Court's response was that:

> It must be emphasised, in that regard, that, as the Advocate General stated in points 105 and 107 of his Opinion, the national measures that were challenged in Pafitis and Others (C-441/93, EU:C:1996:92) had been adopted in the 1986-1990 period and the Court delivered its judgment in 1996, thus well before the start of the third stage for the implementation of the Economic and Monetary Union, with the introduction of the euro, the establishment of the Eurosystem and the related amendments to the EU Treaties. Although there is a clear public interest in ensuring throughout the European Union a strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the

[162] Directive BRRD, *supra* note 127, art. 35(2) states that "[t]he special manager shall have all the powers of the shareholders and the management body of the institution."

[163] *See id*., arts. 35(1)–(2).

[164] *See id*., arts. 28–29.

[165] BRRD, *supra* note 127, art. 29(5) states that "[t]he temporary administrator may exercise the power to convene a general meeting of the shareholders of the institution and to set the agenda of such a meeting only with the prior consent of the competent authority." On the other hand, (7) of the same provision states that "[t]he appointment of a temporary administrator shall not last more than one year. That period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to be met. The competent authority shall be responsible for determining whether conditions are appropriate to maintain a temporary administrator and justifying any such decision to shareholders."

[166] In this case, it was the Second Company Law Directive, originally Directive 77/91/EEC, now Parliament and Council Directive 2012/30/EU on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, 2012 O.J. (L 315) 74.

financial system.[167]

Simply put, Single Market goals enshrined in the Second Company Law Directive prevail over States' public interest under their national laws, but not over the public interest of the Monetary Union, under the blessing of EU rules. This leaves the Court vulnerable to two types of criticism. First, under the Court's maximalist stance, it now looks as though it suffices to wave the *financial stability* card to trump investors' interests (a risk we warned about in Section II.4). Second, the Court applies a double standard—a skeptical approach towards national public policies, and a more accommodating stance towards EU policies. Yet this openly controversial statement is not the only, and, in our view, not even the most relevant, source of trouble.

Whereas the above-cited language was the concluded the Court's judgment, *Kotnik*'s previous paragraphs developed a different argument, which carried more weight to justify the holding. This argument relied on the distinction between an intervention over "a single bank" and the case at hand, where burden-sharing was required as a prerequisite to state aid "in an exceptional context of a national economy being affected by a serious disturbance, to overcome a systemic financial crisis capable of adversely affecting the national financial system as a whole and the financial stability of the European Union."[168]

The Court reiterated this argument in *Dowling*, where the Court was asked directly about the compatibility of the intervention with the Second Company Law Directive, without the other considerations regarding property rights that were present in *Kotnik*.[169] In *Dowling* the relevant bank intervention involved the issuance of shares at a price below nominal value, with exclusion of pre-emption rights, in a way that diluted existing shareholders, and in contravention of a decision of the shareholders meeting.[170] The CJEU's chosen narrative distinguished between the insolvency of a *single bank*, and the application of *ordinary reorganization measures*, where the Second Company Law Directive and the *Pafitis* case law applied, and measures adopted "where there is a serious disturbance of the economy and financial system of a Member State that threatens the financial stability of the European Union."[171] The Court used the maximalist reasoning that *Pafitis* had been decided before the third stage of implementation of the monetary union as a closing argument, in the same way it did in *Kotnik* (see above).[172]

Although keen to uphold intervention measures, the Court may have done a disservice to the framework of bank intervention under the Banking Union by founding its reasoning on a sort of *financial state of necessity*. If the measures concerned in *Kotnik* and *Dowling* were justified because they were adopted in the context of a systemic crisis, does that mean, conversely, that absent that context, the measures would not be valid, or that the provisions of the Second Company Law Directive would apply in full? The answer to the question is relevant, since bank resolution rules contained in the BRRD permit the write-down and conversion of

[167] *Kotnik,* EU:C:2016:102, ¶ 91.
[168] *Id.* ¶ 90.
[169] Gerard Dowling & Others v. Minister for Finance, Case C-41/15, EU:C:2016:473.
[170] *Dowling*, EU:C:2016:473, ¶¶ 42–43.
[171] *Id.* ¶¶ 43, 53.
[172] *Id.* ¶ 54.

capital and debt over a single bank, regardless of the presence of public funding, and *without* the need to prove a risk for the financial system as a whole.[173] In this context, *Pafitis* and related law could create problems for individual bail-in measures adopted in the absence of a financial crisis.[174] The Court would have done better to construct a more seamless transition of principles to accommodate the criteria of the Second Company Law Directive, applicable in *normal times*, and those of bank resolution, applicable in *crisis times*, without limiting the latter to *systemic* crises.

In fact, the determination of the point where shareholder protection under the Second Company Law Directive ceases to be the prevailing principle in the *Pafitis* case law was in dire need of review. The criterion of whether a company "continues to exist within its own structures" is vague, and does not take adequate account of the interests at stake. It is our view that the applicability of pre-emption rights should be less linked to the continuity or discontinuity of company structures, and more linked to the existence of a *market* for the company's shares and pre-emption rights. In a context where it is likely that the company's shares will find subscribers, shareholders would have an incentive to *hold out* the issuance of new shares to extract better terms from public authorities, to the detriment of creditors and of the public interest. Bank resolution measures support this view. Articles 59 of the BRRD and 21 of the SRM Regulation permit the bail-in "independently of resolution action" *if* the conditions for resolution are met or the entity "will no longer be viable" absent a bail-in.[175] This happens if (a) the institution-entity-group is failing or likely to fail, and (b) there is no reasonable prospect that *any alternative private sector measures* would prevent failure within a reasonable timeframe. If resolution authorities can unilaterally gauge the availability of a private solution and convert debt instruments into capital, it makes little sense to deny them the power to suppress pre-emption rights for shares in case of recapitalization.[176]

Critics could still argue that the domestic measures analyzed by the CJEU in *Kotnik* and *Dowling* were forerunners of *resolution* measures subject to the BRRD, which was not yet in place. Yet the Court could nonetheless have evaluated the compatibility of the BRRD criteria with those of the Second Company Law Directive to review its *Pafitis* case law, and used the resulting balance as a yardstick to appraise the validity of pre-BRRD domestic measures. Even if we believe that the approach proposed here is more sound than mere reliance on *systemic crisis* arguments, any solution where a bail-in decision binds the company without being adopted by the shareholders' meeting (a point of raised in *Kotnik*, and *Dowling*)[177] will open a final

[173] *See* BRRD, *supra* note 127, arts. 43–55, 59–62.

[174] The Court stated that the measures under the Second Company Law Directive are conceived for the "normal operation" of companies. Conversely, "the burden-sharing measures involving both shareholders and subordinated creditors constitute, when they are imposed by the national authorities, exceptional measures. They can be adopted only in the context of there being a serious disturbance of the economy of a Member State and with the objective of preventing a systemic risk and ensuring the stability of the financial system." *Kotnik*, EU:C:2016:102, ¶ 88.

[175] BRRD, *supra* note 127, art. 59; SRM Regulation, *supra* note 79, art. 21.

[176] That is, long after the financial entity has been put in *crisis mode*, its bodies count for little, and its creditors have been hit hard, once a plan has been put together to recapitalize the entity, the entity would have to make first an offer to shareholders, or force a special resolution in the shareholders' meeting to suppress pre-emption rights, pursuant to Parliament and Council Directive 2012/30/EC, *supra* note 156, art. 33(4) .

[177] *Kotnik*, EU:C:2016:102, ¶¶ 82–88; *Dowling*, EU:C:2016:473, ¶¶ 58, 61.

issue of principle, such as the conformity of the decision with the *company interest*. EU supervision and resolution rules try to achieve a difficult balance between letting public authorities alter private rights and reiterating the requirement that special measures comply with company law. Company law is designed to serve the *company interest*,[178] which is often identified with the interest of shareholders.[179] However, resolution decisions, which are adopted for the benefit of depositors, clients, or the system as a whole,[180] are difficult to accommodate within this scheme.[181] For example, EU rules on temporary administrators state that they cannot be considered "shadow directors" or *de facto* directors,[182] and require them to manage the business to preserve or restore the financial position of the institution and its sound and prudent management.[183] This creates a statutory exception to the general principles of company law, which is partially inconsistent with the requirement that directors' powers comply with company law.[184] Should this be interpreted as *compliance with formalities* or also with the substance of company law? The question is even more pressing if, instead of temporary administration, public authorities simply remove the senior management body. In this case, there is no statutory exception, and the new management body should both comply with resolution objectives and pursue the *company interest* under company law.[185]

A second difficulty concerns corporate groups—the structure adopted by all supervised institutions, given that intra-group financial assistance arrangements may be adopted as a resolution measure.[186] The problem is more acute due to the diverging

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[178] Directors can be sued if they are not loyal to that interest. *See, e.g.*, UK Companies Act 2006, c. 46, §§ 172 and 175 in relation with § 260–64. Decisions of the shareholders' meeting may be annulled if they are against that interest. *See, e.g.*, Spanish Capital Companies Act, art. 204. In relation to the suppression of pre-emption rights, some countries have introduced an additional requirement that the decision be favorable to the company's interest. *See, e.g.,* Siemens AG v. Henry Nold, Case C-42/95, EU:C:1996:444 (regarding Germany). *See also* Spanish Capital Companies Act, art. 306 (B.O.E. 2010, 161).

[179] Nevertheless, this is a contentious issue. *See* A. A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049–74 (1931); E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145–63 (1932).

[180] BRRD, *supra* note 127, art. 31 (on "resolution objectives").

[181] Section 172 of the UK Companies Act 2006, c. 46 provides for the need to look after the interests of constituencies other than shareholders, under the so-called "enlightened shareholder approach". *See* Paul J. Davies, *Shareholder Value, Company Law and Securities Markets Law—A British View*, *in* CAPITAL MARKETS AND COMPANY LAW 261 (Klaus J. Hopt and Eddy Wymeersch, eds., 2003). In the United States, the Delaware Chancery court briefly suggested that creditors' interests could justify decisions contrary to shareholders' interest in the vicinity of insolvency (Credit Lyonnais Bank Netherland, N. V. v. Pathe Communications Co., 1991 WL 277613 (Del. Ch. Dec. 30, 1991), but even this subtle hint has been later overruled in Production Resources Group, L.L.C. v. NCT.Group, Inc., 863 A.2d 772 (Del. Ch. 2004), *and* North American Catholic Educational Programming Foundation Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).

[182] *See* BRRD, *supra* note 127, art. 29(10).

[183] *See id*. art. 29(3).

[184] *Id*. art. 29(2) states that "[t]he powers of the temporary administrator in relation to the institution shall comply with the applicable company law." Article 8 states that "the appointment of a temporary administrator shall not prejudice the rights of the shareholders in accordance with Union or national company law." *Id*. art. 8.

[185] The potential for conflict can be high if, once the institution is nearing insolvency, a large stake of the bank is acquired by a hedge fund specializing in distressed debt that is not afraid of litigation. The *Northern Rock* case on the protection of property discussed above (*supra* Part II.A.) was litigated by a hedge fund.

[186] BRRD, *supra* note 127, arts. 19(6)–(7).

approaches of different jurisdictions to situations where the interest of the group collides with the interest of the individual subsidiaries. Chapter 16 of the European Model Company Act (EMCA) today offers an international benchmark,[187] supplemented by the general requirement that intra-group transactions be performed under "fair conditions."[188]

From this perspective, the BRRD approach to intra-group financial assistance looks unobjectionable: there must be a prior contract determining mutual financial assistance, concluded between parties under arm's length conditions, and where consideration and profit are considered in the calculation of the contract conditions, "taking account of any direct or any indirect benefit that may accrue to a party as a result of provision of the financial support."[189] Alas, the devil is in the details. Although general studies suggest that the "fair conditions" standard, even an arm's length requirement, is widespread, different jurisdictions may diverge on the meaning of the concept, the leeway granted to the parties in determining the consideration for the intra-group financial support, and the consequences of any breach of these requirements.[190] To the extent resolution rules on intra-group financial support are not entirely self-standing and rely on general company law, this may feature a *hidden trap* posed by diverging national company laws on (a) the conditions for financial support and the consideration to be paid for it; and (b) the latitude granted by the courts in the determination of the "arm's length standard." The problem could be more acute in cross-border situations.

4. Filling the Gap of Property Protection (II): Rights Under Investment Treaties

At first glance, the law of investment protection looks like an improbable source of inspiration for stronger protection of the fundamental right to property. Although investment protection originated in cases of blatant expropriation, investor activism, and a pro-investor stance, international tribunals have enhanced safeguards to an extent that current protection levels, based on broad provisions such as "Most Favoured Nation" (MFN) clauses, "Fair and Equitable Treatment" clauses, or "Full Protection and Security" clauses,[191] may be superior to that dispensed by

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[187] Chapter 16 of the European Model Company Act (EMCA) codifies the right of a parent company to give instructions to the management of a subsidiary and the relevance of the interest of the group. EUROPEAN MODEL COMPANY ACT (EMCA) DRAFT, ch. 16 (2015).

[188] *See* JAMES STONEBRIDGE, STUDY ON THE FEASIBILITY OF REDUCING OBSTACLES TO THE TRANSFER OF ASSETS WITHIN A CROSS BORDER BANKING GROUP DURING A FINANCIAL CRISIS - NATIONAL REPORT UNITED KINGDOM 61–70 (2008), http://ec.europa.eu/internal_market/bank/docs/windingup/200908/annex17_finalcountryreport_uk_en.pdf.

[189] BRRD, *supra* note 127, arts. 19(6)–(7).

[190] Countries that regulate conflicts of interests within groups (or whose courts have expressly addressed such conflicts) have opted for a *liability rule*, where a party can be deprived of rights without its consent if compensation is paid (as in Germany or, to some extent, Italy). In other countries, the transaction can be annulled if it is against the subsidiary's interest. In Spain, for example, the Supreme Court has annulled decisions that served the group's interest against the subsidiary's interest. *See* S.T.S. Apr. 12, 2007 (R.J. 2260); *and* S.T.S. Jan. 17, 2012 (R.J. 1686). For the distinction between "liability rules" and "property rules," *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106 (1972).

[191] For criticism of the unpredictability that this causes, see Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1558 (2005).

constitutional rights to property or free movement.[192] This was probably unexpected for EU States, which having changed from enforcers to defendants under the Treaties, and are now trying to protect what they see as legitimate policy choices.[193]

For the purposes of the Article, there are two relevant doctrines: (a) the doctrine of *indirect expropriation* and (b) the "Fair and Equitable Treatment" standard. The first doctrine distinguishes between regulatory intervention, which the investor has to endure, and expropriation, which carries compensation corresponding to the severity or economic impact of the measure.[194] The "Fair and Equitable Treatment" standard protects the investor's "legitimate expectations"[195] about the legal environment when the investment was made.[196] This standard does not prevent States from passing new rules, but it recognizes the right of investors to compensation in the face of certain changes in regulation or licensing, even during purported "crisis" situations.[197]

One useful precedent for our purposes is *Saluka Investments v. Czech Republic*.[198] The arbitral tribunal held the respondent to be in breach of the "[F]air and [E]quitable" standard because, in the midst of a systemic debt problem, the State provided financial assistance *only* to three of the four biggest banks and left out the entity in which the plaintiffs had invested. The tribunal considered that the problem was generalized and therefore concluded that the reasons alleged by the State did not justify denying

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[192] *See* Thomas Eilmansberger, *Bilateral investment treaties and EU law*, 46 COMMON MKT. L. REV. 383, 383–429 (2009).

[193] *E.g.*, the decision of Germany to phase out nuclear power. *See* EUROPEAN COMMISSION, *Investment Protection and Investor-to-State Dispute Settlement in EU agreements* (2013).

[194] *See, e.g.*, Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, (Aug. 30 2000), 5 ICSID Rep. 209, 225 (2002); CME v. Czech Republic, Partial Award (UNCITRAL Arbitration Proceedings 2001), http://www.italaw.com/sites/default/files/case-documents/ita0178.pdf. This can include the appointment of a manager if that manager interferes with the property involved. *See* Tippets, Abbet, McCartthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219 (1984). The test also includes the existence of a purpose or intention to expropriate, but this is not essential, and it is not necessary to prove it. *Metalclad Corp.*, 5 ICSID Rep.at 225. ¶ 101.

[195] *See, e.g., Metalclad Corp.*, 5 ICSID Rep. at 225.

[196] If the investor relied on such legal environment when the investment was made, it may give rise to a legitimate expectation that needs to be protected. BG Group plc v. Republic of Argentina, Final Award (UNCITRAL Arbitration Proceedings 2007), http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf. *See also* National Grid v. Argentina, Award (UNCITRAL Arbitration Proceedings 2008), http://www.italaw.com/sites/default/files/case-documents/ita0555.pdf. In addition to the *substance* of the legal environment, the standard also protects the fairness of the investor's treatment from a procedural perspective. *See, e.g.,* Waste Management, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, (Apr. 30, 2004), 6 ICSID Rep. 538 (2004). The procedural perspective encompasses the right to administrative due process and similar safeguards. *See, e.g.,* International Thunderbird Gaming Corporation v. United Mexican States, Arbitral Award ¶ 200, (UNCITRAL Arbitration Proceedings 2006), http://www.italaw.com/sites/default/files/case-documents/ita0431.pdf. Cases of breaches usually involve clear situations of abuse (*e.g.* a lack of evidence supporting the decision, as in *Metalclad Corp*.5 ICSID Rep. 209; or an overbearing exercise of administrative functions, as in Pope & Talbot, Inc. v. Government of Canada, Award on the Merits of Phase 2 (UNCITRAL Arbitration Proceedings 2001), http://www.italaw.com/sites/default/files/case-documents/ita0678.pdf, which means that the protection of procedural safeguards under the Charter or the ECHR should be superior to that of investment treaties, and the latter should not constitute a source of additional limits.

[197] Argentina has been the main defendant in past years due to the measures adopted during its financial crisis. Spain is also currently facing several claims from foreign investors as a result of the derogation of subsidies to the renewable energies sector during the economic crisis.

[198] Saluka Investments BV v. The Czech Republic, Case No. 2001-04, Partial Award, PCA Case Repository (Perm. Ct. Arb. 2006), https://pcacases.com/web/sendAttach/880.

assistance to one entity while providing it to others.[199] The facts of the case suggested that there was clear discrimination between the domestic-held and foreign-held entities, but what matters is that an international arbitration tribunal was readier to engage with the substance of the State's arguments on financial stability than the ECtHR was in *Grainger v UK*.[200] Although it is unclear whether an international investment tribunal would have jurisdiction over acts by NCAs under instruction by the ECB, it would be embarrassing if shareholders and debt-holders were better protected outside the EU framework than inside it.

B. Limits Based on Procedural Rights (I): Privacy and "Good Administration" in Administrative Proceedings

1. Privacy Rights

Although privacy rights are *substantive* in nature, in the context of supervisory activities they generally act as *safeguards* during the inspection-investigation procedure.[201] Yet, their protection is not strong, nor do they have clear boundaries. First, privacy rights are weaker in the context of legal, as opposed to natural, persons.[202] Second, the different characterizations that may be used to justify these rights for their own sake, as part of defense rights, as part of a general interest in the integrity of the process, or in service of other diffuse collective goals, may result in different levels of protection.

In CJEU case law, privacy has been linked to protection against "disproportionate intervention." In *Roquette Frères*, the CJEU used the ECtHR's more protective standard towards legal persons to illustrate the scope and limits of the Commission's inspection powers in competition cases.[203] The main safeguards are: (i) the requirement of judicial authorization when called for under national law; (ii) the requirement that national courts ensure that the measure is not arbitrary[204] and that it

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[199] *Saluka Investments BV*, Case No. 2001-04, Partial Award, PCA Case Repository at ¶¶ 327–47. The conduct was only aggravated by regulatory changes, which modified the rules for provisioning of loan losses. The tribunal held this was a consequence of a lack of adequate protection of creditors in the enforcement of security interests, which was the responsibility of the State.

[200] In *Grainger* the non-discrimination argument was raised by the plaintiff and simply ignored by the Court. *See* Grainger, CE:ECHR:2012:0710DEC003494010,. *See* discussion *supra* Part II.A.

[201] Privacy and defence rights include attorney-client privilege. The inapplicability of the privilege to in-house lawyers under EU law is controversial. According to EU courts, communications are protected by attorney-client privilege *only* if (a) the exchange with the lawyer is related to the client's right of defence; and (b) the exchange emanates from independent lawyers, i.e. lawyers who are not bound by a relationship of employment. *See* AM & S Europe Ltd. v. Comm'n, Case 155/79, EU:C:1982:157, ¶ 21. Thus, in-house lawyers are excluded from such protection, but this difference in treatment has not been considered grounds for discrimination claims. *See* Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd. v. Comm'n. Case C-550/07P, EU:C:2010:512, ¶¶ 42–51 (in house lawyer not protected by privilege) and 54–61 (no violation of the equality principle). However, since the issue has no unique importance in the context of the Banking Union it will not be addressed here.

[202] *See supra* Part I.C.

[203] *Roquete Frères SA,* EU:C:2002:603. These standards were reiterated in subsequent case law. *See, e.g.,* Minoan Lines v. Comm'n*,* Case T-66/99, EU:T:2003:337.

[204] In other words, there are reasonable grounds to suppose that there is an infringement of the rules that give rise to the investigation. Thus, the Commission is required to provide the court with substantiated explanations showing that the Commission is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned. *See, e.g., Roquete Frères SA,* EU:C:2002:603, ¶ 61. The court cannot, however, request the information on the

is proportionate to the subject-matter of the investigation, its purpose, and the institution's specific powers;[205] and (iii) the requirement that the EU authority state reasons for ordering an investigation, and specify its subject-matter, purpose, and status as precisely as possible.[206] Problems may arise if national laws do not require judicial control or leave full discretion to the ECB/NCA. Although Article 13 of the SSM Regulation merely requires court involvement, the action could still be challenged as a breach of privacy rights under ECtHR case law.[207]

Another important dimension concerns business reputation. Business reputation is protected by privacy rights for natural persons, but it has a difficult status for legal persons. EU courts, following the ECtHR, have established that Article 8 ECHR cannot be used to prevent publication of reputation-harming decisions when this harm stems from the acts of the entities themselves; that is, because the acts performed were illegal.[208] Yet, the courts have not explored whether this would justify the automatic publication of penalties without even balancing the *interests*, if not the *rights*,[209] at stake, as the language of Article 18(6) SSM could suggest. Some scholars conclude that, for natural persons, such automaticity should be invalid,[210] but its application to legal persons is debatable.

The case for restraint is stronger if *reputation* can be connected to *interests* that are more closely related to the objectives of the rules themselves (such as *financial stability*). Actually, SSM rules state that decisions on administrative penalties will be published in anonymous form when these might jeopardize the stability of financial

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files on which the suspicions are based, nor substitute its own judgment about the necessity for the investigation.

[205] *See Roquete Frères SA,* EU:C:2002:603, ¶¶ 71, 76, 80. Consideration of the investigative powers may result in the exclusion of non-business documents from the inquiry. *Id.* ¶ 45.

[206] If a court were to annul the investigation, EU authorities could not use the information in bringing a further enforcement action. *See id.* ¶ 49. This does not mean that national courts can substitute their own assessment about the need for the investigation for that of the competent EU authorities (as only EU courts have the requisite jurisdiction, *id*. ¶ 51), or that parties being inspected can refuse to cooperate on grounds that the company is not suspected of breach. In Strinzis Line Shipping SA v. Comm'n, Case T-65/99, EU:T:2003:336, ETA was the agent of the company originally inspected (Minoan), but part of the business of Minoan was undertaken from its premises. The General Court validated Commission officials' insistence on inspecting the premises after being told that these belonged to ETA, and granted the Commission some leeway in deciding where the information could actually be found. Therefore, in the exercise of its investigatory powers, the Commission was entitled to take into account the fact that its chances of finding proof of the supposed infringement would be higher if it were to investigate the premises from which the target company conducted its business as a matter of practice.

[207] *See, e.g.*, Funke v. France, app. no. 10828/84, CE:ECHR:1993:0225JUD001082884; Société Colas Est & Others v. France, app. no. 37971/97,CE:ECHR:2002:0416JUD003797197. For a thorough discussion of this point, partly disagreeing with ECtHR case law, *see* Raffaele D'Ambrosio, *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings*, 74 BANCA D'ITALIA EUROSISTEMA 52 (2013), https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2013-0074/Quaderno-74.pdf.

[208] *See, e.g.*, Evonik Degussa GmbH v. Comm'n, Case T-341/12, EU:T:2015:51, ¶ 125, with reference to Sidabras & Džiautas v. Lituania, app. no. 55480/00 & 59330/00, CE:ECHR:2004:0727JUD005548000, ¶ 49; Taliadorou & Stylianou v. Cyprus, app. no. 39627/05 & 39631/05, CE:ECHR:2008:1016JUD003962705, ¶ 56' Gillberg v. Suède, app. no. 41723/06, CE:ECHR:2012:0403JUD004172306, ¶ 67.

[209] *See supra* Part I.A.

[210] D'Ambrosio argues that in case of a penalty applied by competent national authorities to natural persons, "the publication cannot be an automatic effect (...); otherwise it would be illegal under the rules and the case law on the protection of personal data." D'Ambrosio, *supra* note 207, at 66.

markets or an on-going criminal investigation, or cause disproportionate harm to the entity.[211] This is in line with the CJEU's readiness to accept "built-in" limits resulting from a finalistic interpretation of the rules and the interests protected,[212] instead of external constraints resulting from individual rights.

A final aspect, where courts have been more protective, is business secrets. Courts have granted them protection as *rights* rather than *interests*, when (a) the information is known only to a limited number of persons, (b) its disclosure is liable to cause serious harm to the person who has provided it or to third parties, and (c) the interests liable to be harmed by disclosure are, objectively, worthy of protection.[213] Within this setting, the General Court (GC) has tended to give more discretion to EU authorities,[214] while the CJEU has tended to presume that sensitive information is not subject to disclosure unless justified due to non-confidentiality or pursuant to an overriding public interest.[215]

Nevertheless, privacy rights as standalone rights may not justify robust safeguards in preliminary inquiry proceedings, unless combined with other *procedural* reasons; such as, the need to protect defense rights from being irremediably impaired at a later stage.[216]

In light of this second consideration, the language of the SSM rules can be confusing. Unlike competition rules, which state that hearings and rights of defense *apply before* a decision on infringement or penalties is adopted (positive formulation),[217] the SSM rules state that the right to be heard *does not apply* in the investigative stage (negative formulation).[218] This could be read as excluding also safeguards closely associated with defense rights.

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[211] *See* SSM Framework Regulation, *supra* note 59, art. 132. *See also* BRRD, *supra* note 127, art. 112. Resolution rules also balance expediency and transparency with stability, though less explicitly. Pursuant to BRRD, *supra* note 127, art. 83(4), resolution decisions must be published "as soon as reasonably practicable," but, according to article 81(3), decisions by NCAs or NRAs determining the occurrence of the resolution trigger will be notified "without delay" only to other authorities under an appropriate level of confidentiality.

[212] It is important to remember that before the CJEU used the ECtHR's case law on privacy rights of legal persons, it had reached a similar result via the protection against "arbitrary and disproportionate intervention." This entailed an interpretation of the rules according to the ends they were supposed to achieve. *See* Joined Hoechst AG v. Comm'n, Joined Cases 46/87 & 227/88, EU:C:1989:337. Also, in *Roquete Frères SA,* EU:C:2002:603, where the CJEU accepted the ECtHR's case law on privacy of legal persons, its main analysis was still based on a teleological interpretation of competition rules.

[213] *See, e.g.*, Bank Austria Creditanstalt AG v. Comm'n, Case T-198/03, EU:T:2006:136, ¶ 71.

[214] *Id*. *See also* Evonik Degussa GmbH v. Comm'n, Case T-341/12, EU:T:2015:51.

[215] *See, e.g.*, Lagardère SCA v. Éditions Odile Jacob SAS, Case C-404/10, EU:C:2013:808, ¶¶ 103–27.

[216] *See Hoechst AG*, EU:C:1989:337, ¶ 15.

[217] Council Regulation 1/2003, *supra* note 78, art. 27 ("Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection.").

[218] *See, e.g.*, SSM Framework Regulation, *supra* note 59, art. 31 ("Section 1 of Chapter III of the SSM Regulation shall not be subject to the provisions of this Article."); *see also* SSM Regulation, *supra* note 23, art. 22(1).

Although for the investigative stage SSM rules include procedural safeguards that are roughly consistent with the approach outlined above,[219] they lack clarity about the applicability of other safeguards.[220] This raises the question of whether SSM rules are trying to create self-contained proceedings, whose procedural safeguards do not necessarily draw from case law on the Charter or the ECHR. Although the EU legislature should have some leeway in configuring specific safeguards, these should be consistent with the Charter and the ECHR; they should not be based solely on consideration of privacy rights but also as a projection of defense rights. Thus, the exclusion of the right to be heard during the investigative stage should be interpreted narrowly, and other safeguards should not be excluded from the investigative stage as long as they are needed to preserve defense rights in a posterior stage.

2. The Right to Good Administration

Supervised entities can also rely on the "right to a good administration," recognized under Article 41 of the EU Charter. Yet this is not a single provision, but an ensemble of provisions. Furthermore, the way the courts have interpreted each of the single provisions casts doubts on whether what matters are the *rights* of the person (natural or legal) subject to the proceedings, requiring powerful reasons to be restricted, or the public interest in sound proceedings, which can be more easily balanced with other general interests or policies.

Article 41(2)(a) of the EU Charter enshrines the "right to be heard."[221] Pursuant to the CJEU's case law, the right applies in sanctioning procedures and in cases where a procedure was initiated against, or had an adverse impact on, the claimant.[222] The *right to be heard* provisions in the SSM framework mirror those in competition procedures,[223] which makes interpretation easier, but still leaves important questions open.

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[219] These include (a) the duty to "specify the information concerned" and to give a reasonable time limit to comply with requests for information; (b) the need to indicate, in the decision opening an investigation, the legal basis of the decision; (c) the need to include the subject matter and the purpose of the on-site inspection in the decision, and to notify it to the legal person subject to it; and (d) judicial control guidelines for requests for on-site inspection. SSM Framework Regulation, *supra* note 59, art. 139, 142–43, 145. Article 13 of the SSM Regulation provides that "If an on-site inspection provided for in Article 12(1) and (2) or the assistance provided for in Article 12(5) requires authorization by a judicial authority according to national rules, such authorization shall be applied for." The same article also regulates the test for controlling requests for on-site inspection applied by domestic courts in line with Council Regulation 1/2003, *supra* note 78, art. 20(8) and case law of EU courts. SSM Regulation, *supra* note 23, art. 13.

[220] See SSM Framework Regulation, *supra* note 59, art. 141 with regard to information at recurring intervals, providing that "[s]ubject to the conditions set out in relevant Union law, the ECB *may* specify in particular the categories of information that should be reported as well as the processes, formats, frequencies and time limits for provision of the information concerned" (emphasis added). SSM articles refer to the need to specify only the nature of the information, as opposed to competition rules, which refer to the nature *and* purpose. *See* Council Regulation 1/2003, *supra* note 78, arts. 18(2)–(3), 20(3).

[221] This was acknowledged by the CJEU in its early case law. *See* Transocean Marine Paint v. Comm'n, Case C-17/74, EU:C:1974:106, ¶ 15.

[222] Al-Jubail Fertilizer v. Council, Case C-49/88, EU:C:1991:276, ¶ 15 (investigative proceedings prior to the adoption of the anti-dumping duty).

[223] SSM Regulation, *supra* note 23, art. 22(1); SSM Framework Regulation, *supra* note 59, art. 31. Article 31 adopts the formula found in EU court precedent, stating that the right attaches "[b]efore the ECB may adopt *an ECB supervisory decision addressed to a party which would adversely affect the rights of such party*" (emphasis added). *Cf.* Council Regulation 1/2003, *supra* note 78, art. 27(1).

Beginning with the obvious, it is unclear how the right will be weighed against the ECB's discretion to manage the procedure, including the possibility to exclude oral hearings[224] or to shorten deadlines.[225] Also salient is the uncertainty regarding the ability of the ECB to exclude the right "if urgent action is needed in order to prevent significant damage to the financial system."[226] The broad wording of the provision, coupled with the ECB's technical expertise, suggest that the courts will be more keen to use the requirements that the measure be "provisional," and that an opportunity to be heard be granted "as soon as possible," as the means to balance the decision.

Less obvious is the problem of acts of general application, which are not subject to the right to be heard[227] in order to ensure expediency. This means that the ECB/NCAs could draft their decisions in an unspecific fashion to adopt concrete measures under the guise of general ones. The problem is explicit in the case of macro-prudential tools, which can have an adverse impact on the subjects affected,[228] and can be entity-specific too.[229] The provisions on "supervision," including safeguards, are not applicable to macro-prudential tools unless they are addressed to individual, supervised entities,[230] but there are no criteria to differentiate between individual and general measures, and case law is not very helpful.[231] The recent General Court case *United Kingdom and Ireland v. ECB* shows the Court's willingness to examine the substance of the legal act, regardless of its denomination, but the context was the

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[224] Although relevant, these are not an inextricable part of the right to be heard. *See* PAUL CRAIG, *Commentary to Article 41*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers et al. eds., 2014). SSM Framework Regulation, *supra* note 59, art. 31(1) states that the ECB "may," "if it considers it appropriate," give the opportunity to be heard "in a meeting," but otherwise the objections will be filed in writing.

[225] Documents will have to be filed within a deadline of two weeks after the party is notified of the decision (which can be extended on application of the party, but also shortened to three working days "in particular circumstances"). SSM Framework Regulation, *supra* note 59, art. 31(3). The notification shall contain "the material content of the intended ECB supervisory decision and the material facts, objections and legal grounds on which the ECB intends to base its decision." *Id.* art. 31(1).

[226] SSM Regulation, *supra* note 23, art. 22(1). In that case, "the ECB may adopt a provisional decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision."

[227] AJD Tuna Ltd. v. Direttur tal-Agrikoltura u s-Sajd, Avukat Generali, Case C-221/09, EU:C:2011:153, ¶ 47–52 (on emergency measures for the conservation of living, aquatic resources as a result of fishing).

[228] These include increases in capital buffers, liquidity requirements, and "other measures" aimed at addressing systemic or macroprudential risks. *See* SSM Regulation, *supra* note 23, art. 5; SSM Framework Regulation, *supra* note 59, art. 101; CRD IV, *supra* note 25, arts. 130–42; CRR, *supra* note 26, art. 458.

[229] CRD IV, *supra* note 25, art. 130, for example, regulates an institution-specific, countercyclical capital buffer. Systemic risk buffers (CRD IV, *supra* note 25, art. 133, CRR, *supra* note 26, art. 458) can be introduced for a "subset of entities," although it is not specified whether this can also include one or two of them.

[230] "The macro-prudential procedures referred to in Articles 5(1) and (2) of the SSM Regulation shall not constitute ECB or NCA supervisory procedures within the meaning of this Regulation, without prejudice to Article 22 of the SSM Regulation in relation to decisions addressed to individual supervised entities." SSM Framework Regulation, *supra* note 59, art. 101(2).

[231] In *AJD Tuna*, the CJEU stated that "[t]he criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the act in question. (*See*, *inter alia*, Gibraltar & Gibraltar Development v. Council, Case C-168/93, EU:C:1993:302, ¶ 11). A measure is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in general and in the abstract (*See*, *inter alia*, Alusuisse Italia v. Council and Comm'n, Case 307/81, EU:C:1982:337, ¶ 9)." *AJD Tuna*, EU:C:2011:153, ¶ 51.

review of admissibility of an annulment action by a government.[232] It is unclear whether the same *substance-over-form* approach would be applied to a private bank's right to be heard.

The second less obvious challenge is how to apply the right to be heard in composite proceedings with ECB and NCAs action.[233] In the past, EU courts have guaranteed the right to be heard even when it was not contemplated in one of the stages of the procedure.[234] They have granted it to national authorities[235] as well as EU institutions, typically the Commission,[236] when these authorities and institutions were the ones determining the content of the act. SSM rules stipulate that "the ECB shall give the persons who are the subject of the proceedings the opportunity of being heard,"[237] but do not indicate the institution before which it can be exercised. In supervisory actions where the ECB has the final decision, it is logical for the right to be granted before the ECB itself.[238] The problem could arise in those instances where NCAs retain discretion over the decision, in which case *the ECB* should grant a right to be heard *before the NCA*, or where the decision by the NCA pre-determines the ECB's decision, in which case the question is whether there should be a right to be heard before both the NCA *and* the ECB.

The related question of how much involvement is required at each level of the institution adopting the decision[239] was considered by the ESAs' Board of Appeal in *Standard Rating/ESMA*. There, the Board held, referencing the CJEU's *Büchler* case, that procedural fairness was not impaired despite the absence of a hearing by ESMA's Board of Supervisors and, apparently, an uneven level of involvement by its members in the decision's review, since the Board had "complete and detailed information

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[232] "[T]hat case-law is intended specifically to prevent the form or designation given to an act by its author from resulting in its escaping assessment of its legality in an action for annulment, even though it in fact has legal effects . . . In the light of case-law, in order to determine whether an act is capable of having legal effects and, therefore, whether an action . . . can be brought against it, it is necessary to examine its wording and context. If the act is perceived as only proposing a course of conduct and, therefore, as being similar to a mere recommendation . . . it should be concluded that the act does not have legal effects that are such as to render an action for annulment brought against it inadmissible. On the other hand, that examination may reveal that the parties concerned will perceive the contested act as an act which they must comply with, despite the form or designation favoured by its author." United Kingdom v. ECB, Case T-496/11, EU:T:2015:133, referring to Comm'n v. Council, Case 22/70, EU:C:1971:32 and Athinaïki Techniki AE v. Comm'n, C-521/06, EU:C:2008:422, ¶¶ 43, 45.

[233] S*ee generally* Christina Eckes & Joana Mendes, *The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?*, 36 EUR. L. REV. 651–70 (2011). In the SSM context, these include the NCAs' submission of "draft supervisory decisions" for significant entities (SSM Framework Regulation, *supra* note 59, arts. 90–91), notification of developments relevant for the suitability of managers (*Id*. art. 94), or the opening of proceedings to impose penalties at the ECB's request (*Id*. art. 134; SSM Regulation, *supra* note 23, arts. 18(1), 18(5)), but in practice can give rise to many more.

[234] *See* Lisrestal v. Comm'n, Case T-450/93, EU:T:1994:290; Comm'n v. Lisrestal, Case C-32/95P, EU:C:1996:402.

[235] *See* France Aviation v. Comm'n, Case T-346/94, EU:T:1995:187, ¶ 30.

[236] *See* Eyckeler & Malt AG v. Comm'n, Case T-42/96, EU:T:1998:40, ¶ 84–86; Primex Produkte Import-Export GmbH & Co & Others v. Comm'n, Case T-50/96, EU:T:1998:223, ¶ 65–67. *See also* Eckes and Mendes, *supra* note 233.

[237] SSM Regulation, *supra* note 23, art. 22.

[238] SSM Framework Regulation, *supra* note 59, art. 31.

[239] In the case of the ECB, that would be the unit instructing the file, the supervisory board preparing the draft decision, or the Governing Council adopting the final decision by not objecting.

regarding the essential points of the case and had access to the entire file."[240] This, however, raises the question whether the broader *right to good administration*, which encompasses the right to be heard, should be understood in a *functionalist* way, as a general *interest* in ensuring that the administration has all the facts, or as an individual *right*, closer to the rights of defense in the judicial process. The standard of review will be different, as will be the decision on whether it is legitimate to replace the right to be heard with a more thorough investigation.

The fact is that supervisory functions have become sufficiently complex to lead to a division of tasks, which is even enshrined in statute for cases where penalties are involved: investigation by independent units[241] and decision-making by the Supervisory Board.[242] This complexity and division of functions within the process has led to the inclusion as part of the right to good administration the requirement of independence/impartiality of the administrative process.[243] It requires that no member of the institution shows any bias or personal prejudice (subjective impartiality) and that the institution is not, in itself, biased (objective impartiality).[244] The duty of impartiality will not be impaired because units entrusted with different tasks belong to the same organizational structure, such as the European Commission.[245] Indeed, the impartiality standard under the right to good administration is autonomous, and different from the standard applicable to "courts or tribunals,"[246] which stems from fair trial rights.[247] The question, of course, is how to construe this autonomous concept, when its justification cannot be drawn from the *rights* to judicial review and fair trial, but from a *right to good administration*, which oscillates between an individual right and a collective interest.

The same difficulty arises with the provisions that complete the right to good administration, such as the duty to state reasons[248] and the right of access to the file,

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[240] *See* Joint Committee Board of Appeal Decision, Standard Rating v. ESMA, BoA 2013-014, ¶ 89 (Jan. 10, 2014), and the references to Buchler & Co v. Comm'n, Case C-44/69, EU:C:1970:72.

[241] *See* SSM Framework Regulation, *supra* note 59, art. 123.

[242] *See* SSM Framework Regulation, *supra* note 59, art. 126. One must also add the review by an also independent "board." Given its semi-judicial traits, we examine this below. *See infra* Part II.D.3.

[243] The provision stipulates that "Every 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." This provision was held applicable in the context of financial supervision by the Joint Board of Appeal Decision, SV Capital OÜ v. EBA, BoA 2014-C1-02 (Jul. 14, 2014). Among other things, it requires use of technical knowledge (in Hauptzollamt Munchen-Mitte v. Technische Universitat Munchen, Case C-269/90, EU:C:1991:438, the Commission breached this principle by relying on experts lacking the requisite technical knowledge in the area); but does not impair the institution's discretion to undertake an investigation. *See* EMC Development AB v. Comm'n, Case T-432/05, EU:T:2010:189 (competition law). In Comm'n v. Sytraval & Brink's France, Case C-367/95 P, EU:C:1997:249, the Commission was found not to have an obligation to undertake an investigation of every reported infraction, nor to engage with the applicant in an exchange of views about the reasons for not doing so.

[244] *See* Ziegler SA v. Comm'n, Case C-439/11 P, EU:C:2013:513.

[245] *See id.* ¶ 158. *See also* Europese Gemeenschap v. Otis & Others, Case C‑199/11, EU:C:2012:684, ¶ 64.

[246] *See* Bolloré v. Comm'n, Case T-372/10, EU:T:2012:325, ¶ 57; van Landewyck & Others v. Comm'n, Joined Cases 209/78 to 215/78 & 218/78, EU:C:1980:248, ¶ 81; Enso Española v. Comm'n, Case C-282/98 P, EU:C:2000:628, ¶ 56.

[247] *See Ziegler*, EU:C:2013:513, ¶ 159. *See also infra* Sections II.D.2.

[248] SSM Regulation, *supra* note 23, art. 22(2), ¶ 2 states that: "The decisions of the ECB shall state the reasons on which they are based." Article 33 of the SSM Framework Regulation, *supra* note 59, contemplates the right in more detail, by stating that: "1. Subject to paragraph 2, an ECB supervisory

where SSM rules mirror competition rules.[249] Whereas these are less specific to the SSM,[250] the right of access to the file in particular confirms that it is difficult to balance rights and interests whose nature is unclear. Aside from other limits,[251] exceptions to the right of access exist in cases of (a) legitimate interest of third-parties to keep their business secrets, and (b) confidential information,[252] in line with EU case law.[253] That case law has discussed the complexity of balancing the right of access with confidentiality,[254] and the rights of parties affected by the proceedings with the public interest.[255] Yet, balancing is difficult and less transparent if it is unclear whether the right of access, and, by extension, the right to good administration, is an actual right or a collective interest in the soundness of the proceedings.

C. Limits Based on Procedural Rights (II): Specific Rights in Procedures for the Imposition of Penalties

1. Ne Bis in Idem

The first safeguard is the *ne bis in idem* principle. Under the EU Charter, the prohibition encompasses duplicative proceedings in two or more jurisdictions.[256] Yet, EU courts have been more lenient towards regulatory authorities[257] and have required

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decision shall be accompanied by a statement of the reasons for that decision. 2. The statement of reasons shall contain the material facts and legal reasons on which the ECB supervisory decision is based. 3. Subject to Article 31(4), the ECB shall base an ECB supervisory decision only on facts and objections on which a party has been able to comment."

[249] *Compare* SSM Regulation, *supra* note 23, art. 22, *and* Council Regulation 1/2003, *supra* note 78, art. 27(2).

[250] The duty to give reasons helps the institution decide whether to seek judicial review and provides grounds for such review (*Sytraval*, EU:C:1998:154). It also requires calibration between specific acts and acts of general application. Case law is often based on TFEU, art. 296, which states the duty to give reasons for all EU acts. But the duty is not applied in the same manner to all acts. *Compare* Comm'n v. Council, C-122/94, EU:C:1996:68, *with* Comm'n v. Germany, Case 24/62, EU:C:1963:14.

[251] The CJEU has stated that the "file" does not necessarily encompass the whole file. *Compare, e.g.*, VBVB & VBBB v. Comm'n, Joined Cases 43 & 63/82, EU:C:1984:9 *with* SA Hercules Chemicals NV v. Comm'n, Case T-7/89, EU:T:1991:75 (access included the whole file except for confidential information). *But see* Aalborg Portand & Others v. Comm'n, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P & C-219/00 P, EU:C:2004:6, ¶ 108. The CJEU has also stated that there must be an "objective link" between the documents not disclosed and the decision against the specific entity for a violation of the right of access to exist. *See Aalborg Portand*, EU:C:2004:6, ¶ 108.

[252] *See* SSM Regulation, *supra* note 23, art. 22; SSM Framework Regulation, *supra* note 59, art. 32(1).

[253] *See Aalborg Portand*, EU:C:2004:6.

[254] In *Hoechst*, for example, the GC held that there was a breach by the Commission for failing to make that balance, and for failing to provide a non-confidential version of the documents or a list of documents with a non-confidential summary of their content. Hoechst GmbH v. Comm'n, Case T-410/03, EU:T:2008:211, ¶ 154. *See id*. ¶¶ 150–155.

[255] Evonik Degussa GmbH v. Comm'n, Case T-341/12, EU:T:2015:51, ¶ 95.

[256] *See* Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303) 17. On *ne bis in idem* in the SSM framework, *see* Bastiaan van Bockel, *Fundamental Rights Aspects of the SSM: Differentiated Standards of Protection Under the Charter of Fundamental Rights of the EU, in* MONETARY UNION TO BANKING UNION, ON THE WAY TO CAPITAL MARKETS UNION - NEW OPPORTUNITIES FOR EUROPEAN INTEGRATION 103 (2015).

[257] The courts have permitted the resumption of enforcement proceedings regarding the same conduct in breach of regulatory rules when the first decision adopted by the authorities had been annulled for procedural reasons (i.e. there had been no decision on the merits). ThyssenKrupp Stainless AG v. Commission, Case T-24/07, EU:T:2009:236; Limburgse Vinyl Maatschappij and others v. Commission (LVM), Case C-254/99, EU:C:2002:582.

(i) identity of facts, (ii) unity of the offender, and (iii) unity of the legal interests protected. This has allowed, for example, the existence of parallel competition proceedings and sanctions at EU and national levels.[258] The GC has merely held that the latter penalty must take the former into account as a matter of "natural justice."[259] On the other hand, although the ECHR only explicitly prohibits duplicative proceedings in one State, the ECtHR has adopted a more protective approach and prohibited, not only the trial of the "same offences," but also of different offences where the underlying facts are materially the same.[260]

SSM and SRM rules are not conducive to duplicative proceedings or sanctions: there is a strong level of coordination, and the imposition of penalties by NCAs under ECB instruction merely circumvent the ECB's lack of competence to impose them itself.[261] Further coordination in sanctioning procedures could help mitigate the risk even more.

A different issue, however, arises when the same conduct can give rise to both administrative fines under the SSM and criminal prosecution under domestic law. In *Fransson*, the CJEU held that the *ne bis in idem* principle does not prevent the States from choosing administrative penalties, criminal penalties, or a combination of the two.[262] Yet, the Court also held the principle to be applicable and adhered, at least formally, to the ECtHR's approach,[263] which means that the two types of penalties can only be cumulative *if* administrative penalties are not criminal in nature.[264]

As we described earlier,[265] the *administrative* fines imposed under the SSM would, most likely, be considered *criminal* in nature. This could lead to the odd situation where, after the ECB imposes fines, State authorities could impose further pecuniary fines if they are classified as administrative, but could not prosecute. Under the CJEU's more restrictive view, pecuniary penalties and prosecution would be possible if the former were imposed on the legal entity and the latter were undertaken against individuals. This approach, however, is controversial under the more protective view of the ECtHR, which applies when the facts are materially the same. This example shows the difficulty of adhering to the more protective approach of the ECtHR in a context where *ne bis in idem* applies across the European Union, and could show that the CJEU's adherence to the ECtHR's approach will merely be formal, or else will force an explicit rupture.

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[258] The controversial argument is that the two types of proceedings view restrictions from different angles. *See* Toshiba & Others v. Comm'n, Case C-17/10, EU:C:2012:72, ¶ 81.

[259] *See* Roquette Frères v. Comm'n, Case T-322/01, EU:T:2006:267.

[260] *See* Opinion of Advocate General Kokott, Toshiba & Others v. Comm'n, Case C-17/10, EU:C:2011:552, ¶¶ 121–23.

[261] *See* SSM Regulation, *supra* note 23, art. 18(5).

[262] *See* Comm'n v. Greece, Case 68/88, EU:C:1989:339, ¶ 24; José Teodoro de Andrade v. Director da Alfândega de Leixões, Case C‑213/99, EU:C:2000:678, ¶ 19; Hannl-Hofstetter Internationale Spedition GmbH v. Finanzlandesdirektion für Wien, Niederösterreich und Burgenland, Case C‑91/02, EU:C:2003:556, ¶ 17.

[263] In so doing, it rejected AG Cruz Villalón's view that the *ne bis in idem* principle under article 4 of the seventh Protocol should be disregarded, in light of its lack of widespread acceptance. Not all EU States had ratified it, and some had made reservations. Opinion of Advocate General Villalon, Åklagaren v. Hans Åkerberg Fransson, Case C-617/10, EU:C:2012:340, ¶¶ 83–85.

[264] In *Fransson* the matter was left to the national court. *See Fransson*, EU:C:2013:105, ¶ 85.

[265] *See supra* Part I.C.

2. Certainty, legality, and proportionality of penalties

A second issue of great relevance in the SSM context is the role of the principles of certainty, legality, and proportionality in the calculation and apportionment of penalties. The criteria drawn from competition cases should be handled with caution.[266] The more relevant are *vertical* cases, where a subsidiary follows the parent's instructions, the parent is fined, and then the latter challenges the decision on grounds of legality (*nulla poena sine lege*),[267] legal certainty, and presumption of innocence.[268] Although EU courts admit that these three grounds entail a principle of "personal liability,"[269] they have generally upheld the imputation of the wrongful conduct to the parent when the subsidiary was following the former's instructions.[270] More controversially, the courts have held valid imputations based on a *presumption* that a 100%-owned subsidiary is under the direct and decisive influence of the parent.[271] The presumption is subject to contrary proof, although it is very difficult to rebut. Nevertheless, the Commission normally accompanies the presumption with other evidence to show the "direct and decisive" influence.[272]

In applying these doctrines, it is difficult to determine the personal scope of application of the rules. For example, whereas competition rules are based on the concept of an "undertaking,"[273] which is flexible and can encompass several persons within an economic unit,[274] SSM rules use the terms "companies" or "entities".[275] Article 18 of the SSM Regulation is even more problematic. Article 18(1) allows fines of up to ten percent of the total annual turnover of a *legal person* in the preceding

[266] Particularly those applied in *horizontal* cases, i.e., those concerning different entities in the same link of the value chain, forming a cartel. (*Vertical* cases concern entities in different parts of the value chain.) SSM cases will not concern agreements between entities, but between banking groups. In these cases, differences in the calculation of fines are challenged on grounds of breach of equality and proportionality. EU courts have tended to be quite generous in the amount of discretion they allow, and have refused to use the Commission's own practice as a framework to legally bind the Commission in future decisions. *See Ziegler*, EU:C:2013:513; JCB Service v. Comm'n, Case C-167/04 P, EU:C:2006:594, ¶ 205. However, in the field of banking, breaches of rules are not often the result of concerted action and, therefore, it should be even more difficult to make a case based on the equality principle.

[267] ECHR, art. 7 and Charter, art. 49 provide that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

[268] *See, e.g.*, Elf Aquitaine v. Comm'n, Case T-299/08, EU:T:2011:217; Elf Aquitaine v. Comm'n, C-521/09 P, EU:C:2011:620.

[269] *See* Akzo Nobel & Others v. Comm'n, Case C-97/08 P, EU:C:2009:536, ¶ 77.

[270] *See, e.g.*, Imperial Chemical Industries v. Comm'n, Case 48/69, EU:C:1972:70; AEG-Telefunken v. Comm'n, Case 107/82, EU:C:1983:293; Metsä-Serla & Others v. Comm'n, Case C-294/98 P, EU:C:2000:632; Akzo Nobel & Others v. Comm'n, Case C-97/08 P, EU:C:2009:536, ¶ 58; General Química & Others v. Comm'n, Case C-90/09 P, EU:C:2011:21, ¶ 37; ArcelorMittal Luxembourg v. Comm'n & Comm'n v. ArcelorMittal Luxembourg & Others, Joined Cases C-201/09 P & C-216/09 P, EU:C:2011:190, ¶ 96; Arkema v. Comm'n, Case C-520/09 P, EU:C:2011:619, ¶ 38.

[271] *See* AEG-Telefunken v. Comm'n, Case T-107/82, EU:C:1983:293, ¶ 50.

[272] For reference to a number of cases where the General Court appraised the evidentiary process of the Commission in this respect, *see* Bolloré v. Comm'n, Case T-372/10, EU:T:2012:325, ¶ 45.

[273] *See* Council Regulation 1/2003, *supra* note 78, art.7.

[274] *See* Akzo Nobel & Others v. Comm'n, Case C-97/08 P, EU:C:2009:536, ¶¶ 54-55.

[275] *See* SSM Regulation, *supra* note 23, art. 18(1) ("companies"); SSM Framework Regulation, *supra* note 59, art. 122 ("entities"). "Undertaking" is only used by SRM rules as part of the concept of "parent undertaking" (i.e. an entity, not a group). *See* SRM Regulation, *supra* note 79, art. 2 (*definitions*) (6).

business year, whereas Article 18(2) states that the turnover from which to calculate such percentage shall be that of the "ultimate parent undertaking."[276]

The language of Article 18 of the SSM Regulation is open to several interpretations. The provision could be read to say that *if* the legal person committing the offence is a subsidiary, it is *presumed* that the subsidiary acts under the direct influence of the parent for *imputation and calculation* purposes. However, this would be against the principle of personal liability accepted by the Court:[277] strong presumptions of direct influence[278] are compatible with fundamental rights *as long as* they remain rebuttable presumptions.[279] The contradiction with the case law cited above is even more glaring since no 100%-ownership or similar holding is required—a fifty-one percent stake would suffice to attribute the liability to the parent.

A second possibility would be to interpret the rule to provide a maximum fine *regardless* of the imputation of the conduct to the parent. Yet, in cases where the subsidiary is solely responsible for the illegal conduct, this interpretation would be contrary to the principle of proportionality.[280]

A third, and, in our view, more sensible, interpretation would be to read the provision in the following terms: the ten percent limit applies *provided that the conduct can be attributed to the parent company*. Nevertheless, this interpretation would still be problematic because the provision refers to the turnover "resulting from the *consolidated account* of the ultimate parent undertaking,"[281] which includes *all* the consolidated subsidiaries, with or without involvement. Since "consolidated" accounts would include insurance subsidiaries, this would be problematic, given that the ECB has no supervisory competence over them per Article 127(6) TFEU.[282]

3. The Privilege Against Self-Incrimination

Perhaps one of the most cumbersome issues in this context is the privilege against self-incrimination, especially in relation to legal persons.[283] In the SSM's context, the

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[276] Charter, art. 18.

[277] *See Akzo Nobel*, EU:T:2012:325, ¶ 71. *See also* Metsä-Serla & Others v. Comm'n, Joined Cases T-339/94 & T-342/94, EU:C:2000:632, ¶ 34; *Bolloré,* EU:T:2012:325, ¶ 52; Stora Kopparbergs Bergslags v. Comm'n*,* Case C-286/98 P, EU:C:2000:630.

[278] In some cases, the analysis of actual involvement is secondary. *See, e.g.*, Elf Aquitaine v. Comm'n*,* Case T-299/08, EU:T:2011:217; *and* Elf Aquitaine v. Comm'n, C-521/09 P, EU:C:2011:620.

[279] *See, e.g.*, Spector Photo Group & Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)*,* Case C-45/08, EU:C:2009:806, ¶ 43–44; Janocevic v. Sweden, app. no. 34619/97, CE:ECHR:2002:0723JUD003461997. *See also Elf Aquitaine*, EU:C:2011:620, ¶ 62.

[280] See, e.g., Evonik Degussa GmbH v. Comm'n*,* Case C-266/06 P, EU:C:2008:295; and, implicitly, Showa Denko KK v Commission*,* Case C‑289/04 P EU:C:2006:431 for a discussion of criteria for calculation of fines, including the purpose of fines to deter breach. *See also* Degussa v. Comm'n, Case T‑279/02*,* EU:T:2006:103; Imperial Chemical Industries Ltd. v. Comm'n, Case T-214/06, EU:T:2012:275; Sasol & Others v. Comm'n*,* Case T-541/08, EU:T:2014:628.

[281] Emphasis added.

[282] TFEU, art. 127(6).

[283] A comparative analysis suggests that the privilege itself is restricted to natural persons. In the United States, the privilege clearly does not protect artificial persons. *See* U.S. CONST. amend. V. Individuals cannot claim the privilege to avoid production of documents either. *See* Doe v. United States, 487 U.S. 201 (1988); Braswell v. United States*,* 487 U.S. 99 (1988); Bellis v. United States, 417 U.S. 85, 88 (1974); George Campbell Painting Corp. v. Reid*,* 392 U.S. 286, 288 (1968). In Canada, the privilege against self-incrimination can only be invoked to protect the rights of a physical

problem may arise if the ECB or NCA (i) compels statements or the production of documents in order to impose fines, and/or (ii) uses the information obtained through supervisory actions in posterior sanction proceedings. In these situations, supervised institutions may raise the privilege against self-incrimination in an attempt to avert compliance with the supervisors' requests.

The CJEU, which was the first to decide on the matter in *Orkem*,[284] made a restrictive analysis. It began by referring to the effectiveness of the Commission's competition powers[285] and by emphasizing that the privilege against self-incrimination was recognized neither by the ECHR *nor by the ECtHR*, while Member States granted it only to natural, and not legal, persons. Thus, corporations could not rely on the privilege *per se*, but only on the "implied" limits to investigation powers resulting from the "rights of the defense."[286] As a result, the Commission was entitled to request information or production of documents, and was only prevented from compelling "an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove. "[287]

The ECtHR's later case law invalidated one of the CJEU's major premises, as it recognized the privilege against self-incrimination as part of basic fair trial rights.[288] However, since the Court did not discuss the protection of legal persons under the right, an answer to this question requires discussing the *nature* of the privilege, which is controversial.[289] Some scholars emphasize its intensely "personal" character based

person. *Cf.* R v. Bata Industries Ltd., (No. 1) (1991) 70 C.C.C. (3d) 391, 392 (Can. Ont. Prov. Div.). Corporations do not have the privilege. *See* British Columbia (Securities Comm'n) v. Branch (1995) 2 S.C.R. 3 (Can.). In Australia, the Federal Court in *Trade Practices Comm'n v. Abbco Ice Works Pty Ltd.* [1994] 52 FCR 96 held that the privilege is not available to corporations, although the view remains controversial. For a summary of these views, see Michael Kidd, *Environmental Audits and Self-Incrimination*, 37 COMP. & INT'L L. J. S. AFR. 84 (2004).

[284] *See* Orkem v. Comm'n, Case 374/87, EU:C:1989:387.

[285] *See id.* ¶¶ 18–19.

[286] *See id.* ¶ 29 (Member States' Constitutions), ¶ 30 (ECHR and ECtHR), ¶¶ 32–34 (implied limits based on defence rights).

[287] *Id.* ¶ 35.

[288] *See* Funke v. France, app. no. 10828/84, CE:ECHR:1993:0225JUD001082884.; Saunders v. United Kingdom, app. no. 19187/91, CE:ECHR:1996:1217JUD001918791. In *Saunders*, the ECtHR explained its view in more detail, holding that the right "presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused." In an odd twist, it added that "it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect." *Id.* ¶¶ 68–69. The last part is equivocal, since it is well established that the privilege can invalidate the use of documents obtained by compulsion even though documents have an existence separate from the will of the suspect. *See, e.g.*, *Funke*, CE:ECHR:1993:0225JUD001082884; JB v. Switzerland, app. no. 31827/96, CE:ECHR:2001:0503JUD003182796.

[289] *See, e.g.*, Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243 (2004). *See also* Ronald J. Allen, *Theorizing about Self-Incrimination*, 30 CARDOZO L. REV. 729 (2008). Nonetheless, Allen and Mace conclude that it is not necessary to define, more or less precisely, the instances in which the privilege applies. According to them, the bulk of cases on self-incrimination can be explained by the proposition that "the government may not compel disclosure of the incriminating substantive results of cognition that themselves [the substantive results] are the product of state action" (whatever the justification may be). Allen & Mace, *supra* note 289, at 247.

on the origins of the privilege and its academic justifications.[290] Other scholars emphasize that the privilege is based on a right to distance oneself from the State when the State is at its most powerful, and would thus seem more inclined to apply it to legal persons, although in a limited manner.[291] In fact, a justification based on the preservation of the rights of defense, like the CJEU employed in *Orkem*, would provide the most solid basis to apply the privilege equally to natural and legal persons.

To complicate things further, the CJEU has maintained its restrictive construction in cases that involve legal persons.[292] In its view, if it is a fundamental right at all, the privilege merely protects the right not to provide answers to questions when that would mean the express admission of an infringement, and only if failure to answer would carry a fine. All other information requests must be complied with.

However, this case law originates in *Orkem*, which was construed assuming that the privilege was not protected by Article 6 of the ECHR. This assumption that has been belied by the ECtHR. There are two possibilities: to conclude that the approaches of the CJEU and the ECtHR are contradictory and the CJEU should vary its approach, or to conclude that the ECtHR's more elaborate approach, discussed below, only applies to natural persons, while the CJEU's approach is still valid for legal persons.

Assuming the CJEU's view does not evolve, the hypothetical requests by the ECB/NCAs indicated above would be valid, as any "privilege" would only protect the right not to make express admissions of unlawful conduct. The problem is that the ECtHR has developed a more protective approach. In *Saunders*, the ECtHR distinguished between regulatory/administrative proceedings and criminal proceedings when applying the privilege. The compulsion of testimony in exercise of regulatory inspection powers is not in itself unlawful, but the use of evidence in posterior criminal proceedings is.[293] In *IJL,* the ECtHR reiterated that questioning by inspectors was not subject to the privilege, and rejected the applicant's argument that such questioning should be considered part of the prosecution due to the collusion between inspectors and prosecuting authorities.[294] Yet, in *King*, the Court was ready

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[290] The origins of the privilege are related to the prevention of torture, and the protection of oaths or confession. *See* Allen, *supra* note 289, at 730. Some decisions have held that it is "cruel" to compel someone to choose between self-accusation, perjury, and court fines/imprisonment. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Others have argued that persons should not be instrumentalized. *See, e.g.*, Doe v. United States, 487 U.S. 201 (1988).

[291] Redmayne's construction also includes, as a justifying reason, personal integrity (understood as a sense of self). This is only applicable to natural persons, while the protection of the "ability to distance" oneself is not. The same happens with his argument about the small importance of the privilege's negative cost (i.e., the harm caused by the defendant's refusal to cooperate with the prosecution is very slight). *See* Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J. LEGAL STUD. 209 (2007).

[292] *See* Fresh del Monte Produce Inc. v. Comm'n, Joined Cases C-293/13 P & C-294/13 P, EU:C:2015:416; Erste Group Bank & Others v. Comm'n, Joined Cases C-125/07 P, C-133/07 P & C-137/07 P, EU:C:2009:576; Dalmine SpA v. Comm'n*,* Case C-407/04, EU:C:2007:53.

[293] *See Saunders,* CE:ECHR:1996:1217JUD001918791. The background was that the takeover of a drinks company by Guinness had been facilitated by unlawful dealing.

[294] *See* IJL, GMR & AKP v. United Kingdom*,* app. no. 29522/95, CE:ECHR:2000:0919JUD002952295. Compare this conclusion with Shannon v. United Kingdom*,* app. no. 6563/03, CE:ECHR:2005:1004JUD000656303, where the applicant was fined for refusing to attend a meeting with financial investigators after having been charged with false accounting and conspiracy to defraud. The financial investigators refused to give assurances that his testimony would not be used against him in further criminal proceedings. In this case, the act of fining the applicant was itself unlawful, as it was

to admit that it was not only lawful to obtain a person's statement of his assets via a request by tax authorities under threat of a fine, but also to use that statement later to assess the penalty for underpayment of tax.[295] The grounds to differentiate this case from previous ones was the distinction between administrative-investigative proceedings (such as tax inspection), and criminal proceedings. In *Saunders*, the regulatory proceedings were *punitive* as they aimed at imposing fines too.[296]

In *Orkem*, the CJEU also attempted to distinguish between investigation procedures and further, usually enforcement, procedures.[297] Yet, in competition proceedings, as in many others where the investigation prepares the corresponding enforcement action, assuming that the procedures are separate, and thus that the investigation is subject to weaker safeguards, is somewhat formalistic.[298] In fact, in *Chambaz v Switzerland*, the ECtHR seemed to backtrack on *King* and held that the imposition of penalties for a refusal to hand over documents during a tax collection procedure was contrary to the privilege against self-incrimination.[299] Yet, the facts in *Chambaz* are more telling than its holding: tax authorities had begun administrative tax collection proceedings, opened tax evasion proceedings three years later, then re-opened administrative proceedings and managed both sets of proceedings as an ensemble.[300]

In summary, this is yet another example of a procedural safeguard where the Court's view has drifted away from the view of *rights* as *trumps* or *entitlements* and into the view that simply *balances* different general *interests*.[301] This does not bode well for safeguards in a context where financial stability is at stake.[302] Courts accept coercive mechanisms to protect the interest in effective inspection and supervision. In contrast, the justification for the countervailing *privilege against self-incrimination* is

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done in the context of the criminal prosecution against him. Still, in *IJL et al.*, the use of the information obtained during the administrative proceedings in further criminal proceedings was considered unlawful.

[295] *See* King v. United Kingdom*,* app no. 13881/02, CE:ECHR:2003:0408DEC001388102. More generally, the court held that the "privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation by the revenue authorities." *Id.* ¶ 10. *See also* Allen v. the United Kingdom, app. no. 76574/01, CE:ECHR:2002:0910DEC007657401.

[296] *Compare King,* CE:ECHR:2003:0408DEC001388102, *with* JB v. Switzerland*,* app. no. 31827/96, CE:ECHR:2001:0503JUD003182796. In *King*, a breach of article 6 (consisting of a violation of the privilege against self-incrimination) was found to exist where the information was required, under threat of penalty if the information was not provided, in tax-evasion proceedings. The Court held that "[t]he information was not, however, used against him in the sense that it incriminated him in the commission of an offence due to acts or omissions in which he had been involved prior to that moment." *King,* CE:ECHR:2003:0408DEC001388102, ¶ 10. But the Court then compared the fine to which the taxpayer was subject in case of non-compliance with the "criminal" penalties to which the applicants were subject in case of non-compliance in *JB v. Switzerland*. *Id*.

[297] According to the CJEU, the Commission distinguishes "two successive but clearly separate procedures: first, a preparatory investigation procedure, and second, a procedure involving submissions by both parties initiated by the statement of objections." *Orkem*, EU:C:1989:387, ¶ 20.

[298] So is the assertion that "[t]he sole purpose of the preliminary investigation procedure is to enable the Commission to obtain the information and documentation necessary to check the actual existence and scope of a specific factual and legal situation." *Id.*¶ 21.

[299] *See* Chambaz v. Suisse*,* app. no. 11663/04, CE:ECHR:2012:0405JUD001166304. Judge Power-Forde pointed out the apparent inconsistency in her separate opinion.

[300] For example, a representative of the federal tax administration in charge of the tax evasion proceedings appeared at a hearing before the tax court for the tax proceeding. *Id.* ¶ 25.

[301] *See supra* Part I.A.

[302] *See supra* Part I.D.

vague, which explains the courts' use of different approaches to calibrate it. If the CJEU view prevails, legal persons will benefit from the privilege, but the privilege itself is rather weak, since its protection begins after the formal opening of a sanctioning procedure. Prior to that, it only protects against a request to expressly admit a breach of rules under threat of a fine. If the ECtHR approach prevails, the protection can be more robust during the investigative stage if the information is used instrumentally for sanctioning purposes. However, it is unclear whether legal persons will benefit from the privilege. Also, the Court might grant supervisors more leeway, since the negative cost of the privilege is higher in this context;[303] again, this would constitute a *pure balancing* instead of a *trump and justification* approach. To stay on the safe side, ECB/NCAs could limit requests that might lead to self-incrimination in proceedings that could be characterized as *criminal*,[304] and separate inspection/investigation from sanctioning units within each institution.

D. Judicial (and Semi-Judicial) Review

The effectiveness of the rights discussed above hinges upon the right to have the ECB/NCA decisions reviewed by an independent court or tribunal. In light of its importance, it is perplexing that there is so much uncertainty surrounding this right (discussed in sub-sections 1 and 2 below). This is not comforting in light of the fact that the review by semi-judicial administrative bodies has not been strengthened over time (discussed in sub-section 3).

1. Judicial Review

In Competition law, the combination of a review of legality in general[305] and unlimited jurisdiction for review of sanctions[306] guarantees effective judicial protection.[307] It is therefore surprising that the SSM provisions do not contain more explicit references to the mechanisms of judicial review.

The first question is, thus, whether full jurisdiction with regard to sanctions may be implicitly deduced from existing rules. SSM rules presume, rather than provide for, judicial review of fines,[308] without clarifying whether such review is limited. Council

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[303] In Redmayne's view, the low negative cost of the privilege was one of the reasons for its justification, in spite of the fact that the arguments to support it (protection of the ability to distance oneself from the proceedings) were weak. *See* Redmayne, *supra* note 291, at 226–28. If the negative cost were to increase, as would happen if the privilege were extended to large organizations, this would be a reason to restrict it.

[304] *E.g.*, procedures that can lead to the deprivation of a banking license or a failure of suitability requirements.

[305] *See* TFEU, art. 263.

[306] TFEU, art. 261 requires the specific regulations to *give* the Court unlimited jurisdiction with respect to penalties contained in the regulations. Council Regulation 1/2003, *supra* note 78, art. 31, does that for Competition Law.

[307] *See* KOEN LENAERTS, IGNACE MASELIS, & KATHLEEN GUTMAN, EU PROCEDURAL LAW 394 (2015). *See also* KME Germany & Others v. Comm'n, Case C-272/09 P, EU:C:2011:816; European Community v. Otis NV & Others, Case C-199/11 EU:C:2012:684. Sanctions in the SSM context can carry the same *criminal* qualification (and thus should be subject to the same guarantees) as competition fines. *See* discussion *supra* Part I.C.

[308] SSM Framework Regulation, *supra* note 59, art. 130(4) states: "The limitation period for imposing administrative penalties shall be suspended for any period during which the decision of the ECB's Governing Council is subject to review proceedings before the Administrative Board of Review or appeal

Regulation 2532/98,[309] which regulated sanctions before the SSM and the SRM, required full CJEU jurisdiction over sanctions.[310] For penalties imposed for breaches of directly applicable Union law, the SSM provisions state that sanctions shall be imposed pursuant to the 2532/98 Regulation's "procedures," "as appropriate."[311] Only in case of sanctions imposed for a breach of ECB regulations and decisions *may* sanctions be imposed "in accordance with Regulation 2532/98," with SSM rules complementary.[312] Such vague language raises a number of important questions, such as whether the "procedure" includes "review," whether "review" is "appropriate" for all sanctions, and whether the fact that sanctions "may be" imposed in accordance with Regulation 2532/98 also means that the sanctions "may not" be reviewed pursuant to its provisions in other cases.

Such ambiguity is not acceptable. In fact, the ECB proposed the text of Regulation 2532/98, which included full jurisdiction review for sanctions.[313] More recently, the ECB proposed an amendment of Council Regulation 2532/98 with aspects that could conflict with SSM rules, and full judicial review was not one of them. This should mean that SSM sanctions are subject to it.[314] Yet, the reference to full judicial review of all sanctions should be more explicit. As it stands, it leaves doubts as to whether all sanctions are reviewable, doubts that are greater for actions whose status as sanctions is unclear, such as withdrawal of a license.[315]

The second question is whether, absent full review, the "legality" review under annulment procedures[316] will provide sufficient grounds for robust judicial review. Even assuming that the CJEU would be likely to extend the reinforced standard of

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proceedings before the Court of Justice." In a similar sense, *see* SSM Framework Regulation, *supra* note 59, art. 131(4)(b).

[309] Council Regulation 2532/98/EC, Concerning the Powers of the European Central Bank to Impose Sanctions, 1998 O.J. (L 318) 4. This norm regulated sanctions in fields much less sanction-intensive than supervision. It applied in fields such as monetary policy, payment systems, and statistical information. *See* ECB Recommendation for a Council Regulation Amending Regulation (EC) No 2532/98 Concerning the Powers of the European Central Bank to Impose Sanctions, rec. 2, 2014 O.J. (C 144) 2.

[310] *See* Council Regulation 2532/98, *supra* note 309, art. 5 in relation with TFEU, art. 261.

[311] SSM Regulation, *supra* note 23, art. 18(4) provides that: "The ECB shall apply this Article in accordance with the acts referred to in the first subparagraph of Article 4(3) of this Regulation, including the procedures contained in Regulation (EC) No 2532/98, *as appropriate.*" (Emphasis added). SSM Framework Regulation, *supra* note 59, art. 121(1) states: "1. For the purposes of the procedures provided for in Article 18(1) of the SSM Regulation, the procedural rules contained in this Regulation shall apply, in accordance with Article 18(4) of the SSM Regulation." It does not even mention Regulation 2532/98.

[312] SSM Regulation, *supra* note 23, art. 18(7) states that: "Without prejudice to paragraphs 1 to 6, for the purposes of carrying out the tasks conferred on it by this Regulation, in case of a breach of ECB regulations or decisions, the ECB may impose sanctions in accordance with Regulation (EC) No 2532/98." SSM Framework Regulation, *supra* note 59, art. 121(2) states that: "For the purposes of the procedures provided for in Article 18(7) of the SSM Regulation, the procedural rules contained in this Regulation shall complement those laid down in Regulation (EC) No 2532/98 and shall be applied in accordance with Articles 25 and 26 of the SSM Regulation."

[313] *See* Recommendation of the European Central Bank for a Council Regulation (EC) Concerning the Powers of the European Central Bank to Impose Sanctions, 1998, O.J. (C 246) 9. Article 5 of the recommendation was adopted as Article 5 of Council Regulation 2532/98, *supra* note 309.

[314] Areas of conflict include, on the other hand, the publication of the decision to impose penalties by the ECB, the upper limits of fines, the ability to impose periodic penalties as a coercive measure to compel compliance, and the separation of tasks. *See* Recommendation for a Council Regulation Amending Regulation (EC) No 2532/98, *supra* note 309.

[315] *See*, *supra*, Part I.C.

[316] *See* TFEU, art. 263.

review it adopted recently in competition cases (and, notably, in the *MasterCard* case)[317] into this field, we are doubtful that such in-depth review of the law and of the facts can effectively take place. This is due to (i) the restrictive requirements on standing, as interpreted by the CJEU, and (ii) the specificities of the SSM mechanism.

Regarding standing, ever since *Plauman*,[318] EU courts have granted standing to private parties under Article 263(4) TFEU[319] only if: (1) the measure affects the applicant's legal position directly and leaves no discretion to the addressees of the measure who are entrusted with its implementation (that is if there is a direct link between the challenged measure and the loss or damage—"direct concern")[320] and (2) the measure "affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."[321] These criteria, especially the second, have excluded standing of private parties in almost all cases where EU acts were not directly addressed to those parties, a result scholars criticize.[322] In *Inuit Tapiriit Kanatami*, the CJEU also interpreted restrictively the requirements on standing for annulment actions against *regulatory* acts, where Article 263(4) only requires "direct" but not "individual"

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[317] MasterCard v. Comm'n & Others, Case C-382/12 P, EU:C:2014:2201. The court noted that:

> As regards the extent of judicial review, it is apparent from EU case-law that where the General Court is seised, in accordance with Article 263 TFEU, of an action for annulment of a decision applying Article 81(1) EC, the General Court must as a general rule undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a full review of the question whether or not the conditions for the application of that provision are met (*see*, to that effect, judgments in *Remia and Others* v *Commission*, EU:C:1985:327, paragraph 34; *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraphs 54 and 62; and *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 59). The General Court must also establish of its own motion that the Commission has stated reasons for its decision (*see*, to that effect, judgments in *Chalkor* v *Commission*, EU:C:2011:815, paragraph 61 and the case-law cited, and *Otis and Others*, EU:C:2012:684, paragraph 60). 156 In carrying out such a review, the General Court cannot use the Commission's margin of discretion, by virtue of the role assigned to it in competition policy by the EU and FEU Treaties, as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (*see*, to that effect, judgments in *Chalkor* v *Commission*, EU:C:2011:815, paragraph 62, and *Otis and Others*, EU:C:2012:684, paragraph 61).

Id. ¶ 155.

[318] *See* Plaumann v. Comm'n, Case 25/62, EU:C:1963:17.

[319] TFEU, art. 263(4) states that: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

[320] *See*, *e.g.*, International Fruit Company BV v. Comm'n, Joined Cases 41-44/70, EU:C:1971:53 (standing was denied on the basis that the approval of a merger by the Commission would not be a direct cause of the loss of jobs in the merged company).

[321] *Plaumann*, EU:C:1963:17, ¶ 107.

[322] *See, e.g.*, Albertina Albors-Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?*, 62 CAMBRIDGE L. J. 72 (2003).

concern.[323] This restrictive standard has also been applied to *implementing* measures consisting in "economic regulations" in *Telefonica*[324] and *T&L Sugars*.[325]

These restrictions can have drastic consequences in the SSM framework, which includes acts by (1) the ECB, (2) the NCAs following ECB instructions, (3) the NCAs upon a delegation regarding less significant institutions, but executing tasks attributed to the ECB, and (4) the ECB in application of EU soft law and national legislation.[326]

ECB acts in application of EU law include orders to entities to adopt specific measures that address relevant problems[327] or the imposition of penalties,[328] and are open to challenge by the targeted entity pursuant to Article 263(4) TFEU.

Acts adopted by NCAs under instruction by the ECB are more difficult.[329] They are subject, in theory, to legality control under Article 263(4) TFEU. However, in case of general instructions by the ECB, the entity must demonstrate that it is particularly affected, unlike other entities.[330] In case of specific instructions, the entity must prove that the instructions leave the NCA no discretion. This is not reassuring. The ECB would merely have to give its instructions a formal degree of generality or leave the NCA some discretion to avoid scrutiny. Thus, a challenge based on a discriminatory exercise of supervisory powers would be almost impossible.[331] Such challenge could come before national courts later, upon implementation by NCAs, but the latter may be more deferential towards decisions that implement ECB acts. These national courts

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[323] *See* Inuit Tapiriit Kanatami & Others v. European Parliament and Council, Case C-583/11 P, EU:C:2013:625. The General Court has also made a similar interpretation. *See* Rütgers Germany GmbH v. ECHA, Case T-96/10, EU:T:2013:109.

[324] *See* Telefonica v. Comm'n, Case C-274/12 P, EU:C:2013:852.

[325] *See* T&L Sugars v. Comm'n, Case C-456/13, EU:C:2015:284.

[326] *See, e.g.*, Andreas Witte, *The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?*, 21 MAASTRICHT J. EUR. & COMP. L. 109 (2014).

[327] *See* SSM Regulation, *supra* note 23, art. 16.

[328] *Id*. On Article 18, *compare*, D'Ambrosio, *supra* note 207; Antonio Luca Riso, *The Power of the ECB to Impose Sanctions in the Context of the SSM* 63 BANCNI VESTNIK 32 (2014); *and* Sven Schneider, *Sanctioning by the ECB and National Authorities within the SSM*, EUZW-BEILAGE, Special Issue 1, 2014 at 18.

[329] This can occur through (1) specific supervisory instructions with regard to a significant supervised entity, under SSM Regulation, *supra* note 23, art. 6(3) (power to issue instructions in relation to the tasks of article 4); (2) general supervisory instructions, typically addressing, but not limited to, the supervision of less significant entities, under SSM Regulation, *supra* note 23, art. 6(5) (less significant institutions), arts. 7(1) & (3) (close cooperation with non-euro States regime); (3) in cases where the ECB has a supervisory task, but no related power, under SSM Regulation, supra note 23, art. 9(1)(3) and SSM Framework Regulation, *supra* note 59, art. 2; or (4) cases where NCAs undertake a specific act, but, then, the ECB adopts the definitive act, as in cases of authorizations or assessment of qualified holdings, under SSM Regulation, *supra* note 23, arts. 14–15. The challenge is similar to the right to be heard in composite proceedings (discussed *supra* Part II.B), only in this context the courts have shown less flexibility in interpreting the standing to challenge. *See* SSM Framework Regulation, *supra* note 59, art. 22.

[330] For example, if the entity has a business model peculiar to it. *See* Witte, *supra* note 326, at 102–03.

[331] *See id.* at 102. The author refers to Gestevisión Telecinco S.A. v. Comm'n Case T-95/98, EU:T:1998:206, ¶ 58, which holds that procedures for failure to act are subject to the *Plaumann* test.

could use the preliminary reference procedure,[332] but if recourse to such procedure remains as uneven as it is today,[333] there would be little cause for comfort.

The third type of acts arises from Article 4(4) of the SSM Regulation, which provides that, when applying EU Directives that grant options to the States, the ECB "shall apply also the national legislation exercising those options." For example, if a Member State has enacted legislation in the exercise of options granted under EU prudential rules,[334] the ECB will apply those domestic rules to give a *supervisory* instruction to that country's NCA, while leaving it some discretion. The ECB will also have to apply that national legislation the ECB exercises the options itself, but such exercise is followed by implementation acts by the NCA. In these situations, how can the acts be challenged? In principle, the financial institution concerned could have recourse to national courts to challenge NCA acts, but only to the extent that the NCA exercises some discretion. The national court could not annul the ECB's instructions, which could not be challenged before the CJEU either because it has no *direct* application; it grants discretion to the NCA. The only possibility would be for the national court to make a preliminary reference to the CJEU, but in cases where the ECB instructions are based on national law, which would be the competent court?

If such laws are seen simply as national laws,[335] the national court could interpret them, and even annul them, but not the ECB act applying the laws. A preliminary reference to the CJEU would be necessary to validate the national court's decision, but the CJEU could only decide whether the court's decision goes beyond the discretion granted by the Directive and whether it impinges upon ECB competences. Still, this would require determining how the national law applies, which the CJEU would be reluctant to do. If, on the other hand, national law was re-characterized as EU law as a result of its application by the ECB,[336] the CJEU would be entitled to issue an authoritative interpretation. However, the Court would be even more reluctant to do this, as it would require it to go against the express language of SSM provisions, which use the term "national law," and to interpret laws enacted by a national legislature.

The problem is compounded by the rigidity of the *Plaumann* test. If the test is not relaxed, the ECB should adjust its practice by (i) using acts directed to specific financial institutions—or to NCAs, but leaving no discretion—to facilitate a legality

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[332] *See, e.g.,* Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, EU:C:1987:452.

[333] *See* Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961–95*, 5 J. EUR. PUB. POL'Y 66, 66–97 (1998); Maarten Vink, Monica Claes & Cristine Arnold, Explaining the Use of Preliminary References by Domestic Courts in EU Member States: A Mixed-Method Comparative Analysis, Paper presented at the 11th Biennial Conference of the European Union Studies Association (Apr. 24, 2009), *available at* http://aei.pitt.edu/33155/.

[334] These options are left open to "competent authorities," "Member States," or both by CRD, *supra* note 25 and CRR, *supra* note 26. We argue in the Article preceding this Article that the references to "competent authorities" should be interpreted as referring to the ECB. *See* Lamandini, Ramos, & Solana, *supra* note 1. However, this still leaves open the possibility of discretion left *only* to "Member States," as well as the possibility that ECB acts leave some room to NCAs. Of course, that regulatory/supervisory practice might evolve along different lines than the ones we propose.

[335] The ECB only applies it as a result of a specific mandate. *See* Witte, *supra* note 326, at 108.

[336] *Id*. at 107.

review;[337] or (ii) issuing new instructions if a national court corrects the interpretation of national laws, but cannot annul the ECB's instructions that apply those laws.

However, recent examples could suggest a relaxation of *Plaumann*. In *Dyson*,[338] for example, the contested act was an "implementing" Commission regulation[339] on labelling and standard product information for vacuum cleaners. The Commission did not even object on grounds of admissibility, and the Court did not consider, of its own motion, Dyson's standing to challenge the act.

Perhaps the above example may be a lapse, but if this were to become the norm, and entities affected by the rules were gradually to be granted standing to challenge the acts, this would not be the end of the problem.[340] Annulment actions are subject to a very short period of two months after publication of the measure.[341] Further, the Court has held that any party with standing to challenge an EU measure directly under annulment proceedings who has not done so in due time cannot later attempt to challenge it by filing an action before domestic courts and then requesting a preliminary reference.[342] If the *Plauman/Inuit* standard is relaxed, it would be possible for a financial entity to let the deadline for annulment expire without knowing that it is directly affected by the measure, or that it has standing to challenge it, and yet lose the ability to make a preliminary reference. Entities would have to pre-emptively challenge all ECB measures lest they lose the right to do so afterwards. This would contravene the right to judicial protection and the principle of legal certainty.

2. Imperfect Review Mechanisms: A Breach of Fair Trial Rights?

In light of the above, does the imperfect review mechanism provided by EU courts constitute a breach of fair trial rights? According to the ECtHR, these rights rely heavily on the "opportunity to challenge any decision […] before a tribunal which offers the guarantees of Article 6,"[343] requiring a body that has "full jurisdiction."[344]

In *Menarini*, the review applied in competition cases was held valid, as it included a review of the use of powers, the grounds of the decision, its proportionality, its

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[337] In such cases, the only difficulty would be that the legality of the ECB measure would have to be evaluated in the context of the national rules that exercise the option granted by the Directives. However, the CJEU could limit itself to gather the opinions of the courts and experts to assess the actual state of national law, and evaluate the ECB action in its light, rather than making an authoritative interpretation of that domestic law.

[338] Dyson Ltd. v. Comm'n, Case T-544/13, EU:T:2015:836, ¶ 28.

[339] We discuss the limits of the ECB's power to dictate rules that exercise some of the discretion under CRD and CRR, with reference to the case law on "implementing" powers of the Commission and of EU agencies, in the preceding Article. *See* Lamandini, Ramos, & Solana, *supra* note 1.

[340] We are grateful to Daniel Sarmiento, for pointing us to these latest developments. *See* his blog *Despite Our Differences,* Personal Blog (Nov. 18, 2016), https://despiteourdifferencesblog.wordpress.com/.

[341] *See* TFEU, art. 263(5).

[342] *See* TWD Textilwerke Deggendorf GmbH v. Germany, Case C-188/92, EU:C:1994:90.

[343] *See Grande Stevens*, CE:ECHR:2014:0304JUD001864010, ¶ 138, with reference to Kadubec v. Slovakia*,* app. no. 27061/95, CE:ECHR:1998:0902JUD002706195, ¶57; Čanády v. Slovakia, app. no. 53371/99, CE:ECHR:2004:1116JUD005337199, ¶ 31; Menarini Diagnostics v. Italy, app. no. 43509/08, CE:ECHR:2011:0927JUD004350908, ¶ 58.

[344] *See* Menarini Diagnostics v. Italy, app. no. 43509/08, CE:ECHR:2011:0927JUD004350908, ¶ 59.

technical evaluations, and the proportionality of the fine.[345] The ECtHR accepted *prima facie* that due process rights could be calibrated in administrative procedures with independent authorities,[346] but was more persuaded by the Courts' *actual* use of their powers to exercise a robust review than by the formal denomination of the review as "legality review" or "full review." Under the same approach, in *Grande Stevens*, the Court held that the review by the Turin Court of Appeal of penalties imposed by the Italian Securities Commission "CONSOB," in insider trading proceedings fell short of standards.[347] The Italian Court complied with the impartiality, independence, and full jurisdiction requirements. It reviewed the reasons for the decision and reduced some penalties for being disproportionate. However, it was unclear whether the hearings were "public," or whether there was an effective equality of arms between the parties.[348]

In other cases,[349] the ECtHR has found violations of Article 6 when the applicant was prevented "in a practical manner" from bringing the claim to the courts,[350] when the review rules were of "such complexity" to create "legal uncertainty;"[351] or where the restriction resulted an "unreasonable construction of a procedural requirement."[352]

In sum, it is not certain if the CJEU can undertake a "full review" of sanctions under SSM. The restrictive *Plaumann* standard limits the standing for more general annulment actions where, even if the standard were modified, only the legality of the measure is reviewed. Moreover, in composite decision-making, where the ECB and NCAs are involved, it is unclear who can challenge what measure. If a State had a similar review procedure in place, the State could be held in breach of Article 6 of the ECHR.

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[345] *Id*. ¶¶ 63–67. The ECtHR emphasized that *Consiglio* had gone beyond an "external" review of the consistency of the decision on penalties, and examined the elements resulting in the final determination.

[346] *Id*. ¶ 62.

[347] In that case, the CONSOB initiated an action for insider trading against the Mr. Grande Stevens, who had been negotiating an amendment to an equity swap agreement in favor of the Agnelli family (the controlling shareholders in Fiat), in the context of a conversion of debt for equity for a banking syndicate (which had lent money to Fiat). that the purpose of the amendment was to allow the Agnelli family to remain as the dominant shareholder (i.e. with more shares than the banks), while avoiding the duty to launch a takeover bid (triggered at 30% of voting shares). According to the Insider Trading division of CONSOB, the press releases announcing the debt conversion initiative with the banks should also have included information on the equity swap agreement. *See Grande Stevens*, CE:ECHR:2014:0304JUD001864010.

[348] *See id.* ¶¶ 153–155. Public hearings before the *Corte di Cassazione* were not enough, as the court did not have full jurisdiction.

[349] *See* Laurent Pech & Angela Ward, *Article 47:The Right to an Effective Remedy*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY, 1245 (Steve Peers, Tamara K. Hervey, & Angela Ward eds., 2014).

[350] *See* T.P. & K.M. v. United Kingdom, app. no. 28945/95, CE:ECHR:2001:0510JUD002894595, ¶ 100.

[351] *See* Pech & Ward, *supra* note 349, at 1245, referring to Geouffre de la Pradelle v. France, app.no. 12964/87, CE:ECHR:1992:1216JUD001296487, ¶ 33. The Court has required schemes of judicial review to be sufficiently coherent and clear' to afford "a practical, effective right of access" to the courts' jurisdiction.

[352] *See* Melnyk v. Ukraine, app. no. 23436/03, CE:ECHR:2006:0328JUD002343603, ¶ 23. *See also* Pech & Ward, *supra* note 349, at 1245.

In this regard, it is interesting to examine the two precedents in *Credit and Industrial Bank v. Czech Republic*[353] and *Capital Bank v. Bulgaria*.[354]In the face of financial crises, Czech and Bulgarian authorities adopted extraordinary measures of intervention over individual banks, (namely Credit and Industrial Bank and Capital Bank) to mitigate the spill-over effects of insolvency. Capital Bank was declared insolvent, deprived of its license, and wound up. The applicable rules rendered the intervention unchallengeable before the Courts.[355] Credit and Industrial Bank's board was replaced with an insolvency administrator appointed by administrative authorities, which meant that the former directors/representatives lacked standing to lodge an appeal on behalf of the bank.[356] In both cases, the ECtHR analyzed due process rights[357] and concluded that there had been a breach. In *Credit and Industrial Bank*, the deprivation of representative powers had rendered review practically impossible, as the decision was adopted without the presence of the bank, and was not subject to appeal. [358] In *Capital Bank*, the decision had been notified after its adoption, but Courts had not acted as "courts with full jurisdiction." [359] Moreover, the hearing before the Central Bank, an administrative body, could not replace the lack of judicial review.[360] Interestingly, in *Capital Bank*, the ECtHR discussed the specificities of the "banking business" and the public interest argument of financial stability, but found the measures disproportionate; the urgency of the situation could be remedied by stricter time limits, and the absence of a hearing on the deprivation of the license was not justified by the need to avoid panic, as it was adopted several months after the bank was subject to intervention.[361]

Article 6 ECHR should not be the only worry. Article 52(3) of the EU Charter requires that Charter rights that corresponding to ECHR rights, including the right to a fair trial, be at least as well protected under the former as under the latter.[362] The

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[353] Credit and Industrial Bank v. Czech Republic, app. no. 29010/95, CE:ECHR:2003:1021JUD002901095.

[354] Cap. Bank AD v. Bulgaria, app. no. 49429/99, CE:ECHR:2005:1124JUD004942999.

[355] *Credit v. Czech Republic,* CE:ECHR:2003:1021JUD002901095, ¶ 69; *Capital Bank v. Bulgaria,* CE:ECHR:2005:1124JUD004942999, ¶¶ 27–33.

[356] *Credit v. Czech Republic,* CE:ECHR:2003:1021JUD002901095, ¶ 58.

[357] The applicants challenged the measures on grounds of a breach of article 6 ECHR (access to court) and article 1 of Protocol 1 (right to property). However, in *Credit v. Czech Republic*, the arguments were the same, and once the Court found a breach of article 6, it did not proceed to examine the claim under article 1 Protocol 1. *Id*. In *Cap. Bank v. Bulgaria,* the declaration of insolvency was challenged pursuant to article 6, and the deprivation of a banking license was challenged pursuant to article 1 of Protocol 1. *Capital Bank v. Bulgaria,* CE:ECHR:2005:1124JUD004942999. Yet the arguments of the applicants, and the approach by the Court, was clearly procedural for both claims.

[358] Credit v. Czech Republic*,* CE:ECHR:2003:1021JUD002901095, ¶¶ 69–72. According to the ECtHR's findings, in the process of review envisaged in the procedural laws, the courts could not examine the substantive reasons for the imposition and extension of compulsory administration. The procedure was exclusively written, with no hearing, and no possibility of opposition by the bank's management.

[359] *Cap. Bank v. Bulgaria*, CE:ECHR:2005:1124JUD004942999, ¶¶ 109, 135.

[360] *Id.* ¶¶ 105–109, 134–135.

[361] *Id.* ¶¶ 113, 137.

[362] *See* Charter, art. 47. The Explanations of article 52 include article 47(2) (fair trial rights) as one where the *meaning* of Charter provisions is the same as that of the corresponding ECHR article (article 6), and "the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation." *See* Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303) 17. That is, the fact that the *scope* of the right under article 47 of the EU Charter may be *wider* (*See, e.g.,* DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Germany,

problem is that this avenue would require the CJEU to admit that *its own* standard of review falls short of fundamental rights. We can be forgiven for not holding our breath.

The other avenue would be for the ECtHR to find the review system in breach of Article 6 ECHR. Yet, this would require the ECtHR to hold the EU review system to the same standard as national systems, which seems unlikely.[363] The ECtHR lacks jurisdiction over the ECB.[364] When reviewing States' acts in execution of EU acts, the ECtHR has been almost too keen to presume that EU Law safeguards are roughly "equivalent" to those under the ECHR, without going into a detailed examination or close scrutiny reserved for purely national decisions.[365]

What is left is for EU courts to use the available powers to develop a robust review of SSM decisions.[366] This is extremely challenging, given that SSM rules, unlike competition rules, are not explicit about court involvement during proceedings,[367] nor about review afterwards.[368] The omission is surprising, if one considers the highly afflictive nature of many measures that are to be adopted by the ECB. It is worth recalling that the CJEU has found that, in competition cases, the "review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, satisfies the requirements of the principle of effective judicial protection in Article 47 of the [EU Charter]."[369] However, in the field of competition law, fines are the major, if not the only, way entities are "severely" affected in their fundamental rights. In the SSM context, many more supervisory, administrative, and punitive measures are highly impactful and can be "criminal in nature" according to the ECtHR standards.[370] If they have an effect on recipients similar to antitrust fines, they deserve equivalent, unlimited judicial protection.

If the CJEU and national courts work out a satisfactory system of review on the merits, the timeframe for review might remain an important issue. The time-sensitive nature of some supervisory, intervention, or resolution measures, might call for narrow deadlines, which can hinder the parties' ability to present their cases. So far, precedents show that courts are ready to be especially lenient towards public authorities. In *Adorisio v. The Netherlands*, which concerned an intervention and bail-in by Dutch authorities,[371] the ECtHR held that there had been no breach of judicial

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Case C-279/09, EU:C:2010:811) does not mean that the *meaning* of the right can be restricted, to compensate.

[363] *See supra*, Part I.A.

[364] *See* Confederation Française Democratique du Travail v. European Communities, app. no. 8030/77, CE:ECHR:1978:0710DEC000803077 1978, ¶ 231 (admissibility).

[365] *See supra*, Part I.A. The conclusion is tentative and may change if (a) the EU accedes the ECHR; (b) the ECtHR runs out of patience with the CJEU for stalling such accession; or (c) the lack of review by EU courts is too blatant to maintain the illusion of equivalence.

[366] Some would argue that this is what they have done in competition law, with the evolution of the standard of the review over time (t Remia B.V. v. Comm'n, Case 42/84, EU:C:1985:327 is often said to have marked a turning point), and that EU courts have grown bolder and more willing to elaborate the criteria of manifest error and excess of power to grant themselves sufficient leeway for effective and robust judicial control.

[367] *See* Council Regulation No 1/2003, *supra* note 78, arts. 6, 15.

[368] *See id.* arts. 20(4), 20(8), 21(2), 21(3) (annulment), and 31 (full jurisdiction over sanctions).

[369] LENAERTS, *supra* note 307, at 394. *See also*, KME Germany & Others v. Comm'n, Case C-272/09, EU:C:2011:810; Europese Gemeenschap v. Otis N.V. & Others, Case C‑199/11, EU:C:2012:684.

[370] *See supra*, Part I.C.

[371] Adorisio v. The Netherlands, app. no. 47315/13, CE:ECHR:2015:0317DEC004731513.

protection rights despite short deadlines to lodge an appeal against the authorities' decision and despite the fact that the plaintiffs gained access to the Minister's statement of defence the afternoon before the hearing.[372] Thus, courts seem quite comfortable with short timeframes as long as parties have an opportunity to present their case.

3. Review by Boards of Appeal

The final question is whether the lack of a satisfactory judicial review could be balanced by a more robust review by the review/appeal boards as a means to assess compliance with fair trial rights. The answer, we believe, is "no;" but the reasons for it are of greater interest than the answer itself. The boards of appeal are part of a new trend in the construction of the EU supervisory architecture. They were first introduced in the rules of the European Supervisory Authorities (ESAs, comprising the ESMA, EBA and EIOPA) to facilitate the review of ESAs acts,[373] and constituted the blueprint for the subsequent introduction of the "Appeal Panel" under the SRM[374] and the "Administrative Board of Appeal" under the SSM.[375] However, their function is unclear, and there are at least three variations on the same background idea.

The ESAs rules offer the first. The three sets of rules use the exact same structure and language (collectively, "the ESAs Regulations"). ESAs Regulations' Recital (58) refers to the need for parties affected by ESAs decisions to have access to "remedies" and be able to "appeal" the decisions before a Board that is "independent from their administrative and regulatory structures."[376] This notion of independence is reiterated in Article 59 of ESAs Regulations.[377] Yet, Article 58 of the same rules states that the Board's appointments shall be made by the ESAs' Management Boards from the Commission's shortlist, and Article 6 includes the Board within the Authorities' structure.[378]

The second type is in the SRM Regulation, where Article 85 regulates the "Appeal Panel," but, tellingly, its Section (1) indicates that "*[t]he Board shall establish* an Appeal Panel."[379] Although the term chosen is "appeal," and Section (5) still refers to the need for the Board to "act independently," the references to "institutional independence" from the SRM "structures" are absent, together with the lofty talk about "remedies."

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[372] *Id.* ¶ 41. This echoed the ECtHR's decision in *Capital Bank v. Bulgaria*, where the Court held that the time-sensitive nature of the issue could be remedied with shorter deadlines, but not the absence of review. *Capital Bank v. Bulgaria*, CE:ECHR:2005:1124JUD004942999.

[373] *See* Parliament and Council Regulation 1093/2010/EU, Establishing a European Supervisory Authority (European Banking Authority), art. 58, 2010 O.J. (L 331) 12; Parliament and Council Regulation 1094/2010, Establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), art. 58, 2010 O.J. (L 331) 48; Parliament and Council Regulation 1095/2010, Establishing a European Supervisory Authority (European Securities and Markets Authority), art. 58, 2010 O.J. (L 331) 84 [hereinafter the ESAs Regulations].

[374] SRM Regulation, *supra* note 79, art. 85.

[375] *See* SSM Regulation, *supra* note 23, art. 24.

[376] *See* ESAs Regulations, *supra* note 373, rec. 58.

[377] *Id.*, art. 59.

[378] *Id.*, art. 6, 58.

[379] SRM Regulation, *supra* note 79, art. 85 (emphasis added).

Finally, Article 24 of the SSM Regulation states that "*[t]he ECB shall establish* an Administrative Board of Review," while adding that its purpose is to carry out "*an internal administrative review* of the decisions."[380] Although the language about the "independence" of the members is maintained under Article 24(4), there is no reference to an "appeal," and the scope of review is defined in a more cryptic way, comprising only "the procedural and substantive conformity with this Regulation of such decisions."[381] Recital (64), which has the exact same language of Article 24 (1), adds that such review shall take place "while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions."[382]

Thus, successive reforms have given rise to reviews that are increasingly softer and more internal, which could be due to the progressive centralization of powers, particularly in the SSM. The differences are apparent in the effects of an appeal/review on the decision's enforcement. Although, as a general rule, an appeal or request for review does not have suspensory effect, a specific decision can be made to that effect. That decision is adopted by the Board of Appeal for ESAs and by the Panel, in the SRM,[383] but in the SSM it is adopted by the Governing Council on a proposal by the Board.[384] The contrast is even starker in the effects of the decision. Unlike the system for ESAs or the SRM, where competent bodies "shall be bound" by the decision,[385] under Article 25(7) of the SSM Regulation, the Board "expresses an *opinion*" and then sends the case back to the Supervisory Board, which has to take into account the Board's opinion and submit a new draft decision to the Governing Council. The draft decision, however, may "abrogate the initial decision, *replace it with a decision of identical content*, or replace it with an amended decision."[386]

In short, the Board would fall short of the "institutional independence" seen as necessary by the ECtHR as part of the right to an independent and impartial tribunal[387] for two reasons. One is the lack of power to issue a final and binding decision, which distinguishes between a judicial and an "advisory" body.[388] A second would be the lack of an "appearance of independence," given that the Board is part of the ECB's structure, and conducts an internal review.[389] In *Grande Stevens*, the ECtHR accepted the Italian Securities Commission (CONSOB) members' subjective independence, but held that the fact that the investigative and decision-making units were branches of the

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[380] SSM Regulation, *supra* note 23, art. 24 (emphasis added).

[381] *See id.*, art. 24(1)

[382] *Id.*, rec. 64.

[383] *See* Council and Parliament Regulation 1093/2010/EU, Establishing a European Supervisory Authority (European Banking Authority), art. 60(3), 2010 (L 331) 2 [hereinafter EBA, EIOPA and ESMA Regulations]; *see also* SRM Regulation, *supra* note 79.

[384] *See* SSM Regulation, *supra* note 23, art. 24(8).

[385] *See* EBA, EIOPA and ESMA Regulations, *supra* note 383, art. 60(5); *see also* SRM Regulation, *supra* note 79, art. 85(8).

[386] SSM Regulation, *supra* note 23, art. 25(7) (emphasis added).

[387] *See* Campbell & Fell v. United Kingdom, app. nos. 7819/77 & 7878/77, CE:ECHR:1984:0628JUD000781977.

[388] *See* Belilos v Switzerland, app. no. 10328/83, CE:ECHR:1988:0429JUD001032883; *see also* Van de Hurk v. The Netherlands, app. no. 16034/90, CE:ECHR:1994:0419JUD001603490, ¶ 45; *and* Bryan v. United Kingdom, app. no. 19178/91, CE:ECHR:1995:1122JUD001917891.

[389] The requirement of independence is not only about the respect of individual rights in the specific procedure, but also the confidence that the courts inspire in the public. *See* Case of Fey v. Austria, app. no. 14396/88, CE:ECHR:1993:0224JUD001439688, ¶ 30.

same administrative body, acting under the authority and supervision of a single chairman, was not compatible with the requirement of impartiality.[390] The "independence" required of administrative bodies for purposes of the right to good administration, on the other hand, does not require that decision-making units be separate from investigative or prosecuting units.[391]

A pervasive question lingers: why did the EU lawmakers grant conditions typically linked with judicial independence, such as protection from removal[392] or non-subjection to instructions,[393] yet balk at the prospect of going further? The result does not fulfil the conditions under Article 6 ECHR or 47 of the Charter, while it creates tension, not only with the supervisory body, but also with the courts.

These tensions are exemplified by the case of *SV Capital v. EBA*, where the General Court went out of its way to scold the Board of Appeal. SV Capital appealed a decision by the EBA *not to* investigate the Finnish and Estonian banking authorities,[394] and the Board held the appeal unfounded after declaring it admissible.[395] In annulment proceedings, the General Court (GC) held the action against the EBA inadmissible as time-barred,[396] but held the action against the Board admissible. Although none of the parties had alleged the Board's lack of competence, the GC raised the issue of its own motion, finding that the Board had acted *ultra vires* by finding the appeal admissible. Since the EBA's refusal to undertake an investigation did not fall strictly within the list of "decisions" subject to appeal, the Board exceeded its competences.[397] It is unclear whether the GC was more focused on protecting the supervisory authority's discretion, or on teaching the Board its proper place. In any event, it is telling that the court was less preoccupied by the exercise of supervisory powers than review powers.

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[390] *See Grande Stevens*, CE:ECHR2014:0304JUD001864010, ¶ 137.

[391] However, "the Regulation on CRA and the Regulation of OTC derivatives, central counterparties and trade repositories apply the principle of separation between investigative and decision-making powers (...)irrespective of its qualification as an administrative measure or as an administrative penalty." D'Ambrosio, *supra* note 207, at 64. Also, Regulation 2015/159/EC follows the principle without mentioning it. *See* Council Regulation 2532/98/EC, Concerning the Powers of the European Central Bank to Impose Sanctions, art. 4(b), 2015 O.J. (L 27) 1.

[392] Though the appointment is made by the bodies subject to appeal, removal (by the Management Board) is only possible in case the Board member "has been found guilty of serious misconduct." Parliament and Council Regulation 1095/2010/EU, Establishing a European Supervisory Authority (European Securities and Markets Authority), art. 58(5), 2010 O.J. (L 331) 84 [hereinafter ESA Regulation]. Neither Article 85 of the SRM Regulation, *supra* note 79, nor Article 24 of the SSM Regulation, *supra* note 23, stipulate express rules for removal.

[393] *See*, *e.g.*, ESA Regulation, *supra* note 392, art. 59(1); SRM Regulation, *supra* note 79, art. 85(2); SSM Regulation, *supra* note 23, art. 24(2). The association between (non) subjection to instructions and independence is established in Beaumartin v. France, app. no. 15287/89, CE:ECHR:1994:1124JUD001528789.

[394] The authorities had refused to investigate a breach of suitability requirements by two persons from the Estonian branch of a Finnish bank.

[395] *See* SV Capital v. European Banking Authority, Case T-660/14, EU:T:2015:608.

[396] The two months since the EBA decision was notified had passed. In the Court's view, the applicant should not have waited until after the decision of the Board of Appeal, but brought the action before the GC as a precautionary measure. *See SV Capital*, EU:T:2015:608, ¶ 44.

[397] *Id.* ¶¶ 67– 69. The GC also held that the applicant was not one of the entities specifically listed in Regulation 1093/2010, *supra* note 373, art. 17(2). In so finding, the Court paid no heed to the arguments regarding fair trial rights under article 47 of the Charter that the plaintiff raised.

III. SSM, SRM, AND NATIONAL CONSTITUTIONS

If an SSM or SRM act is deemed valid, subject only to limited review under the ECHR and the EU Charter, could this vacuum be filled by national constitutions?[398] A positive answer would leave a sobering prospect: reduced accountability for SSM/SRM acts would be replaced by a multiplicity of challenges to those acts based on different constitutional backgrounds. In case of conflict, the CJEU would probably fall back on the supremacy principle to regulate EU-domestic relations,[399] and would conclude that domestic courts, even constitutional courts, are not competent to annul an act by an EU institution.[400] National courts, for their part, do not easily waive their prerogative to have the last word on a matter of national identity.[401]

In theory, however, there need not be any such conflict. Fundamental rights under national constitutional traditions may be applicable provided "the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised."[402] It would be impossible at this stage to provide an analysis of fundamental rights protection in each Member State and its contrast with the ECHR or the EU Charter, but we can single-out the right to property as protected by the German Constitution[403] as a likely source of conflict in the face of the weak constitutional protection dispensed by the EU Charter and the ECHR.[404] It is true that the right to property is, under German Law, a fundamental right of critical importance for the dignity of persons, understood as self-development.[405] However, the Constitution distinguishes between "expropriation,", subject to compensation, and the restriction of the use of the right, or even the legal configuration of the right,[406] where the German Federal Constitutional Court (FCC) uses property's "social function" to calibrate the protection—a function that depends on the type of property.[407] In some cases, it means enhanced protection, such as those concerning a home or domicile. in others, where individual self-development is not

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[398] For a constitutional assessment of the Austrian resolution regime (before national implementation of the BRRD) by the Austrian Constitutional Court, compare Verfassungsgerichtshof [VfGH] [Constitutional Court], Jul. 3, 2015, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VFSLG] Nos. G 239/2014-27, G 98/2015-27. For a comment, *see* G. Giuzzi, *Il bail-in nel nuovo sistema di risoluzione delle crisi bancarie. Quale lezione da Vienna?*, 12 CORRIERE GIURIDICO 1485 (2015).

[399] *See* Flaminio Costa v. ENEL, Case 6/64, EU:C:1964:66.

[400] *See* Foto Frost v. Hauptzollamt Lübeck-Os, Case C-314/85, EU:C:1987:452.

[401] For an enlightening comparative analysis, see Monica Claes & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, 16 GERMAN L. J. 917–70 (2015).

[402] Stefano Melloni v. Ministerio Fiscal, Case C-399/11, EU:C:2013:107, ¶ 60.

[403] *See* GRUNDGESETZ [GG] [Basic Law], art. 14.

[404] *See supra* Part II.A.

[405] *See* Gregory S. Alexander, *Property as a Fundamental Constitutional Right—The German Example*, 88 CORNELL L. REV. 733, 745 (2002).

[406] Article 14(1) of the German Basic Norm states that: "Property and the right of inheritance shall be guaranteed. Their content and limits *shall be defined by the laws*" and would be read in conjunction with (2), which states that "[p]roperty entails obligations. Its use shall also serve the public good" (emphasis added). Section (3) of article 14 contemplates expropriation. GRUNDGESETZ [GG] [Basic Law], art. 14.

[407] *See* GRUNDGESETZ [GG] [Basic Law], art. 14(2); *see also* BVerfGE, 1 BvR 6/74 und 2270/73, Apr. 23, 1974; BVerfGE, 2 BvL 5/74, Feb. 4, 2975(housing and leases case). This "purposive" approach to the right to property, focused on a balance between self-development and social function, has led to rejection of alternatives, such as protection for purposes of wealth maximization, satisfaction of individual choices, etc. *See* BVerfGE, 1 BvL 77/78, Jul. 15, 1981 (groundwater cases).

present in the property (such as with shares), the protection is weaker.[408] The approach followed by other constitutional courts, such as the Spanish Constitutional Court, seems no more robust.[409]

From a broader methodological perspective, the clash can be avoided through an exercise of self-restraint on both sides. On the EU side, Article 53 of the EU Charter makes room for the application of fundamental rights enshrined in national constitutions in cases where the Charter is also applicable.[410] Article 4(2) of the TEU acknowledges the importance of national identities,[411] which lays the ground for a kind of mutual adjustment that the supremacy principle is incapable of achieving. The CJEU has been ready to grant such flexibility on matters that have a strong identity component, with or without the support of Article 4(2); this was true in *Groener*,[412] *Omega*,[413] and *Wittgenstein*,[414] while only the latter was decided after the re-drafting of Article 4(2) of the TEU under the Lisbon Treaty to include the "national identity"

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[408] The FCC has declared the system of workers' co-determination valid. In the case BVerfGE, 1 BvR 532, 533/77, 419/78 und BvL 21/78, Mar. 1, 1979, the FCC admitted that shares were "property," but it also held that rights of ownership of shares in a corporation are less essential than, say, personal tangible property, as an element of the guarantee of personal, individual freedom. Thus, it was ready to give Parliament some room to manoeuver. Even if the consequences of an Act could potentially be harmful, the evaluation of the consequences was too complex, and thus the legislature should have a right to be wrong, as long as it engages adequate means of evaluation. *See also* Hans Joachim Mertens & Eric Schanze, *The German Co-Determination Act*, 2 J. COMP. CORP. L. & SEC. REG. 75, 77–78 (1979).

[409] The protection dispensed by the Spanish Constitution to the right to property is even weaker. As to protection against expropriation, the Spanish Constitutional Court has held that, in judging proportionality, it cannot normally weigh the existence of alternatives, since that involves a judgment of political opportunity. *See* S.T.C., Dec. 2, 1983 (B.J.C., No. 111, p. 1487). However, in its more recent S.T.C., Mar. 3, 2005 (B.J.C., No. 48, p. 23)., the Court held that the measure (expropriation of a building to expand the regional parliament) was suitable, but not necessary, since the government could have negotiated with the owners, or expropriated different buildings. Protection against *interventions* or *regulation* of the right, however, remains weak, as shown by S.T.C., Mar. 17, 1994 (B.J.C., No. 89, p. 5) (mandatory extension of leases) whose (thoughtful and inspired) dissenting opinion by Judge Rodríguez Bereijo has not yet been echoed in the mainstream case law of the Court.

[410] Charter, art. 53 states: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

[411] TEU, art. 4(2) states: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

[412] Anita Groene v. Minister for Education and the City of Dublin Vocational Educational Committee, Case C-379/87, EU:C:1989:599 (concerning the refusal to grant an exception from the requirement to know Irish for a Dutch national applying for a position as an arts teacher. The European Court relied on the corresponding clause in the Constitution, referring to the language as a basis to justify the restriction, but nonetheless held that the policy to preserve the Irish language had to be an actively pursued policy, and was subject to the principle of proportionality).

[413] Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, EU:C:2004:614 (prohibition of the exploitation of games where people simulated acts of homicide with laser guns was compatible with freedom to provide services and free movement of goods, given the identity-related character of "dignity" under the German Constitution).

[414] Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Case C-208/09, EU:C:2010:806 (refusal of a Member State to recognize the "von" of a German citizen, pursuant to Austrian law on the abolition of nobility, found compatible with EU rights of citizenship).

reference.[415] The CJEU has also proven its flexibility on the insertion of domestic fundamental rights in the context of EU law, as it was with Sweden in *Fransson*.[416]

On the States' side, while national constitutional courts have proclaimed the superiority of national constitutions on "fundamental" principles or the country's "constitutional identity,"[417] the strength of such claims has been diluted. In some cases, such claims have been mainly hypothetical[418] and have generally been accompanied by a reference to the need to proceed under a spirit of cooperation.[419] In others, such claims have been accompanied with mechanisms to facilitate dialogue with the CJEU and *prima facie* acceptance of its rulings on EU law matters as part of domestic tests of constitutional review.[420] These different possibilities have given rise to much literature on constitutional pluralism, which seeks to explain the multiple levels of interaction between States, the EU, and their polities, and the possibilities to overcome rigid notions of constitutionalism.[421]

Yet, the CJEU has also proven that it can be less flexible, as it was with Greece in *Michaniki*,[422] or with Spain in *Melloni*.[423] The same can be said of national courts. In fact, *Gauweiler*[424] is the last episode in a series of cases by the FCC,[425] which stand

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[415] TEU, art. 4(2) states that: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

[416] Granting discretion to strike down penalties in a VAT case based on the *ne bis in idem* principle under national standards, "as long as the remaining penalties are effective, proportionate and dissuasive." *See Fransson*, EU:C:2013:105, ¶ 36.

[417] *See* Corte Cost., 13 aprile 1989, Foro it. 1990, I, 1855 (It.); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-540DC Jul. 27, 2006, J.O., 11541 (Fr.); BVerfGE, 2 BvR 197/83, Oct. 22, 1986 (Ger.) (Solange II). *See also* Leonard F.M. Besselink *National and constitutional identity before and after Lisbon* 3 UTRECHT L. REV., Issue 6 (2010).

[418] *See, e.g.,* the D.T.C., Dec. 13, 2004 (B.J.C., No. 1, p. 7). *See also* Corte Cost. 13 aprile 1989, Foro it., 1990 I, 1855.

[419] *See, e.g.,* Pham v. Secretary of State for the Home Department, [2015] UKSC 19.

[420] *See* BVerfGE, 2 BvR 2661/06, Jul. 6, 2010 (*Honeywell*), ¶¶ 303–04.

[421] *See, e.g.,* MATEJ AVBELJ & JAN KOMÁREK, CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (2012). *See also* Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN L. REV. 317–359 (2002). Walker, nonetheless, presents a broad overview, not merely centered in the EU context.

[422] Refusal to uphold an absolute prohibition against persons with interests in media also having interests in public procurement, despite its basis under the Greek Constitution. *See* Michaniki AE v. Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias, Case C-213/07, EU:C:2008:731. The provision was there to limit the power of media tycoons. Arguably, the CJEU refused to uphold the provision because it did not see it as forming part of the national constitutional identity. *See* Leonard F. M. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 UTRECHT L. REV. 36, 47–48 (2010).

[423] In *Melloni*, the CJEU resorted to the primacy principle: the interpretation of defence rights by the Spanish Constitutional Court was held incompatible with article 4(a)(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant. It rendered the execution of an European arrest warrant based on a conviction sentence issued *in absentia* conditional upon review in the issuing Member State. The CJEU considered that the Council decision had already drawn a very specific balance between fundamental rights protection, effectiveness, and mutual cooperation (the Council Decision aimed to create an arrest warrant system based on the high confidence between States)—a balance that already took into account the rights of those convicted *in absentia*. *See* Stefano Melloni v. Ministerio Fiscal, Case C‑399/11, EU:C:2013:107 ¶62.

[424] Peter Gauweiler & Others v. Deutscher Bundestag, Case C-62/14, EU:C:2015:400.

[425] *See* Claes & Reestman, *supra* note 401.

as a sobering reminder of how quickly inter-court harmony can deteriorate. The FCC has construed the concept of "constitutional identity" as part of the *ultra vires* review that is protected by the "eternity clause" of Article 79(3) of the Basic Law. The provision states that certain "structural" characteristics of the country—federal, democratic, social, and protective of the rule of law—cannot be derogated from unless a new constituent power approves a new Constitution.[426] Quite recently, however, the FCC was ready to consider the German concept of constitutional identity as similar to the concept under article 4(2) TEU.[427] Yet, the most recent case law has drifted towards a more confrontational view, which emphasizes the "fundamental" difference between the two concepts: the German test is supposed to be narrower, more rigid, and, above all, controlled exclusively by the FCC.[428] As a result, although it was a case that examined the monetary policy mandate of the ECB, the FCC's restrictive interpretation of that mandate can only be explained by the fact that the fundamental right to participate in democratic elections under the German Constitution was at stake.[429] That right was considered part of Germany's "constitutional identity," and thereby an absolute limit.

If this were to happen with the exercise of policies whose effect on fundamental rights is unpredictable—and the effect of monetary policy on fundamental rights is, *prima facie*, unpredictable—it is not unreasonable to surmise that exercise of competences under the Banking Union will be controversial. There are reasons for optimism: the rights affected, mainly property and due process, are less likely to strike against "structural" elements of "constitutional identity," and courts have not yielded to their more uncompromising instincts.[430] Still, it would be wrong to consider the centralization and concentration of supervisory competences in the ECB as a signal that pluralism is over and hierarchy is the future. Before *Gauweiler*, no one thought that the fundamental right to participate in elections could be construed in such broad terms that it could be used as a countervailing "policy" to limit the ECB's monetary mandate. If the Banking Union is taken as an invitation to prevail over domestic constitutional traditions, "identity" disputes may become much more common, to the CJEU's dismay.

CONCLUSION

This Article shows the tension in combining credible fundamental rights with a credible central bank that undertakes supervisory tasks. In our previous Article, we analyzed the extent and limits of the ECB's mandates and discussed the principle of institutional balance. The flip side of a institutional balance is the risk of abuse of

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[426] GRUNDGESETZ [GG] [Basic Law], art. 79(3).

[427] *See* BVerfG, 2 BvE 2/08, Jun. 30, 2009 (*Lisbon*). In *Gauweiler*, Advocate General Cruz-Villalón suggested that the two concepts cannot be too far away. *See, e.g.,* Opinion of Advocate General Cruz-Villalón, Peter Gauweiler & Others v. Deutscher Bundestag, Case C-62/14, EU:C:2015:7, ¶¶ 59–61.

[428] *See* BVerfG, 2 BvR 2728/13, Jan. 14, 2014, ¶ 29.

[429] The FCC interpreted the Constitution as requiring that decisions entailing public expenditures be voted by Parliament. *See* BVerfG, 2 BvR 2728/13, ¶ 40. An English translation of the decision is available at http://www.bundesverfassungsgericht.de/en/index.html.

[430] In *Gauweiler*, the FCC still stated that it would be bound "in principle" by the CJEU decision. The CJEU refused to heed some States' argument that the Court should declare the case inadmissible because the referring court had not fully committed to accept the CJEU decision. *Gauweiler*, EU:C:2015:400, ¶ 24.

individual rights if such balance is not respected. This puts the EU framework of fundamental rights and ECB powers in tension, as the two rely on *trumping* notions of credibility, which we explore in Part I. The credibility of fundamental rights rests on their susceptibility to prevail over considerations of general interest. The credibility of the Central Bank rests on its ability to act independently. Even if its supervisory powers are more rule-bound than its monetary powers, their gradual subordination to the *goal* of financial stability has resulted in an uncompromising construction that may apply to both monetary and prudential tasks, and trump everything else.

The *trumping* rigidity of fundamental rights has been tempered by the gradual reading of rights as *prima facie* powerful reasons, which means that the State needs a strong justification to curtail them. Yet, this has opened the door to the kind of *pure balancing* of collective interests that may jeopardize fundamental rights' status as the immovable parts of the system. In fact, this is seen in the attempts of the CJEU and the ECtHR to calibrate the rights. In controversial issues, such as the application of fundamental rights to legal persons, or the extension of criminal safeguards to proceedings to impose administrative penalties, the courts accept the *prima facie* application of the rights, but then dilute the protection. Ultimately, an individual right may be turned into something closer to an *interest*, which can be balanced with other general interests, leading to unpredictable results and the blurring of the boundaries of the right itself. To this, one must add that EU bodies and state authorities can now act partially outside the framework of EU Law, as happens with the ESM. This may shield the high-level decision-making process leading to a MoU and the MoU itself from scrutiny under fundamental rights protection, leaving only the uncertain, and unlikely, road of liability actions against EU institutions, as shown by *Ledra Advertising* and *Mallis*. Although the acts implementing the MoU may be subject to scrutiny if adopted under SSM or SRM rules, this can place EU bodies and state authorities in an impossible conflict of loyalties.

Having examined how firm, or, in this case, how uncertain, fundamental rights are, when we examine the strength of ECB powers, we reach the opposite conclusion. The rigidity of *financial stability* and similar considerations has not been tempered, as we explore in Part II. It matters little that investors' property rights are affected: supervisors only need to wield the threat of financial collapse and courts will normally accept their reasons, without delving into the underpinning justification. *Grainger v. UK* is a salient example, and *Ledra Advertising* looks only slightly more encouraging. Specific rights, such as shareholders' rights, cannot act as proxies for property rights either, as shown by *Kotnik* and *Dowling.* Investment arbitration tribunals, like the one in *Saluka Investments*, have a less solid legal base to limit State action, yet have been more willing to engage in an open discussion of the reasons for public action. This shows that it is not only the conclusion that counts, but also the argumentative process that ensures that restrictions of rights are well justified. To be fair, the ECtHR has been more willing to delve into the issues when the rights at stake are procedural.

The configuration of *procedural* rights in administrative actions does not bode well either. It is unclear whether privacy rights, as applied to legal persons, or the *right to good administration*, protect actual individual rights or a collective interest in the thoroughness and integrity of the process. If a *functionalist* view prevails, the *interest* protected may be more easily disposed of under the threat of a crisis. Equally worrying

is the fact that the *ne bis in idem*, certainty, legality and proportionality principles, and the privilege against self-incrimination of criminal proceedings, also look tenuous. The result is that it is actually impossible to depict the specific limits to the imposition of penalties by the ECB, especially to banking groups, or to requests for information that may incriminate the supervised entity.

This is compounded by the unsatisfactory state of judicial review of acts by EU institutions. There is still too much uncertainty about the standard of review for procedures for the imposition of administrative penalties. Furthermore, in general annulment actions, if the CJEU were a domestic court, it is likely that its *Plaumann* standard on the standing of persons would fall short of requirements under Article 6 ECHR and Article 47 of the Charter—at least if it applies strictly to composite acts involving actions by domestic legislatures, the ECB, and NCAs. In *Credit and Industrial Bank v. Czech Republic* and *Capital Bank v. Bulgaria*, the ECtHR showed that a lack of judicial review is not justified even by high order reasons such as financial stability or urgency. But it is extremely unlikely that the ECtHR, let alone the CJEU itself, will conclude that the system of judicial review of SSM acts falls short of Article 6 ECHR or Article 47 of the Charter. The only possibility is that the courts, especially the CJEU, will use the means available to conduct a review that is robust in practice. However, this outcome is uncertain, and does not address the fact that acts adopted outside the EU Law framework, including ESM acts and MoUs, will not be reviewed. The lack of scrutiny cannot be balanced by the role of administrative Boards of Review, as their role has been weakened in the Banking Union. Therefore, a lot depends on the CJEU's use of the tools at its disposal to conduct robust judicial review.

Section III analyzes the scrutiny that can result from national constitutional standards. If EU courts leave a vacuum of countervailing principles, other courts might feel emboldened to fill that vacuum. Here the discussion of the limits to ECB powers comes full cycle. We began that discussion analyzing "mandates" and the *Gauweiler* case, but the uncompromising stance of the German FCC in that case cannot be understood without reference to fundamental rights; in that particular case, to participate in elections. We still believe that the FCC's conclusion was wrong, but that its questions were right and pertinent.

The basic question is what role fundamental rights should play in the Union, Banking and otherwise, and how far they should counteract ECB and NCA discretion. Our findings show that the complexity of the Banking Union, daunting as it is, needs more thorough scrutiny to strengthen its legitimacy. Absent a democratic mandate for the ECB, the Banking Union will only be accepted if the powers of the ECB and NCAs are duly monitored and subject to concrete limits and robust judicial review. Delineating the exercise of competences that is considered appropriate would give the ECB and the NCAs a roadmap on how to conduct their activities, establishing what interests to prioritize and under what circumstances, as well as a comfort zone where they could feel at ease. The alternative is uncertainty, which may leave the ECB and NCAs too insecure or too bold.