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**Single supervision, single judicial protection?
Towards effective judicial protection in Single
Supervisory Mechanism composite procedures**
Tegelaar, J.T.

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Single Supervision, Single Judicial Protection?

*Towards effective judicial protection in Single
Supervisory Mechanism composite procedures*

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Supervisory Mechanism composite procedures*

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Voor Toon

Previously Published Work

This thesis contains and/or builds on the following previously published work by the author:

B. Budinská & J.T. Tegelaar, 'Duty of Care as a Judicial Review Tool for SSM Composite Procedures', in: L. Böffel & J. Schürger (eds.), *Digitalisation, Sustainability, and the Banking and Capital Markets Union. Thoughts on Current Issues of EU Financial Regulation* (Palgrave Macmillan 2023), p. 329-351.

J.T. Tegelaar, 'The EU Courts as *juges de droit national* in the Single Supervisory Mechanism?', in: M. Haentjens et al (eds.), *The Enforcement of EU Financial Law* (Hart Publishing 2022), p 119-136.

J.T. Tegelaar & M. Haentjens, 'Judicial protection in cross-border bank resolution', in: M. Haentjens & B. Wessels (eds.), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019), p. 260-287.

J.T. Tegelaar, 'De Unierechter als *juge de droit national*? Nationaal recht en de rechterlijke toetsing van gemengde procedures', in: L.W. Verboeket et al (eds.), *Bestuursrecht in het echt. Vriendenbundel voor prof. mr. drs. Willemien den Ouden* (Wolters Kluwer 2018), p. 285-300.

M. Haentjens, J.T. Tegelaar & D.J. Verheij, 'Financial Market Regulation and Supervision', in: P.J. Kuijper et al (eds.), *The Law of the European Union* (Wolters Kluwer 2018), p. 951-993.

J.T. Tegelaar, *Exit Peter Paul? Divergente toezichthoudersaansprakelijkheid in de Europese Unie voor falend financieel toezicht, gezien vanuit het Europeesrechtelijke beginsel van effectieve rechtsbescherming*, Meijers-reeks (Jongbloed 2017).

J.T. Tegelaar, 'Immuun voor de Unie? Semi-(immunititeit) van nationale financiële toezichthouders onder nieuw recht', *Ars Aequi* 2016, p. 705-715.

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List of Abbreviations

ABOR	Administrative Board of Review
AFM	<i>Autoriteit Financiële Markten</i> (Authority for the Financial Markets, the Netherlands)
AG	Advocate General
AML/CFT	Anti-money laundering/countering the financing of terrorism
AMLA	Anti-Money Laundering Authority
Awb	<i>Algemene wet bestuursrecht</i> (General Administrative Law Act, the Netherlands)
BW	<i>Burgerlijk Wetboek</i> (Civil Code, the Netherlands)
CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CESR	Committee of European Securities Regulators
CJEU	Court of Justice of the European Union
CMF	<i>Code monétaire et financier</i> (Monetary and financial code, France)
CRD	Directive 2013/36/EU (Capital Requirements Directive)
CRR	Regulation (EU) No 575/2013 (Capital Requirements Regulation)
DNB	<i>De Nederlandsche Bank</i> (Dutch Central Bank, the Netherlands)
EBA	European Banking Authority
EC	European Community
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECR	European Court Reports
EDIS	European Deposit Insurance Scheme
EEC	European Economic Community
EIOPA	European Insurance and Occupational Pensions Authority
EMU	Economic and Monetary Union
ESA	European Supervisory Authority
ESCB	European System of Central Banks
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority

ESRB	European Systemic Risk Board
EU	European Union
GALA	General Administrative Law Act
GC	General Court
ITS	Implementing Technical Standards
JST	Joint Supervisory Team
NCA	National Competent Authority
NRA	National Resolution Authority
ReNEUAL	Research Network on EU Administrative Law
RTS	Regulatory Technical Standards
SRB	Single Resolution Board
SREP	Supervisory Review and Evaluation Process
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SRM Regulation	Regulation (EU) No 806/2014
SSM	Single Supervisory Mechanism
SSM Framework Regulation	Regulation (EU) No 468/2014
SSM Regulation	Regulation (EU) No 1024/2013
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Wft	<i>Wet op het financieel toezicht</i> (Financial Supervision Act, the Netherlands)

1.1 THE SINGLE SUPERVISORY MECHANISM

1.1.1 A beacon of European administrative integration

The administrations of the European Union (EU) and the Member States are developing towards an ever-closer ‘integrated’ or ‘shared’ administration in the EU.¹ In this integrated administration, European policies and legislation are implemented and executed by the EU and the Member States together, constituting a joint task. The concept of an integrated administration may be viewed as the counterpart of a system characterised by ‘executive federalism’.² Traditionally, the relationship between the EU and the Member States could as such be described: The EU is responsible for enacting European legislation and the Member States for executing it.³ Although decentralised implementation and execution of EU law is still the rule, in the EU integrated administration executive tasks are to an increasing extent Europeanised and centralised at the EU level.

Since its establishment 10 years ago, in 2013, the Single Supervisory Mechanism (SSM) has constituted a beacon of European administrative integration. It has Europeanised and centralised prudential banking supervision at the European Central Bank (ECB) of banks in the eurozone and the other participating Member States, while firmly depending on the National Competent Authorities (NCAs).⁴ Prudential supervision is shared between the ECB and the NCAs, but the boundaries between ECB and NCA competences at times are blurred, as the NCAs assist the ECB in preparing supervisory decisions and both national law and EU law govern the exercise of supervision. These general characteristics, task-sharing, blurred competences, national assistance and both national and EU law governing the administration, are inherent to an integrated administration and are therefore not exclusive to the SSM. Other EU areas that are administered

1 For an extensive account of this development and the (potential) legal problems involved, see Hofmann & Türk 2009a. For consistency, I will use the term ‘integrated administration’ throughout this dissertation.

2 More extensively on executive federalism in the EU, see: Schütze 2010, p. 1385-1427.

3 Lenaerts 1991, p. 11-35.

4 Currently, Bulgaria is a non-eurozone participating member state (as of 1 October 2020). Croatia joined the eurozone as of 1 January 2023 and in that capacity has become a participating member state. It had already been a non-eurozone participating member state since 1 October 2020.

via an integrated administration involving the close cooperation between national and EU authorities include EU competition law, EU subsidies and the Single Resolution Mechanism (SRM).

Regardless of the similarities the SSM demonstrates with other areas of integrated administration, the degree of integration achieved within the SSM is unprecedented. Furthermore, as a unique feature in EU law, the ECB has been conferred to competence to apply national law where necessary for carrying out prudential supervision.

This dissertation will focus on the potential problems for effective judicial protection within the SSM. This issue has also been addressed in other literature dedicated to the phenomenon of an integrated or shared administration. As a beacon of EU administrative integration, this dissertation, its analyses and conclusions may not only be relevant to the SSM. The SSM is an example, albeit with unique features, of a broader tendency towards multi-level integration, cooperation and coordination. This tendency is likely to become more present in EU law, specifically in, but not limited to, the area of financial regulation. Examples of this development are the expanding direct supervisory powers of the European Supervisory Authorities (ESAs)⁵ and the proposal for setting up an EU supervisory authority in the area of anti-money laundering/countering the financing of terrorism (AML/CFT) (Anti-Money-Laundering Authority (AMLA)).⁶

The SSM can be seen as a precursor for other (future) areas of integrated administration. Not only regarding its administrative structure and organisation,⁷ but also regarding solutions for issues relating to judicial protection. The problems relating to effective judicial protection encountered within the SSM therefore will not only be relevant to formulate SSM-specific solutions. The importance of the process of discerning (potential) problems, analysing those and formulating solutions, as carried out in this dissertation, may thus extend to other areas than the SSM as well.

5 The three ESAs are the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

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

7 The AMLA, for instance, will, according to the proposal, be embedded as the 'center-piece' in 'an integrated AML/CFT supervisory system' comprising both the AMLA and the national AML/CFT authorities. See Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM(2021) 421 final, p. 3.

1.1.2 Centralised, yet shared prudential supervision

The SSM forms a revolutionary step in the EU's integration process. Prior to the Banking Union, integration was achieved primarily by regulatory means, i.e. by harmonising financial regulation under the flag of the 'harmonisation clause' in Article 114 TFEU. But now, the execution of prudential regulation, i.e. prudential supervision, has become a Union competence.⁸ The degree of Europeanisation of financial supervision that the SSM achieves is unprecedented.

The SSM constitutes one of the pillars of the European Banking Union, altogether comprising pan-eurozone prudential supervision (SSM), pan-eurozone resolution (Single Resolution Mechanism (SRM)) and a pan-eurozone deposit guarantee scheme (European Deposit Insurance Scheme (EDIS), not yet in force).

The SSM Regulation designates the ECB as the authority which is exclusively competent to carry out the prudential supervisory tasks as listed in Article 4 SSM Regulation in relation to all credit institutions within the participating Member States.⁹ Although the tasks are codified as a limited list, it comprises all core prudential supervisory activities. It may thus be argued that essentially all prudential supervisory tasks formerly within the remit of the national authorities, are now an exclusive competence of the ECB.¹⁰

Notwithstanding the ECB's exclusive competences, the SSM is explicitly composed of both the ECB and the NCAs.¹¹ The allocation of supervisory responsibilities between the ECB and the NCAs is laid down in the SSM Regulation, and the cooperation framework is elaborated in the SSM Framework Regulation. Various decentralisation mechanisms within the SSM Regulation 'redistribute' supervisory tasks to the NCAs. The primary distribution mechanism in the SSM Regulation is a distinction between significant and less significant entities. The ECB is in charge of the day-to-day supervision of significant entities, and the relevant NCA supervises the less significant entities.¹² Thus, a complete centralisation of prudential supervision at the ECB has not been achieved.¹³ Yet the ECB must be regarded as

8 For a historical overview of different phases of financial integration within the EU, see Teixeira 2017, p. 535-565; Dermine 2003, p. 31-96; Tridimas 2011, p. 783-804.

9 Art. 4(1) SSM Regulation. See also Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, confirmed in Case C-450/17 P *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:C:2019:372

10 See Wymeersch 2014, p. 14, 41; Wolfers & Volland 2014, p. 1470.

11 Art. 6(1) SSM Regulation.

12 Art. 6(4) SSM Regulation.

13 European Commission, Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511 final, p. 5. Eq., although concerning the division of responsibilities between national supervisors and ESAs, see De Larosi re Report 2009, p. 47. The SSM may be referred to as a semi-strong centralisation, see Ferrarini & Chiarella 2013; Ferrarini 2015a, p. 57-69; Ferrarini 2015b, p. 513-537. See also Lo Schiavo 2015, p. 111-130.

the central supervisor. It remains ultimately responsible for the functioning of the SSM;¹⁴ the ECB is ‘in a position of supremacy’.¹⁵ To this end, the ECB has been conferred various overseeing and coordinating powers, and it may at any time ‘take over’ supervision of an NCA ‘when necessary to ensure consistent application of high supervisory standards’.¹⁶

The decentralisation mechanisms in the SSM Regulation lead to a situation where prudential supervision is effectively shared between the ECB and the NCAs. Therefore, the administrative architecture of the SSM qualifies as a ‘shared’, ‘mixed’ or ‘integrated’ administration.¹⁷ Characteristic of a model of integrated administration is not only that responsibilities are distributed among multiple authorities, but also a close cooperation between them in exercising these responsibilities.

The actual exercise of banking supervision within the SSM thus often transpires jointly. For example, although the ECB is designated the direct supervisory authority for significant entities, the ECB relies on NCA staff in the so-called Joint Supervisory Teams (JSTs) for day-to-day supervision. The JSTs are not the only situations where NCAs and the ECB work closely together in the exercise of supervision. The SSM Regulation puts in place various ‘composite procedures’ via which administrative decision-making is distributed between and shared among the relevant NCA and the ECB. Illustrative of such composite procedures are the credit institution authorisation procedure and the procedure governing the assessment of acquisitions of qualifying holdings. NCAs play an important preparatory role as they prepare a draft decision for the ECB. Another situation where the relevant NCA and the ECB share responsibility is where the ECB instructs an NCA to take a specific supervisory decision under national law vis-à-vis an individual credit institution. It is in these composite procedures specifically that the outcome may be regarded as a joint responsibility of the ECB and the relevant NCA, notwithstanding the varying degrees of decisional dominance of each of the supervisory authorities.

Prudential supervision within the SSM has thus become a joint responsibility of the NCAs and the ECB. This sharing of responsibilities leads to an unprecedented integration of the European and national administrative systems and a complex interaction between the European and national (administrative) legal systems, including multi-layered decision-making structures subject to a plurality of legal systems and involving supervisory authorities from different jurisdictions. In addition, as already stated above,

14 Art. 6(1) SSM Regulation.

15 De Bellis 2015, p. 79.

16 Art. 6(1)(3)(5) SSM Regulation.

17 See, e.g., Wissink 2021, p. 2; Wissink, Duijkersloot & Widdershoven 2014, p. 92; Van Cleynenbreugel 2014, p. 1-2. More extensively on the concept of a European integrated administration, see, *inter alia*, Cassese 2004, p. 21-36; Della Cananea 2004, p. 197-217; Hofmann & Türk 2007, p. 253-271.

as an integrational novelty within the EU, the ECB now must pursuant to Article 4(3) SSM Regulation apply national law when supervising banks.¹⁸

1.2 THE PARADOX: SHARED SUPERVISION, SEPARATED JUDICIAL PROTECTION

1.2.1 General

Prudential supervision within the SSM is thus organised through a shared or integrated administration model. Moreover, supervisory action must be considered a joint responsibility in various instances. The integrated supervisory model forms a paradox with the European system of judicial protection, which is rooted in a system of ‘executive federalism’ and has remained ‘dualistic’.¹⁹ The Court of Justice of the European Union (hereinafter: the EU Courts)²⁰ traditionally takes a dualistic approach to the division of competences between the national courts and the EU Courts within the European system of judicial protection,²¹ assuming that a competence lies either with the EU or the Member State. In this view, the EU legislates and the Member States execute EU legislation (‘executive federalism’). Should one wish to challenge EU legislation, the EU Courts are exclusively competent. Conversely, the national judicial level is exclusively competent in proceedings directed at the execution of EU legislation by a national authority. Hence, the European system of judicial protection is based on the principle of separate jurisdictions.²² This principle also applies to jurisdiction in proceedings concerning non-contractual liability.²³

Such a dualistic stance on judicial protection does not match the SSM’s institutional reality, which, as already described above, is characterised by joint responsibilities and blurred boundaries between European and national competences. The paradox, or mismatch, between an integrated administration and a dualistic system of judicial protection raises a host of complex legal problems. Specifically, judicial protection problems are often identified in legal literature.²⁴ The general view is that one of the central

18 More extensively on this novelty, see Witte 2014, p. 89-109; Witte 2021, p. 236-250; Biondi & Spano 2020, p. 1023-1046; Lo Schiavo 2019, p. 177-196; Boucon & Jaros 2018, p. 155-187; Amtenbrink 2019, p. 136-151; Coman-Kund & Amtenbrink 2018, p. 133-172.

19 Türk 2009b, p. 218. Cf. Eliantonio 2015, p. 66-68 and Eliantonio 2014, p. 116-117; J. Hofmann 2011, p. 446.

20 The Court of Justice of the European Union comprises the Court of Justice, the General Court and the specialised courts (Art. 19(1) TEU). The Court of Justice and the General Court together will be hereinafter referred to as the ‘EU Courts’, the Court of Justice as the ‘Court’ and the General Court as the ‘General Court’.

21 Eliantonio 2015, p. 101; Brito Bastos 2015, p. 283-285.

22 J. Hofmann 2011, p. 446.

23 J. Hofmann 2011, p. 462. See also Kawczyńska 2014, p. 74; De Visser 2004, p. 50-51.

24 See, e.g., Della Cananea 2004, p. 197-217; Hofmann & Türk 2007, p. 253-271; Hofmann 2009a, p. 136-167; J. Hofmann 2011, p. 441-466; Eliantonio 2015, p. 65-102; Hofmann 2019; Brito Bastos 2020, p. 63-64; Scholten 2019, p. 538-553; Gaztea 2019, p. 9-37.

challenges of an integrated administration is to adapt the system of judicial protection to it.²⁵

1.2.2 Potential threats for judicial protection

Threats posed to effective judicial protection caused by the paradox of the SSM's integrated administration and a system of judicial protection that is characterised by a separation between the national and EU level, in legal literature generally and euphemistically referred to as 'challenges',²⁶ are manifold. They are the most acute where a supervisory decision or another type of supervisory action must be considered a joint responsibility of both an NCA and the ECB. Most notably, such joint responsibility arises in what is commonly known in legal scholarship as 'composite procedures'. This type of administrative decision-making procedures within the SSM will be the focus of this research (see further para 1.5).

The potential threats will be discussed more extensively in Chapter 2, in which the normative framework will be developed, yet a brief overview will be given here. The potential threats may be categorised into difficulties regarding the allocation of responsibilities between the various authorities involved in an integrated administration or composite procedures; 'gaps' in judicial protection, for example as occurred and were subsequently remedied by the EU Courts in *Borelli*²⁷ and *Berlusconi and Fininvest v Bank of Italy*;²⁸ the limited scope of jurisdiction of each of the judicial levels (national and EU) with regard to acts of authorities beyond their jurisdiction; the necessity of litigating at two judicial levels to obtain judicial protection against both the national and the EU act involved; and, the existence of national statutory limitations that limit or exclude the liability of national financial supervisory authorities and thus NCAs. Although more implicitly than the former threats, the latter concerning national statutory limitations is closely linked to the judicial protection problems caused by the paradox as well, since specifically for damage arising in the context of an integrated administration a party may depend for compensation on national courts and therefore on the national liability regime. As, according to settled case law, even where an EU authority committed an unlawful act that may have caused damage, for compensation the party suffering the damage may be dependent on national courts and national law.²⁹

²⁵ See, e.g., Hofmann 2009a, p. 151

²⁶ See, e.g., Alonso de León 2016; Eliantonio 2015, p. 65-102; Safjan & Düsterhaus 2014, p. 3-40; Della Cananea 2004, p. 197-217; Hofmann & Türk 2007, p. 253-271; Hofmann 2009a, p. 136-167; J. Hofmann 2011, p. 441-466.

²⁷ Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

²⁸ Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

²⁹ See Ch. 6.

1.3 RESEARCH QUESTIONS

Considering the paradox described above and the threats it poses to judicial protection, the aim of this study is to analyse if the integrated system of financial supervision within the SSM poses problems to the EU principle of effective judicial protection. Is this question to be answered in the affirmative, the follow-up question is how these problems should best be remedied. The main research question therefore is:

Is effective judicial protection currently guaranteed within the Single Supervisory Mechanism; and, if not, how should effective protection be achieved?

In order to answer these research questions, the following sub-questions will be addressed:

1. *What constitutes effective judicial protection?*
2. *How is the administrative integration of prudential banking supervision institutionalised within the SSM?*
3. *What is the legal framework of judicial protection within the SSM, and how does it deal with the features of an integrated administration?*
4. *Which problems arise, if any, within the current legal framework of judicial protection, and how should those problems be solved?*

1.4 METHODOLOGY AND OUTLINE

This dissertation takes a doctrinal legal research approach and will combine the legal disciplines of (national and European) administrative law, constitutional law, regulatory law and tort law. The research harbours both descriptive and normative elements, as the goal of this dissertation is two-fold: providing an analysis of the current functioning of the system of judicial protection within the SSM, which is both descriptive as well as normative by assessing whether effective judicial protection is guaranteed within, and seeking to answer the question of how, if necessary, the current system should be improved to ensure effective judicial protection, which is mainly an issue of a normative nature.

The normative elements of the research will be analysed via the normative framework that will be developed in Chapter 2. Central to this framework is the EU principle of effective judicial protection. In Chapter 2, sub-question 1 will thus be addressed: what constitutes effective judicial protection? This sub-question will be answered specifically for an integrated administration and the selected SSM composite procedures in particular.

The principle of effective judicial protection is a key principle underlying the EU legal order, formulated and developed by the EU Courts. It forms part of the EU principle of effectiveness and constitutes a fundamental right. The principle of effective judicial protection provides for judicial

control of the legality of government actions and therefore serves as a means to uphold the rule of law. It embodies the Latin legal maxim *ubi ius ibi remedium*³⁰ and ensures that where an individual, i.e. both natural and legal persons, has a right, this right should be effectuated by a course of action before a court.³¹ This right has been recognised by the EU Courts as a principle of the EU and is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, Articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms and Article 19(1)(2) of the Treaty of the European Union (TEU).³² The right to effective judicial protection may also be found in various instruments of secondary EU law in which elaborated requirements stemming from this fundamental right are laid down. The right to effective judicial protection thus guarantees an individual has legal remedies at his disposal to effectuate one's rights granted by EU law and, as a result of the decentralised nature of the Union system of judicial protection, imposes minimum standards on national (procedural) law.³³ The right to *effective* judicial protection does not just entail access to court, but also provides requirements for the way a case is dealt with by the court. The exact content of the principle of effective judicial protection is, due to its nature, hard to assess.³⁴ In addition, EU case law does not provide for a single definition;³⁵ it rather encompasses a 'bundle of rights'.³⁶

It will be argued in Chapter 2 that the EU principle of effective judicial protection in its current interpretation and application does not adequately address the judicial protection problems characteristic of an integrated administration. It will be proposed to align the system of judicial protection with the administrative unity of composite procedures. Furthermore, in Chapter 2 a selection will be made of the most relevant elements of the EU principle of effective judicial protection that will be utilised to answer the main research question. These elements are:

1. Clear system of judicial protection;
2. Adequate access to court;
3. Full jurisdiction of a court;
4. Right to judicial proceedings within reasonable time;
5. Right to damages for violations of EU law.

30 'Where there is a right, there is a remedy.'

31 Van Gerven 2000, p. 503.

32 Case 222/84 *Johnston* ECLI:EU:C:1986:206.

33 Extensively on the distinction between rights, remedies and procedures, see: Van Gerven 2000, p. 51-70.

34 See also Gerbrandy 2009, p. 18, 27.

35 Drake 2006, p. 843-844.

36 Safjan & Düsterhaus 2014, p. 3-4.

Sub-question 2 – How is the administrative integration of prudential banking supervision institutionalised within the SSM? – is addressed in Chapters 3 and 4. The integration of supervision within the SSM will be analysed from both a historical and an administrative governance perspective. To that end, a brief historical overview will be given of the process of integration in the European Union leading up to the Banking Union and the SSM. The analysis covering the administrative governance perspective will address the decentralisation pursued by the SSM, including the legal framework governing the division of supervision between the ECB and the NCAs and the cooperation framework provided for by the SSM Regulation and the SSM Framework Regulation.

Chapters 5 and 6 are dedicated to answering sub-question 3 – What is the legal framework of judicial protection within the SSM, and how does it deal with the features of an integrated administration? – by analysing the doctrinal framework for judicial protection within the SSM. The analysis will cover both the action for annulment (Chapter 5) and the action for damages (Chapter 6). As the framework for judicial protection and therefore the question of whether effective judicial protection is guaranteed within this system is dependent on both national and European law and the interaction between (the courts of) the Member States and the EU, this dissertation has a comparative component. Hence, when analysing how the SSM provides for judicial protection, legislation, legal doctrine and case law of both the national level and the EU must be analysed. The selected Member State is the Netherlands. The Netherlands has been chosen for several reasons. Firstly, the author is a Dutch lawyer and the Dutch legal system, and its sources are best accessible to her. Secondly, focusing on one national jurisdiction instead of multiple ones allows for a more in-depth inquiry into the specifics of the interaction between the EU and the relevant Member State. Thirdly, the Dutch legal system qualifies as a civil law system, sharing a common foundation and legal concepts with other EU civil law systems, including France and Germany. Therefore, findings and conclusions pertaining to the interaction between EU and Dutch law in judicial protection may have relevance beyond the Netherlands.

In Chapters 5 and 6, an analysis will be carried out for various composite procedures within the SSM. For each of these procedures and each stage of the decision-making process, it will be examined whether, on what level (European and/or national) and under what conditions judicial protection is available.³⁷ These examinations aim to bring any problems concerning judicial protection to the surface. Based on the normative framework, it will be assessed whether these problems, if any, hamper guaranteeing effective judicial protection. For the action for damages, it will be examined on what level (European and/or national) liability proceedings may be instituted.

37 For a similar analysis with regard to gaps in judicial review of the decision-making process provided for in the Habitats Directive (92/43/EEC), see Eliantonio 2014, p. 116-126.

To analyse and understand the legal consequences of the supervisory architecture for judicial protection, where necessary, parallels will be drawn with other fields in which similar models have existed longer, such as state aid and EU funds. Legal literature and case law in these fields will be analysed to conclude on their analogy and formulate conclusions as regards, *inter alia*, the division of competences in the various composite procedures.

The first part of final sub-question 4, regarding any problems for judicial protection arising within the current legal framework of judicial protection, will also be answered in Chapters 5 and 6. The normative framework as elaborated in Chapter 2 will be applied to the findings in these respective chapters. On the basis of the normative framework, it will be assessed whether the problems, if any, with regard to the current legal framework of judicial protection hamper guaranteeing effective judicial protection. Currently existing as well as potential problems regarding judicial protection within the SSM will be identified and investigated. Where it will be concluded that the current legal framework of judicial protection does not guarantee effective judicial protection, answers will be sought to deal with the inadequacy, again by applying the normative framework. Recommendations for the creation of a legal framework ensuring effective judicial protection will be formulated. Chapter 7 is dedicated to the synthesis and conclusions, as well as to the recommendations, thereby addressing the second part of final sub-question 4.

1.5 SELECTION OF COMPOSITE PROCEDURES AND SCOPE

This dissertation focuses on the elements of the SSM that qualify as an integrated administration. More specifically, the study will be dedicated to a specific type of integrated administration: composite procedures. Composite procedures may generally be defined as a procedure ‘entailing the input of administrative actors from different jurisdictions, and in which the final decision, issued by a Member State or a EU authority, is based on procedures involving more or less formalized input of the various authorities’.³⁸ Within the SSM, composite procedures are characterised by the decisional involvement of both the ECB and the relevant NCA. For the purpose of this study, two categories of composite procedures will be distinguished, based on the direction of the procedure: bottom-up composite procedures (from national to EU level) and top-down composite procedures (from EU to national level).³⁹

Specifically, four SSM composite procedures will serve as case studies in Chapters 5 and 6. The selected SSM procedures are:

38 Definition proposed by Eliantonio 2015, p. 68-69. For an overview of definitions of composite procedures proposed in legal literature, see Ch. 5, para 5.2.

39 On this categorisation of composite procedures, see Alonso de León 2016, p. 192-193 and Della Cananea 2004, p. 199-203.

- a. Procedure for authorising a credit institution;
- b. Procedure for withdrawing authorisation as a credit institution upon a proposal of the relevant NCA;⁴⁰
- c. Procedure for authorising the acquisition of a qualifying holding in a credit institution;
- d. ECB instruction addressed to an NCA instructing it to take a specific action under national law vis-à-vis an individual credit institution (encompassing both an ECB instruction requiring an NCA to exercise a national power in case the SSM Regulation does not confer such a power upon the ECB (Art. 9(1), third subpara, SSM Regulation) and an ECB instruction requiring an NCA 'to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with' national law (Art. 18(5) SSM Regulation).

Although these scenarios have been explained in detail, the findings may be extrapolated to other composite procedures. Furthermore, this study will be dedicated to 'judicial protection' in SSM composite procedures. For the purpose of this study, judicial protection will cover both the action for annulment and the action for damages. Due to its focus on 'judicial' protection, this dissertation will not cover administrative review by the ECB's Administrative Board of Review (ABoR). As a result of the integrated nature of the SSM, the interaction between the EU legal framework for judicial protection and the national legal framework of judicial protection constitutes a central element. The selected Member State for analysing the national legal framework for judicial protection is the Netherlands.

Inevitably, the scope of this research is limited in a number of respects. The development towards an integrated administration and its tensions with judicial protection is an EU-wide issue, not unique to the SSM. Yet for an in-depth analysis of the specific problems the paradox poses for a particular field, one needs to zoom into that specific area. The aim of this research is to find those specific problems within the SSM, instead of approaching the topic from a broader EU perspective.

Within the broader area of EU financial regulation, i.e. outside of the SSM, and even broader than financial regulation, i.e. all the EU areas of law which characterise as an integrated administration, similar problems of judicial protection arise and have been acknowledged in legal scholarship. The most apparent example in the broader area of financial regulation is the Single Resolution Mechanism (SRM). This 'twin' of the SSM governing the resolution of credit institutions comprises an EU supranational body, the Single Resolution Board (SRB), and the National Resolution Authorities (NRAs) together. Several composite procedures have been included in the SRM legal framework. Despite the similarities between the SSM and the

40 The procedure for withdrawing authorisation only qualifies as a composite procedure where the withdrawal is proposed by the relevant NCA. A withdrawal decision may also be taken by the ECB without such a proposal.

SRM, this research will, however, exclusively focus on the SSM. This focus will allow for in-depth research into the SSM while ensuring the dissertation stays within acceptable size limits. Nonetheless, it may be of relevance to all EU areas of integrated administration.

Furthermore, the normative legal approach this research adopts is that of effective judicial protection. Several other normative approaches could have been chosen, either alternatively or in addition to the current approach. Examples would be the effectiveness of SSM supervision⁴¹ or a combination of effective judicial protection and accountability.⁴² This has been done by others. Moreover, effective judicial protection has been chosen because of the importance of a counterweight to the increased executive powers of the ECB.

1.6 RELEVANCE

This dissertation attempts to analyse the functioning of the EU system of judicial protection with regard to the SSM, detect any problems regarding effective judicial protection and to propose recommendations for improving the current framework for judicial protection as well as the SSM. Its findings may be of relevance to the financial sector, in particular credit institutions, its management, shareholders and creditors (including bondholders and depositors), the ECB and the NCAs, the EU and national judiciaries and the EU and national legislatures, and beyond, i.e. other areas of integrated administration.

First and foremost, the analysis of the workings of the EU system of judicial protection in relation the SSM may benefit the potential stakeholders involved in litigation against the ECB and NCAs. The central stakeholders are the supervised credit institutions that will generally be the addressee of a supervisory decision. Another central stakeholder are the shareholders, which very well may be a national State. They may be affected by supervisory decisions addressed at the relevant credit institution, for example the imposition of a fine or the withdrawal of the banking license. Shareholders may in their capacity as shareholder-applicant also be involved in the procedure for the assessment of the acquisition of qualifying holdings in a credit institution, the assessment of which is laid down in a composite procedure involving both the ECB and the relevant NCA. Other stakeholders that could initiate proceedings in the capacity of applicant include a credit institution's management and its creditors, including bondholders and depositors. Moreover, the ECB, the NCAs as well as the judiciaries qualify as stakeholders. All these stakeholders may benefit from the mapping out and analysis of the EU system of judicial protection in relation to the SSM, for example to determine which judicial level or judicial levels are compe-

41 For this approach, in addition to effective judicial protection, see Wissink 2021.

42 For this approach, see Scholten 2019, p. 538-553.

tent in an action for annulment or an action for damages. For applicants, this knowledge will guide them in selecting the correct competent judicial level and thus bringing an action before the correct forum. Also for the ECB and the NCAs it is essential to understand whether a specific decision or preparatory act qualifies as a reviewable act, under EU law or national law, whether a certain applicant has legal standing at the EU level or the national level and thus, for instance, make estimations on the chances of litigation proceedings against a certain act. Furthermore, for the judiciaries, both at the EU and the national level, it is key to know whether they have jurisdiction in an action brought against an act that is part of a composite procedure. For example, the landmark ruling in *Berlusconi and Fininvest v Bank of Italy* has prohibited national courts from adjudicating an action for annulment instituted against an NCA preparatory act that is an element of a composite procedure in which the ECB has the 'exclusive decision-making power'.⁴³ A full understanding of this ruling and its application to similar procedures and to actions for damages is of the utmost importance for assessing their own jurisdiction.

Secondly, the recent Europeanisation and integration of financial supervision, especially regarding the Banking Union and the SSM, is a highly relevant, topical and revolutionary development. The features of the SSM constitute a novelty in many respects. In addition, this development will only become more important as there is a broader tendency towards Europeanisation of enforcement, and more specifically, of financial supervision.⁴⁴ Moreover, policymakers are still in the phase of evaluating the new supervisory reality. This research will contribute to this process of evaluation, demonstrating its immediate societal and academic relevance.

Thirdly, adherence to fundamental legal principles in the post-crisis economic reality must be addressed. The ECB's far-reaching supervisory powers require a critical assessment of the judicial accountability regime and adherence to the principle of legitimacy and the rule of law. This is because the legitimacy of the ECB's independence⁴⁵ must rely on a strong accountability framework.⁴⁶ The right to judicial protection is not only an individual fundamental right, but it also serves as a crucial function in a democratic society, by providing judicial accountability of the authorities. Judicial accountability can be regarded as one of the most important control mechanisms for administrative action.

Fourthly, the EU and the eurozone are again facing major economic difficulties, if not crises, both monetary and economic. The economic after-effects of the covid pandemic, high inflation, an energy crisis and the war in Ukraine are looming over the Member States which may be facing a recession. These issues already have and will continue to have consequences for

43 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

44 See also Scholten 2017, p. 1348-1366.

45 See Art. 130 TFEU and Art. 7 Statute of the ECB and the ESCB.

46 See Ferran & Babis 2013, p. 270 et seq.

the financial and banking sector so that these developments require once more strong financial regulation and supervision and cross-border resolution and insurance mechanisms, as the Banking Union aims to provide.

1.7 RELATIONSHIP TO OTHER RESEARCH

A long-standing academic debate has existed on the paradox of an EU integrated administration and a dualistic system of judicial protection and its consequences for judicial protection. Some legal scholars have approached this topic from a general, EU-wide perspective, while others have directed their focus at specific EU policy areas. Since the establishment of the SSM in 2014, several legal scholars have dedicated their research to this revolutionary type of integration. Furthermore, since the start of the research for this dissertation in 2017, various contributions and dissertations were published covering specifically the topic of judicial protection within the SSM.

Scholars that have adopted a more general, EU-wide approach in addressing the legal ‘challenges’ characteristic of the phenomenon of an EU integrated administration include, prominently, Hofmann and Türk. In their 2009 edited volume *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* they seek to address the issues of accountability, legality, legitimacy and efficiency of the actors and acts in the EU integrated administration.⁴⁷ Hofmann and Türk observe that a structured legislative approach is lacking and that the development towards an integrated administration has not been accompanied by a general EU administrative procedures act.⁴⁸ Hofmann’s contribution addresses composite procedures and identifies a ‘gap’ between the integrated organisation of composite procedures on the one hand and the strictly separated two-level-structured mechanisms of accountability and judicial review on the other, causing problems for the allocation of errors within the procedure and for adequate remedies.⁴⁹ One of the recommendations of Hofmann seeking to overcome this gap in vertical composite procedures, i.e. involving both authorities from the EU and a Member State, is the introduction of a reverse preliminary reference procedure, allowing the EU Courts to refer a question of interpretation or review of national law to a national court.⁵⁰ In addition, Hofmann argues that the EU Courts should incidentally review the legality of national input where this input has been given under EU law, enabling them to review the entire procedure.⁵¹ ‘In essence’, Hofmann summarises, ‘the problems consist of linking administrative procedures into complex composite structures without establishing supervision adequately

47 Hofmann & Türk 2009a.

48 Hofmann & Türk 2009c, p. 355.

49 Hofmann 2009a, p. 136-167; Hofmann & Türk 2009c, p. 366-367.

50 Hofmann 2009a, p. 158-159, 167; Hofmann & Türk 2009c, p. 368-370.

51 Hofmann & Türk 2009c, p. 369. See also Hofmann 2009a, p. 159.

developed to address the conditions of the networks.⁵² Other legal scholars that have addressed the issue of judicial protection in composite procedures include Cassese,⁵³ Nehl,⁵⁴ Eliantonio⁵⁵ and Brito Bastos.⁵⁶

Furthermore, four dissertations deserve particular attention, as they specifically address the topic of judicial protection within the SSM. The dissertations are written by Vossen (Germany),⁵⁷ Wissink (the Netherlands),⁵⁸ Karagianni (the Netherlands),⁵⁹ and Van Rijn (the Netherlands).⁶⁰ The principal question in the dissertation of Vossen is whether and to what extent the integrated administration of the SSM is accompanied by effective and coherent judicial protection.⁶¹ The normative blueprint of his study is that the principle of separation (*'Trennungsprinzip'*), underlying the EU system of judicial protection, should in principle be respected.⁶² Central to his study are the efforts to categorise and label the various integrated elements of the SSM, aiming to fit the SSM into the traditional administrative law concepts and discourse and detect elements that do not seem to fit. Vossen finds that the specifics of the SSM's structure and integration particularly pose risks for three elements of judicial protection: clarity on the competent judicial level (*'Rechtswegklarheit'*), full jurisdiction (*'Umfassende gerichtliche Kontrolle'*) and timely judicial protection (*'Rechtzeitiger Rechtsschutz'*).⁶³ To overcome these risks for judicial protection, several recommendations are formulated that seek a better alignment between the integration within the SSM and the dualistic system of judicial protection.⁶⁴ Vossen specifically warns for recommendations that would constitute an overhaul of the current EU system of judicial protection, so as to prevent infringing the constitutional foundations of the EU and unwanted and unanticipated consequences for the EU system as a whole.⁶⁵ Therefore, he rejects the idea of altogether leaving the concept of a dualistic organisation of the division of jurisdiction between the national courts and the EU Courts.⁶⁶ A selection of his recommendations that aim to adjust the system of judicial protection without overhauling, include the EU Courts' competence to review national preparatory acts⁶⁷ and a reverse preliminary reference procedure

52 Hofmann 2009a, p. 153.

53 Cassese 2004, p. 21-36

54 Nehl 2011, p. 629-652.

55 Eliantonio 2015, p. 65-102; Eliantonio 2014, p. 116-126.

56 Brito Bastos 2018, p. 101-134; Brito Bastos 2020, p. 63-90.

57 Vossen 2020.

58 Wissink 2021.

59 Karagianni 2022.

60 Van Rijn 2022.

61 Vossen 2020, p. 17.

62 Vossen 2020, p. 256-257.

63 Vossen 2020, p. 247 et seq.

64 Vossen 2020, p. 254 et seq.

65 Vossen 2020, p. 254-256.

66 Vossen 2020, p. 256-257.

67 Vossen 2020, p. 257-258.

for questions concerning national law.⁶⁸ The specific design of the latter recommendation is elaborated in detail by Vossen.⁶⁹ Vossen also suggests that the ABoR could be designed as such to remedy any gaps currently existing in judicial protection.⁷⁰

Wissink's dissertation addresses the question of how effective legal protection can be ensured in SSM complex composite procedures without hampering the effective implementation of EU law.⁷¹ In her dissertation she adopts a broad definition of effective legal protection, encompassing both legal safeguards in the administrative phase as well as judicial protection by the courts.⁷² In my dissertation, I chose to focus exclusively on judicial protection by the courts. Furthermore, Wissink's normative framework comprises two normative elements that are not necessarily similar: effective legal protection and the effective implementation of EU law. She detects several problems in ensuring effective legal protection. These include the limits of the EU Courts in reviewing national preparatory acts in bottom-up composite procedures in light of national law⁷³ and the fact that in top-down composite procedures for a full judicial review an applicant is dependent on the willingness of the relevant national court to refer a preliminary question.⁷⁴ Recommendations formulated by Wissink include introducing a reverse preliminary reference procedure for bottom-up composite procedures,⁷⁵ further harmonisation of EU banking regulation⁷⁶ and of administrative standards that the NCAs must adhere to⁷⁷ and the introduction of the possibility of referral from the EU Courts to the national courts and vice versa where the court seised is not competent.⁷⁸

Karagianni's dissertation primarily focuses on SSM composite punitive enforcement proceedings and their compliance with a selection of EU fundamental rights. These rights are the right to privacy, the rights of the defense, the right to access to court and the *ne bis in idem* principle.⁷⁹ Much like the approach undertaken in this dissertation, Karagianni delves into the interplay between the EU and the national legal frameworks governing the enforcement of EU banking regulation. This analysis occurs against the backdrop of the paradox presented by an integrated administration and the traditional systems of executive control. In addition to analysing the EU legal framework, Karagianni examines the national legal frameworks appli-

68 Vossen 2020, p. 259-260.

69 Vossen 2020, p. 260 et seq.

70 Vossen 2020, p. 269-271.

71 Wissink 2021, p. 8.

72 Wissink 2021, p. 8-9.

73 Wissink 2021, p. 292 et seq.

74 Wissink 2021, p. 301-302, 305-306.

75 Wissink 2021, p. 308-310.

76 Wissink 2021, p. 310-311.

77 Wissink 2021, p. 311.

78 Wissink 2021, p. 313.

79 Karagianni 2022, p. 15, 18.

cable in the Netherlands and Greece.⁸⁰ Despite the similarities, Karagianni's dissertation takes a different direction than this one. Most importantly, in addition to the distinct set of fundamental rights constituting the normative framework, the focus on punitive enforcement procedures permeates the dissertation. It places particular emphasis on the criminal elements of the selected fundamental rights, including the right not to incriminate oneself. Furthermore, central to the dissertation are the investigative phase and the obtainment, transfer and use of information for the purpose of punitive proceedings. Additionally, her work highlights the interaction between administrative and criminal law enforcement. The recommendations provided, a total of eleven, offer detailed and specific guidance. They relate to, *inter alia*, aligning the information-gathering powers of the NCAs with those of the ECB, laying down the content of the rights of defense, including privilege against self-incrimination, explicitly in the SSM Regulation, including a mandatory *ex ante* judicial authorisation for on-site inspections in the SSM Regulation and enhancing the cooperation between the national courts and the EU Courts, via either a reverse preliminary reference procedure or via a mechanism of national courts acting as an *amicus curiae*.⁸¹

The dissertation of Van Rijn is also, partly, dedicated to judicial protection within the SSM, with a focus on composite procedures. The central normative element of his study is the right of access to court with a focus on the formal rather than the substantive element of judicial protection, i.e. regarding access instead of the standard of judicial review.⁸² The two sub-questions he seeks to answer are: i) which acts can an individual subject to judicial review before a national or EU court?; and, ii) to what extent can the competent court include input from a different jurisdiction in its review? He concludes that the EU system for judicial review does not fit well for composite procedures and he proposes strengthening cooperation mechanisms between the EU Courts and national courts.⁸³ The main problems for judicial review of SSM composite procedures Van Rijn discerns are the difficulties in assessing which act or acts are reviewable and what the competent judicial level is due to the ambiguities surrounding the concept of 'discretion' or 'final decision-making power'⁸⁴ and the limits of the EU Courts' jurisdiction to review the validity of national preparatory acts.⁸⁵ His recommendations comprise providing more transparency of the authorities and acts involved in composite procedures, including communicating the available judicial avenue(s) to the individual concerned by the authority exercising the final decision-making power,⁸⁶ (for top-down composite procedures)

80 Karagianni 2022, p. 15-17.

81 Karagianni 2022, p. 250 et seq.

82 Van Rijn 2022, p. 6-7.

83 Van Rijn 2022, p. 577.

84 Van Rijn 2022, p. 578-580, 606.

85 Van Rijn 2022, p. 581-584, 606-607.

86 Van Rijn 2022, p. 584-586, 612-613.

widening the access to an indirect review via a preliminary reference procedure, also where a direct action before the EU Courts would have been available⁸⁷ and (for bottom-up composite procedures) enhancing cooperation between the national courts and EU Courts in situations where the EU Courts must apply national law or review the validity of national acts.⁸⁸

This dissertation aims to both incorporate the existing academic literature as well as contribute to it, furthering the academic debate on judicial protection in an integrated administration in general and within the SSM in particular. It will partly cover similar topics as the three dissertations just mentioned, yet takes a different approach in several respects. Firstly, a great emphasis will be placed on developing the normative framework and more specifically on the issue of reconciling the current interpretation and application of the EU principle of effective judicial protection with the increasingly integrated EU administration. Secondly, the definition of judicial protection in this dissertation will encompass both the action for annulment and the action for damages, whereas the three dissertations mentioned above focus exclusively on the former. Consequently, also the interaction between these two actions will be analysed, including the extent to which existing case law in the area of judicial review, including, most notably, *Berlusconi*, will also apply to actions for damages within the SSM. Thirdly, instead of focusing exclusively on EU law, as was done in the three dissertations highlighted above, central in this dissertation will be the interaction between the EU law framework and the (Dutch) national law framework governing judicial protection.

The research for this dissertation was finalised on 1 September 2023.

87 Van Rijn 2022, p. 586-588, 613-615.

88 Van Rijn 2022, p. 588-591, 615-617.

2.1 INTRODUCTION

This chapter aims to develop a normative framework for answering the central research question of this dissertation: Is effective judicial protection currently guaranteed within the Single Supervisory Mechanism; and, if not, how should effective protection be achieved?¹ The normative framework will be applied to the findings in the subsequent chapters, specifically Chapters 5 and 6, that deal with the action for annulment and the action for damages in SSM composite procedures, respectively. Through applying the framework, this research seeks to detect shortcomings in judicial protection, as well as to formulate recommendations for improving the current legal framework.

Central to the normative framework is the EU principle of effective judicial protection. Yet I aim to demonstrate in this chapter that, perhaps somewhat counterintuitively, the current interpretation and application of the principle of effective judicial protection by the EU Courts does not adequately address judicial protection problems characteristic of composite procedures. Although the principle has shown effective in remedying lacunae with respect to the right to access to a court,² its role in guaranteeing the substantive element of the principle of effective judicial protection, the right to an effective remedy, in composite procedures has been limited. While gaps pertaining to access to a court have been remedied, new problems relating to effective remedies have arisen. Accordingly, a party affected by a supervisory decision that is adopted via a top-down composite procedure may be required to institute actions in multiple jurisdictions to obtain redress through judicial review and subsequent annulment or via an action for damages, affecting the right to an effective remedy. And in bottom-up composite procedures falling within the exclusive jurisdiction of the EU Courts under Article 263 TFEU,³ the right to an effective remedy is affected as a result of irregularities originating at the national level remaining largely unsanctioned where it concerns infringements of national law. Both situations have in common that a composite procedure that due to its very nature and from the perspective of the affected party is unitary, is

1 This chapter contains and builds on Budinská & Tegelaar 2023, p. 329-351.

2 See, e.g., Case C-97/91 *Borelli* ECLI:EU:C:1992:491; Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

3 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

‘compartmentalized’⁴ at the judicial level: national courts are competent to review the legality of national acts and the EU Courts to review the legality of EU acts. While the landmark judgment in *Berlusconi* has eased the degree of compartmentalisation by assuming jurisdiction over national preparatory acts in bottom-up SSM composite procedures in an action for annulment, the national phase remains partially unreviewable by the EU Courts.

The EU and Member State administrative levels are increasingly mixed and intertwined. As already discussed in Chapter 1, this development is far from unique for the European Banking Union and the SSM and may be observed in many areas. Areas that for the execution of EU law rely on composite procedures include European Structural Funds, the protection of geographical indications and designations of origin and the authorisation of genetically modified organisms.⁵ The compartmentalisation of composite procedures at the judicial level, in actions for annulment and actions for damages, which has its roots in the traditional idea of ‘executive federalism’,⁶ is at odds not only with the very unitary nature of such procedures, yet also with the rule of law. To speak with Scholten: ‘These complex, multi-level governance structures and procedures, in turn, require sophisticated systems of controls over public power to safeguard and uphold the rule of law.’⁷ Accordingly, I will argue in this chapter that for the rule of law and effective judicial protection to be observed in composite procedures, the system of judicial protection must become aligned with the administrative unity in composite procedures.

The current interpretation and application of the principle of effective judicial protection in EU case law however do not seem sufficient to reach the necessary alignment. The current interpretation of the principle of effective judicial protection allows for the situation where two separate competent levels must be sought to review one composite procedure and for a limited reviewability of national preparatory acts by the EU Courts, maintaining a *status quo* in judicial protection. For the principle of effective judicial protection to provide for effective protection in composite procedures it thus is necessary for it to require alignment. Put differently, the principle must require viewing the separate administrative levels pertaining to different jurisdictions as ‘unitary’ for reasons of judicial protection.

A central notion enabling alignment and ‘uniting’ the separate administrative levels is ‘imputation’: Errors originating from one administrative level may be imputed to the other administrative level. Imputation will facilitate a full centralisation of actions for annulment and actions for damages, both in respect of access to a court and an effective remedy. Imputation will furthermore allow for extending judicial scrutiny of the competent

4 For this terminology, see Gaztea 2019, p. 9-37.

5 Cf. Opinion AG Campos Sánchez-Bordona in Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:502, para 3.

6 See Ch. 1, para 1.2.1.

7 Scholten 2020, p. 538.

judicial level to the phase of the procedure that was carried out beyond the jurisdiction to which the competent level belongs.

For the necessary expansion of the interpretation and application of the principle of effective judicial protection, inspiration will be drawn with the EU principle of good administration and more specifically its general duty of care, encompassing the administrative authority's duty to examine carefully and impartially all the relevant factual and legal aspects of the individual case. In EU case law, the duty of care has fostered the doctrine of imputation, enabling the imputation of errors originating at the national level to the EU authority responsible for adopting the final decision. Yet, I will argue in favor of a more far-reaching imputation than the doctrine developed in EU case law. Whilst the doctrine of imputation rooted in the duty of care requires some form of culpable behavior by the authority to which another error will be imputed, I will argue that NCA errors may be imputed to the ECB without the existence of a self-standing error committed by the ECB, for instance comprising of not remedying an NCA error while the ECB had the necessary tools at its disposal. This type of imputation, I will assert, is necessary for guaranteeing effective judicial protection in SSM composite procedures as it will align the judicial system with the administrative unity of composite procedures.

This chapter is structured as follows. First, an overview of legal literature on judicial protection will be provided, including the most important potential threats, in the legal literature cited often referred to as 'challenges', for judicial protection identified in legal literature and a brief overview of the solutions proposed. Second, the rule of law in composite procedures is discussed as the foundation of the principle of effective judicial protection. Third, the central element of the normative framework, the principle of effective judicial protection is explored. This chapter makes no pretence of being a complete study of the principle of effective judicial protection. The 'sub-principles' of the principle of effective judicial protection that will be most relevant for this dissertation will be selected, based on the literature review and more specifically the identified problems. Finally, I will propose the necessary expansion of the current interpretation and application of the principle in composite procedures, for which I will draw inspiration from the doctrine of imputability and its foundation, the duty of care.

2.2 LEGAL LITERATURE ON JUDICIAL PROTECTION IN COMPOSITE PROCEDURE

2.2.1 Potential threats...

Inherent to principles in general and the principle of effective judicial protection specifically, is that they encompass a wide range of 'sub-rights' or 'sub-principles'. For this dissertation, a selection of sub-principles will be made to design a framework that will be most relevant for the specifics of judicial protection in SSM composite procedures. To be able to make this

selection of sub-principles, the potential threats regarding judicial protection in an integrated administration and composite procedures as identified in legal literature will now be discussed.

Potential threats to judicial protection in an integrated administration in general, and composite procedures in particular, are often identified in legal literature, often euphemistically referred to as ‘challenges’.⁸ The mismatch between the increasingly integrated EU administration and the dualistic blueprint of the EU judicial system is generally considered a source of problems for judicial protection.⁹ Whilst the EU increasingly developed towards an administration where the EU and the Member States closely cooperate, the judicial system ‘has remained anchored to a traditional view of executive federalism.’¹⁰ With regard to composite procedures, the mismatch leads to a decision-making procedure characterised by joint efforts that must be reviewed in a dualistic judicial system consisting of judicial levels whose scope of jurisdiction generally does not comprise the entire decision-making procedure or is ill-suited for reviewing a multi-jurisdictional decision-making procedure.

The first threat identified is the challenges for courts and parties to allocate the responsibilities between the various authorities involved in an integrated administration.¹¹ These challenges directly result from the complexity of the system of judicial protection in conjunction with the characteristics of an integrated administration. Such allocation of administrative responsibilities is necessary to select the correct judicial level, national, EU, or both, for judicial review as well as in an action for damages. As Hofmann puts it: ‘Effective judicial control, therefore, relies on the courts’ ability to allocate responsibility and to reduce the inherent complexity of EU administrative governance arrangements.’¹² And as J. Hofmann submits: ‘The lack of clear demarcation of responsibilities causes a lack of clear demarcation of jurisdictions.’¹³

A second threat is ‘gaps’¹⁴ or ‘black holes’¹⁵ in access to judicial protection. These gaps are inherent to a dualistically organised judicial system that must develop constantly to adapt to the reality of an integrated administration. The quest for alignment of the national and EU judicial levels may

8 See, e.g., Alonso de León 2016; Eliantonio 2015, p. 65-102; Safjan & Dürsterhaus 2014, p. 3-40; Della Cananea 2004, p. 197-217; Hofmann & Türk 2007, p. 253-271; Hofmann 2009a, p. 136-167; J. Hofmann 2011, p. 441-466.

9 See, e.g., Eliantonio 2015, p. 65-102; Hofmann 2009a, p. 136-167; Hofmann 2019; Brito Bastos 2020, p. 63-64; Scholten 2019, p. 538-553; Gaztea 2019, p. 9-37.

10 Eliantonio 2015, p. 65-102.

11 See, e.g., Hofmann & Türk 2007, p. 267-268; Hofmann 2009b, p. 43-45; Hofmann 2009a, p. 152-157; J. Hofmann 2011, p. 441-466.

12 Hofmann & Türk 2006a, p. 589.

13 J. Hofmann 2011, p. 451.

14 See, e.g., Eliantonio 2015, p. 65-102; Wissink, Duijkersloot & Widdershoven 2014, p. 92-115.

15 Introduction to the ReNEUAL Model Rules; Book I – General Provisions, para 59.

result in gaps that concern the absence of a competent judicial level where neither the national nor the EU judicial level consider themselves competent for providing judicial protection. Such a gap occurred in the landmark judgment of *Borelli*.¹⁶ The gap was remedied by the Court, as it required national courts to allow for access by providing for judicial review of national acts that are binding on the EU institution that takes the final decision, even if such (preparatory) national acts are considered unreviewable under national law.¹⁷ Another gap has been remedied by the Court in *Berlusconi and Fininvest v Bank of Italy*, a case that will be discussed extensively later on in this chapter, and concerns the general non-reviewability under national laws of non-binding national preparatory acts that precede an EU final act.¹⁸ To ensure effective judicial protection, the Court in *Berlusconi and Fininvest v Bank of Italy* held that under Article 263 TFEU it not only is exclusively competent to review EU acts, but also any preceding non-binding national acts that would otherwise generally remain unreviewable.¹⁹ It may be inferred from EU case law, that any such gaps in access to judicial protection will be remedied. Yet this case law does not prevent that in new areas of integrated administration, including the SSM, new gaps may continue to arise that need to be identified and remedied. Moreover, other gaps may continue to exist or occur as a result of remedying another gap, as will be discussed below as problems number three and four.

The third and fourth threats that will be discussed, are inherent to a dualistically organised judicial system where the scope of jurisdiction of each of the judicial levels is limited, generally to acts issued within their jurisdiction. The unreviewability of national law in composite procedures where the EU Courts have exclusive competence, as established in *Berlusconi and Fininvest v Bank of Italy*, is recognised as a third problem or ‘gap’.²⁰ Unreviewability has two causes. The first cause is the general absence of jurisdiction of the EU Courts to apply national law, also when reviewing composite procedures that involve national preparatory acts.²¹ Due to this lack of competence, national preparatory acts cannot be assessed in light of national

16 Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

17 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 13.

18 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023. For the conclusion on the general non-reviewability of national preparatory acts for the German and Italian legal systems, see Eliantonio 2008, p. 36-37, 43 and 65-66. Eliantonio finds that under English law preparatory acts are generally reviewable, provided that such an act affects the individual’s legal sphere, see p. 54-55 and 65.

19 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 44.

20 Brito Bastos 2020, p. 63-90; Gagliardi & Wissink 2020, p. 41-71; Tegelaar 2022, p 131. In the absence of a general EU administrative law, national authorities primarily apply national administrative law when participating in a composite procedure. An important initiative to create an EU general administrative law are the ReNEUAL Model Rules on EU Administrative Procedure. See the European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)).

21 Brito Bastos 2020, p. 73-78.

law, even though the relevant national authorities' decision-making is governed by, alongside EU law, national law. This conclusion must be somewhat nuanced for the SSM, as Article 4(3) SSM Regulation may be said to provide for the EU Courts' jurisdiction to assess ECB acts in light of national law as defined in that provision.²² National law within the definition of Article 4(3) SSM Regulation, therefore, does not constitute a blind spot in EU judicial review. Yet the scope of national law as referred to in this provision is limited. General national procedural law and national principles of good governance for instance are considered not covered by this provision.²³ As a result, any infringements of national law outside of the scope of Article 4(3) SSM Regulation remain outside of the scope of EU judicial review and therefore are unreviewable. The second cause of the unreviewability of national law is the lack of 'derivative illegality' of the final EU act, where a national preparatory act has been adopted in breach of national law.²⁴ Based on a systematic exploration by Brito Bastos of the conditions under which the Court accepts derivative illegality, he concludes that it is only accepted where national acts are vitiated on grounds of EU law.²⁵ If derivative illegality may only arise where a national act is vitiated on grounds of EU law, this effectively excludes national law from judicial review.²⁶

A fourth threat identified in legal literature is the necessity of litigation at two judicial levels, national and EU, to obtain a review of both the national and the EU act involved in a top-down composite procedure,²⁷ as well as in certain circumstances to obtain full compensation in an action for damages.²⁸ Where it concerns a judicial review of top-down composite procedures, the necessity of having both the national judicial level as well as the EU level involved to obtain a full review, directly results from the *Foto-Frost* doctrine: national courts cannot declare an EU act invalid.²⁹ Parties thus need to turn to the EU Courts if they wish to have the EU act reviewed. Because a direct action under Article 263 TFEU in such a situation would likely be dismissed because of the EU legal standing requirement of direct concern, parties are for judicial protection dependent on the preliminary reference procedure of Article 267 TFEU. Substantial delays in judicial protection are the first consequence of this dependency, as also acknowledged by AG Jacobs in his Opinion in *Unión de Pequeños Agricultores v Council*: 'Proceedings in the national courts, with the additional stage of a reference under Article 234 EC, are likely to involve substantial extra delays

22 For this view, see Gagliardi & Wissink 2020, p. 55; Tegelaar 2022, p. 130-131. Cf. Brito Bastos 2020, p. 85.

23 Lackhoff 2017, p. 108.

24 Extensively on 'derivative illegality', see Brito Bastos 2018, p. 101-134.

25 Brito Bastos 2018, p. 126-130.

26 Brito Bastos 2020, p. 78-79; Brito Bastos 2018, p. 113.

27 Gaztea 2019, p. 13-14. Cf. Opinion AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197.

28 De Visser 2004, p. 52.

29 Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452.

and costs'.³⁰ A second consequence is a dependency on the willingness of national courts to refer a preliminary question on validity to the Court for a full review. Indirect review under Article 267 TFEU does not exist as a matter of right to applicants.³¹ It was further held in the cases *International Air Transport Association* and *Danzer*, that the fact that parties contest the validity of an EU act is not in itself sufficient to initiate a preliminary reference procedure and that national courts may reject parties' arguments in support of invalidity of the EU act and conclude that the EU act is valid.³² The necessity to litigate at two judicial levels to obtain full compensation where damage has resulted from a composite procedure follows from the 'duty to exhaust national remedies' that was introduced by the Court in *Kampffmeyer v Commission*.³³ In this judgment, the Court found a wrongful Commission act capable of giving rise to liability, yet required the applicants to first seek compensation at the national level in proceedings against the relevant national authorities, which the Court found 'necessary to avoid the applicants' being insufficiently or excessively compensated for the damage by the different assessment of two different courts applying different rules of law'.³⁴

A fifth threat, specifically concerns actions for damages, rather than judicial review or action for annulment, and encompasses the existence under national law of statutory limitations that limit or exclude the liability of national financial supervisory authorities and thus NCAs.³⁵ It may seem that this problem does not immediately link to the specificities of an integrated administration. Yet specifically for damage arising in the context of an integrated administration, for compensation, a party may be dependent on national courts and national rules on non-contractual liability, even where an EU authority is involved, as was already touched upon above with the *Kampffmeyer v Commission* judgment. National statutory limitations of supervisory liability, therefore, are specifically relevant for judicial protection within the SSM; where the ECB cannot be held liable, a party that incurred damage must litigate at the national level against the NCA. An action for damages may be considered the final piece in the system of judicial protection against administrative authorities, including financial supervisory authorities. An action for annulment will often precede a non-contractual liability claim. Parties that incurred damage resulting from an

30 Opinion AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197, para 44.

31 See Opinion AG Jacobs in AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197, para 42.

32 Case C-344/04 *International Air Transport Association* ECLI:EU:C:2006:10, para 28-29; Case T-47/02 *Danzer* ECLI:EU:T:2006:167, para 37.

33 Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31.

34 Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31, ECR, p. 266.

35 On the Dutch statutory limitation, see Tegelaar 2016, p. 705-715 and Tegelaar 2017. On the German statutory immunity, see Schürger 2021.

administrative act, may obtain compensation via an action for damages. In addition, where judicial review is not available, parties can obtain judicial protection via an action for damages. An action for damages will not lead to retroactive voidance of a certain act, yet will provide for compensation for any damage that occurred. Judicial review may for instance not be available where an act does not qualify as a reviewable act, or where a party does not fulfil the requirements for legal standing in judicial review. Limiting or excluding liability thus both limits the availability of monetary compensation where an act has been annulled in judicial review and the availability of any judicial protection in a situation where no judicial review is available.

2.2.2 ...and proposed solutions

Various solutions have been proposed in the legal literature to address the potential threats to judicial protection in an integrated administration and composite procedures. Several authors have also formulated solutions specifically for the SSM. Solutions in general for an integrated administration include enacting EU procedural rules on access to effective remedies and the division of responsibility,³⁶ introducing cooperative structures for the Member States' and EU judicial levels that mirror the structures of administrative cooperation³⁷ and, related to the former, the introduction of a reverse (or inverse) preliminary reference procedure.³⁸ In the context of the SSM, the following solutions have been suggested by scholars: a reverse preliminary reference procedure,³⁹ extending the Court's jurisdiction to review national law and national preparatory acts,⁴⁰ application of the concept of imputation to impute procedural errors at the NCA level to the ECB⁴¹ and harmonisation in detail of the national preparatory phase in composite procedures.⁴²

2.3 RULE OF LAW IN COMPOSITE PROCEDURES: ALIGNING EXECUTIVE POWERS AND JUDICIAL PROTECTION

2.3.1 Introduction

What the above list of potential threats to judicial protection in an integrated administration and composite procedures lays bare, is what Scholten

36 Hofmann 2019, p. 25.

37 Gaztea 2019, p. 9-37.

38 Hofmann 2009a, p. 159; Hofmann & Türk 2009c, p. 375; Alonso de León 2016, p. 429-442.

39 Wissink 2021, p. 308-310; Gagliardi & Wissink 2020, p. 66; Van Rijn 2022, p. 573-575.

40 Van Rijn 2022, p. 572.

41 Van Rijn 2022, p. 567-570.

42 Brito Bastos 2020, p. 89.

calls a lack of ‘sophisticated systems of controls over public power to safeguard and uphold the rule of law’⁴³ and a ‘disconnection of the systems of controls between the EU and national legal orders for shared tasks.’⁴⁴ This disconnection hampers ensuring the rule of law, and accordingly judicial control, judicial accountability, and judicial protection in composite procedures.

2.3.2 EU rule of law

Conceptually, the principle of effective judicial protection finds its origin in the rule of law.⁴⁵ That governments are limited by and must act in accordance with the law and are subject to judicial review are the core of the rule of law. This element of the rule of law is also known as the principle of legality. Government bodies may be held accountable in the courts with the judiciary as the primary caretaker of ensuring the respect of the rule of law, i.e. ‘judicial accountability’. The other side of the coin of judicial accountability of public authorities is judicial protection for those affected by government action. The principle of effective judicial protection provides for judicial control of the legality of government actions and therefore serves as a means to uphold the rule of law. Effective judicial protection and judicial review are ‘intrinsic components’ of the rule of law.⁴⁶ More specifically, the rule of law ‘provides the foundation for judicial review and implies the existence of comprehensive and complementary judicial review processes’.⁴⁷ Subsequently, the judicial review provides for a means to assess whether the principle of legality, as well as the principle of effective judicial protection, are complied with.⁴⁸

The EU is based on the rule of law, as was emphasised in the famous *Les Verts* judgment in 1986.⁴⁹ From this judgment, it may be discerned that the ‘central ‘moral’ purpose’ of the EU rule of law is ‘to guarantee the existence of a legal order where natural and legal persons subject to this order, as a matter of principle, are judicially protected against any eventual arbitrary or unlawful exercise of Community/Union power.’⁵⁰ In *Les Verts*, the Court held that neither the Member States nor the EU institutions ‘can avoid a review of the question whether the measures adopted by them conform with the basic constitutional charter, the Treaty’.⁵¹ The EU rule of law thus

43 Generally on this issue, see Scholten 2020, p. 538.

44 Scholten 2020, p. 540, 545.

45 For a conceptualisation and taxonomy of the principle of effective judicial protection, see the framework as developed by Gerbrandy 2009, p. 17-60.

46 Lenaerts 2007, p. 1626.

47 Pech 2009, p. 15.

48 Pech 2009, p. 15-16.

49 Case 294/83 *Les Verts* ECLI:EU:C:1986:166, para 23.

50 Pech 2009, p. 54.

51 Case 294/83 *Les Verts* ECLI:EU:C:1986:166, para 23.

encompasses two aspects: conformity of Member State acts with EU law and conformity of EU acts with EU law. Later, the Court described the legality review of acts of EU institutions as reviewing ‘their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights’.⁵² Currently, the rule of law is enshrined in Article 2 TEU as one of the foundational values of the EU. It also stipulates that the rule of law is common to the Member States. The EU rule of law finds its origin in their constitutional traditions.

Although the rule of law is enshrined in Article 2 TEU as a foundational principle of the EU, no attempts have been made in the Treaties to define the rule of law. As a result, the understanding and application of the rule of law have been fleshed out in EU jurisprudence. In its case law, the Court has recognised several principles and procedural safeguards as elements of the rule of law.⁵³ These principles include the principle of legality, the principle of legal certainty, and the principle of proportionality.⁵⁴ Procedural guarantees include the right to be heard, the right of defence, and the duty to a proper motivation of legal acts.⁵⁵ The rule of law is therefore referred to as an ‘umbrella principle’.⁵⁶

2.3.3 Rule of law and composite procedures: a complicated story

As follows from the above, the EU rule of law principle requires conformity of both Member State and EU actions with EU law. In EU case law describing the content of the rule of law conformity with national law is not explicitly mentioned. Yet it appears from the SSM case *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* that the General Court reviews ECB acts in light of national law, as it held: ‘Article 4(3) of Regulation No 1024/2013 necessarily requires the Court to assesses [sic] the legality of the contested [ECB, JT] decisions in the light of both Article 13(1) of Directive 2013/36 and the second paragraph of Article L. 511-13 of the CMF [French monetary and financial code, JT]’.⁵⁷ From the appeal case *Crédit mutuel Arkéa v ECB* it follows that the Court of Justice does not seem to have any problems with assessing ECB acts against national law either.⁵⁸ Furthermore, as rightly argued by Brito Bastos: ‘One cannot simultaneously hold the rule of law to

52 Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625, para 91.

53 For an overview, see Von Danwitz 2014, p. 1311-1347.

54 Von Danwitz 2014, p. 1315-1316 and references to case law.

55 Von Danwitz 2014, p. 1316 and references to case law.

56 Pech 2009, p. 53 et seq.

57 Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* ECLI:EU:T:2018:219, para 49. See also Case T-712/15 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:900.

58 Gagliardi & Wissink 2020, p. 47-48. See Joined Cases C-152/18 P and C-153/18 P *Crédit mutuel Arkéa v ECB* ECLI:EU:C:2019:810.

be a foundational principle of the European Union while maintaining that EU law is indifferent to whether national law is actually observed.⁵⁹

Accordingly, the application of national law by the ECB may be scrutinised by the EU Courts. Where national authorities in a composite procedure apply national law, the EU Courts however do not consider themselves competent to review the validity of national acts in light of national law. AG Mischo held in his Opinion in *Association Greenpeace France* that it was ‘impossible to see how the Community Court, which has sole jurisdiction to declare a Community act invalid, could form an opinion as to the existence of an irregularity with respect to national law when it has no jurisdiction to interpret or apply that law in the context of the jurisdiction conferred on it under Articles 173 of the EC Treaty (now, as amended, Article 230 EC) and 177 of the Treaty.’⁶⁰

At the level of the EU judicature, a rule of law deficit thus exists where it concerns national law and judicial control over the correct application of national law by national authorities involved in a composite procedure. Generally, this deficit is not problematic, because it is the national courts that review actions of national authorities in the application of national and EU law, thus guaranteeing judicial control and the rule of law at the national level. But the main problem that was induced by the exclusive jurisdiction of the EU Courts over national non-binding preparatory acts in composite procedures as confirmed in *Berlusconi*, is that any violations of national law by national authorities involved in a composite procedure falling within the exclusive jurisdiction of the EU Courts are generally beyond judicial review.⁶¹ As a result, the EU Courts will leave out national law in examining any errors originating at the national level, and any errors made at the national level will not lead to invalidity of the EU final act.

2.3.4 Aligning executive powers and judicial protection

As in SSM composite procedures both NCAs and the ECB are involved which leads to the decision-making procedure being multi-jurisdictional, the principle of rule of law requires alignment of the administrative structures via which financial supervision is exercised with the systems of judicial controls.⁶² For SSM composite procedures, which inherently involve both an NCA and the ECB and are governed by both national law and EU law, the rule of law demands a judicial control system that acknowledges

59 Brito Bastos 2020, p. 63-90. For an overview of exceptions to this rule, see p. 88.

60 Opinion AG Mischo in Case C-6/99 *Association Greenpeace France* ECLI:EU:C:1999:587, para 98.

61 Extensively on this issue, see Brito Bastos 2020, p. 63-90. For an overview of exceptions to this rule, see p. 83-87.

62 On the importance of aligning governance structures and procedures with the systems of control, see Scholten 2020, p. 538-553. See also Gaztea 2019, p. 9-37.

the multi-jurisdictional nature of the procedure as well as the administrative unity of the procedure, the interdependence and close cooperation of the administrative authorities involved and connects the national judicial control system with the EU judicial control system.

The ever-increasing development of the EU and the Member States as an integrated administration and more specifically the SSM thus necessitates rethinking the concept of rule of law. It challenges its original interpretation and application. The shift of supervision to the ECB has led to a shift of jurisdiction to the EU Courts. However, this jurisdictional shift from Member State to EU level has not been accompanied by a shift of national court competences, including judicial scrutiny over national acts in light of national law, to the EU Courts. Accordingly, the rule of law has come under pressure.⁶³

Scholten holds that '[a]ttention to creating a comprehensive system and framework on controls seems to have been lacking in EU legislative practice and research.⁶⁴ To that it could be added that also in EU case law, developing such a comprehensive and coordinated system has not been on the agenda. The solutions the EU Courts propose, are, of course partially necessarily, case-specific and *ad hoc*, rather than being systemic. In the next paragraph, it will be discussed whether the EU principle of effective judicial protection has the ability to provide solutions that will align administrative, executive powers, and judicial protection.

2.4 THE EU PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION

2.4.1 Introduction

This paragraph is divided into three sections. In the first section, the EU principle of effective judicial protection will be introduced. Here, its legal basis, history, and its development in EU case law will be elaborated upon. This section will also include the relationship between the principle of effective judicial protection and the principles of equivalence and effectiveness and a distinction between three functions that may be discerned in EU case law: its instrumental, safeguard, and organisational function. The instrumental and safeguard function are commonly recognised in legal literature. Recent EU case law could be said to show indications of a newer, third function of the principle of effective judicial protection, namely its organisational function.⁶⁵ The second section explores the content of the principle of effective judicial protection. Based on the literature review in paragraph 2.2, the sub-principles or elements most relevant for this disserta-

63 See also Brito Bastos 2020, p. 63-90.

64 Scholten 2020, p. 538.

65 See also Bonelli 2019, p. 59-61.

tion are selected and discussed. The third and last section will address the shortcomings of the principle of effective judicial protection with respect to aligning the administrative structure of composite procedures with the system of judicial protection. This section will conclude with a proposal to expand the interpretation and application of the principle with a technique that was developed as an element of the principle of good administration, the concept of imputation.

2.4.2 Introducing the EU principle of effective judicial protection

2.4.2.1 General

The principle of effective judicial protection was introduced by the Court in 1986 in its seminal *Johnston* judgment⁶⁶ and is currently enshrined in Article 47 EU Charter of Fundamental Rights (Charter) and Article 19(1)(2) Treaty on European Union (TEU). The principle embodies the Latin legal maxim *ubi ius ibi remedium* ('where there is a right, there is a remedy') and ensures that where an individual, encompassing both natural and legal persons, has a right, the individual must be able to assert this right via a course of action before a court.⁶⁷ The exact content of the principle of effective judicial protection is hard to assess due to its nature.⁶⁸ In addition, the Court's case law does not provide for a single definition;⁶⁹ it rather encompasses a 'bundle of rights'.⁷⁰

Article 47 Charter enshrines the right to a fair trial and an effective remedy. In the context of the SSM, Article 47 Charter applies to both the ECB and the NCAs.⁷¹ In this provision, effective judicial protection operates as a fundamental right. Article 19(1)(2) TEU requires Member States to provide effective remedies to ensure effective legal protection in the areas covered by EU law. In this provision, the principle operates as a rule of law principle.⁷² The right to effective judicial protection may also be found in

66 Case 222/84 *Johnston* ECLI:EU:C:1986:206. See also Case 222/86 *Heylens* ECLI:EU:C:1987:442 and Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

67 Van Gerven 2000, p. 503.

68 See also Gerbrandy 2009, p. 18, 27.

69 Drake 2006, p. 843-844.

70 Safjan & Düsterhaus 2014, p. 3-4.

71 Art. 51 Charter states that the Charter provisions apply to the EU institutions, bodies, offices and agencies and 'to Member States only when they are implementing Union law'. It must be inferred from EU case law, most notably *Åkerberg Fransson* (Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280), that the Charter applies where national law is applied to enforce EU law. Therefore, where the NCAs act within the scope of the SSM, even where they apply national law, the Charter will undoubtedly apply. Similarly, see Lamandini, Muñoz & Álvarez 2015, p. 47-51 and Wissink 2021, p. 70.

72 More extensively on the distinction between effective judicial protection as a fundamental right on the one hand and as a rule of law principle on the other in recent case law, see Bonelli 2019, p. 42 et seq.

various instruments of secondary EU law in which elaborated requirements are laid down.

Although the right to effective judicial protection has been provided with a double EU constitutional basis, i.e. Article 47 Charter and Article 19(1)(2) TEU, Article 6 and 13 European Convention of Human Rights (ECHR), and the case law of the European Court of Human Rights (ECtHR) remain relevant for their interpretation. Article 52(3) Charter codifies this principle of alignment: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning, and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’ The right to effective judicial protection as codified in Article 47 Charter is such a corresponding right.⁷³

2.4.2.2 A ‘composite’ principle

Responsibility for upholding effective judicial protection is shared between the European and the national level. This shared responsibility is currently codified in Article 19(1) TEU and finds its basis in the principle of sincere cooperation which is enshrined in Article 4(3) TEU. Article 4(3) TEU stipulates that ‘the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.’ The EU Courts together with the national courts constitute a ‘Union of effective judicial protection’.⁷⁴ With regard to judicial review, the Court held that a ‘complete system of legal remedies and procedures’ is designed to ensure judicial review of acts of Union institutions, which include the direct action at the EU Courts under Article 263 TFEU (action for annulment) and the indirect action via national courts by means of Article 267 TFEU (preliminary reference procedure).⁷⁵ In this context, the principle of effective judicial protection may be considered a ‘composite’ standard.⁷⁶ The principle ‘mirrors’ the composite legal order, comprising both the Member States and the EU, and both levels are complementary to each other in the system of judicial protection where it concerns the adjudication of EU law.⁷⁷

73 See Explanations Relating to the Charter of Fundamental Rights, 14 December 2007, C 303/17, at Article 47 Charter.

74 Safjan & Düsterhaus 2014, p. 4.

75 See Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:462, para 40.

76 For this qualification, see Safjan & Düsterhaus 2014, p. 3-40.

77 Safjan & Düsterhaus 2014, p. 5 et seq.

2.4.2.3 *Effective judicial protection and the principles of equivalence and effectiveness*

General

The principle of effective judicial protection is closely related to the EU principles of equivalence and effectiveness, particularly the latter. All three principles constitute benchmarks for national procedural autonomy. The principles of equivalence and effectiveness were introduced in landmark cases *Rewe* and *Comet* in 1976, simultaneously with, although implicit at the time, the principle of national procedural autonomy.⁷⁸ The principle of equivalence requires granting at least equivalent protection against violations of EU rights to that available against violations of national rights. The principle of effectiveness prohibits national law rendering the exercise of EU rights or the realisation of EU law 'practically impossible or excessively difficult'.⁷⁹ These principles must be understood in the context of the decentralised system of enforcement of EU law.

The consensus in legal literature is that the principle of effective judicial protection has evolved from the principle of effectiveness.⁸⁰ Due to its origin, it has traditionally served as a means to uphold the effectiveness of EU law where adjudicated by the Member States. The principle of effective judicial protection originating from the principle of effectiveness is illustrative of the instrumental function of the principle of effective judicial protection, which will be discussed further below. Notwithstanding originating from the principle of effectiveness, the principle of effective judicial protection is currently conceived as an independent and self-standing principle.⁸¹ Yet it is safe to say that both principles are partially overlapping 'in terms of content, scope and effects'.⁸²

Yet, how exactly the principle of effectiveness relates to the principle of effective judicial protection is hard to discern precisely, as the case law is not consistent.⁸³ Widdershoven observes a quest by the Court to find the right balance between the two principles.⁸⁴ Moreover, the relation has changed over time in the Court's case law.⁸⁵ The lack of consistency in the Court's case law impedes its value for predicting whether the Court will use the principle of effectiveness or the principle of effective judicial protection for assessing national law.⁸⁶ Such consistency and predictive value of the Court's case law is particularly important because the two principles are

78 Case 33/76 *Rewe* ECLI:EU:C:1976:188; Case 45/76 *Comet* ECLI:EU:C:1976:191.

79 See, e.g., Case C-432/05 *Unibet* ECLI:EU:C:2007:163, para 43.

80 See, *inter alia*, Gerbrandy 2009, p. 25-27; Jans, Prechal & Widdershoven 2011, p. 45.

81 Gerbrandy 2009, p. 28.

82 Prechal & Widdershoven 2011, p. 46.

83 Widdershoven 2011, p. 105-112.

84 Widdershoven 2011, p. 105-112.

85 Jans, Prechal & Widdershoven 2011, p. 45.

86 Widdershoven 2011, p. 105-112.

distinct in their potential interference with national law. The assessment based on the principle of effective judicial protection is generally considered stricter than the assessment based on the principle of effectiveness.⁸⁷ A common distinction is that between negative obligations that stem from the principle of effectiveness, and both negative as well as positive obligations for the Member States stemming from the principle of effective judicial protection.⁸⁸

Widdershoven suggests that the Court should first acknowledge that the two principles are different in focus: the principle of effective judicial protection is a fundamental right closely related to the rule of law which is EU-specific, whereas the principle of effectiveness is an EU-specific principle that primarily aims to ensure the effectiveness of EU law.⁸⁹ Second, he argues that national law that may hamper any of the rights included in the principle of effective judicial protection should first and foremost be assessed in light of that principle and not in light of the principle of effectiveness, although the latter may be different where specifically required for the effectiveness of EU law.⁹⁰

Prechal and Widdershoven submit that the two principles should be viewed as separate principles with different functions and purposes.⁹¹ Their view is also relevant for any reflections on the principle of effective judicial protection within the SSM.

Effectiveness and effective judicial protection in the SSM

How to perceive the relationship between the principle of effectiveness and the principle of effective judicial protection in the SSM? The principle of effectiveness' formula 'virtually impossible or excessively difficult' 'by its very nature only operates at the level of the Member States'.⁹² Therefore, first of all, a distinction should be made between top-down situations, i.e. the ECB instructing an NCA, and bottom-up situations, i.e. the NCA helping the ECB to prepare its final decision. In the first situation, the EU in general and the ECB in particular are highly dependent on the cooperation of the relevant Member State and the NCA for the effective exercise of prudential supervision. The ECB must particularly rely on the NCAs where the ECB has been conferred the task, yet not a corresponding power. Would national law in such a situation for instance allow the addressee of the NCA decision implementing the ECB instruction to invoke an interim measure challenging the implementation by the NCA, that would concern both the effectiveness of EU law as well as effective judicial protection. In bottom-up situations, the ECB must rely on the relevant NCA for any preparations.

87 Gerbrandy 2009, p. 28; Prechal & Widdershoven 2011, p. 39-42.

88 Prechal & Widdershoven 2011, p. 40-42.

89 Widdershoven 2011, p. 105-112.

90 Widdershoven 2011, p. 105-112.

91 Prechal & Widdershoven 2011, p. 46 et seq.

92 Prechal & Widdershoven 2011, p. 42.

The ECB is responsible for adopting the final decision. The principle of effectiveness may for instance come into play where national law would allow for challenging the NCA preparatory act, with or without suspensive effect, which would risk delaying and complicating the adoption of the ECB final decision.

To better understand how the Court perceives the relationship between the principle of effectiveness and the principle of effective judicial protection within the SSM and more specifically in SSM composite procedures, the *Berlusconi* judgment contains interesting points of reference. It shows that the Court is foremost concerned with safeguarding the effectiveness of the composite procedure: '[i]n order for such a decision-making process to be effective, there must necessarily be a single judicial review' and the existence of national remedies against national preparatory acts would carry 'the risk of divergent assessments in one and the same procedure'.⁹³ Yet, the Court also established as a general principle applicable to composite procedures over which it has exclusive jurisdiction to review that 'in order to ensure effective judicial protection of the persons concerned', its competence includes an examination of any defects in the preparatory phase that could invalidate the EU final act.⁹⁴ Accordingly, the Court in *Berlusconi* found a solution primarily inspired by the principle of effectiveness while explicitly taking into consideration the principle of effective judicial protection. Since both the principle of effectiveness and the principle of effective judicial protection had the same result in this judgment, namely the centralisation of judicial review of composite procedure, it remains unsure how the Court would have dealt with effective judicial protection would it have pointed into another direction than the principle of effectiveness.

2.4.2.4 Functions of the principle of effective judicial protection

Safeguard function and instrumental function

In legal literature, two functions of the EU principle of effective judicial protection are generally distinguished: its safeguard function and its instrumental function.⁹⁵ The principle of effective judicial protection evolving from the principle of effectiveness explains the principle's instrumental function. Its instrumental function must be understood in light of the original aim of the principle, i.e. guaranteeing the effectiveness of EU law where it is implemented via national law. In the principle's safeguard function, the protection of EU rights serves as a means in itself. The principle's origin in the rule of law may be viewed as emphasising its safeguard function.⁹⁶

93 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 49-50. See Wissink 2021, p. 76-77.

94 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 44.

95 See, *inter alia*, Gerbrandy 2009, p. 22-23, 39; Wissink 2021, p. 73 et seq.

96 Gerbrandy 2009, p. 22.

In the Court's case law, the principle of effective judicial protection is constantly evolving and so is its usage. Multiple attempts have been made in the legal literature to categorise and 'generationalise' the function of the principle in EU case law.⁹⁷ Gerbrandy, for instance, distinguishes four different generations of case law, each of which is characterised by a different position of the Court and a varying degree of influence of EU law on national procedural autonomy.⁹⁸ Gerbrandy sees as the first generation of case law *Van Gend en Loos* and *Costa/ENEL*, in which the Court introduced the EU constitutional concepts of supremacy and direct effect of EU law.⁹⁹ In the second generation of case law, the relationship between procedural autonomy, not yet explicitly acknowledged as a principle, and the developing principle of effective judicial protection, also not yet introduced as a general principle of EU law, is shaped. Also the principles of equivalence and effectiveness are introduced. *Rewe* and *Comet* constitute the second generation of case law in Gerbrandy's categorisation.¹⁰⁰

In the third generation, the principle of effective judicial protection is acknowledged as a general principle of EU law and the principle is constraining the national procedural autonomy. Various national remedies have been assessed against the principle of effective judicial protection.¹⁰¹ Gerbrandy mentions *Francovich*, in which the EU principle of Member State liability was introduced, and thus a right to damages in case of breach of EU law by a Member State, as one of the cases belonging to the third generation.¹⁰² An example of a case that could be added, is *Borelli*.¹⁰³ *Borelli* is a clear indicator of the potential influence the EU principle of effective judicial protection may have on national procedural law. The Court held that irrespective of what based on national law constituted a reviewable act, national preparatory acts that are binding on an EU authority must be reviewable. The fourth generation of cases is characterised by a 'new balance' between national procedural autonomy and the principle of effective judicial protection, and, according to Gerbrandy, seems to leave more room for the Member States, of which *Courage* is an example.¹⁰⁴ In *Courage*, the Court held that to ensure the full effectiveness of EU competition law, Member States may not provide for an absolute bar to actions for damages for infringement of competition rules. At the same time, the Court respected the principle of national procedural autonomy, by emphasising that the

97 See, *inter alia*, Gerbrandy 2009, p. 25-27 and Widdershoven 1996, p. 107-122.

98 Gerbrandy 2009, p. 25-27.

99 Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa/ENEL* ECLI:EU:C:1964:66.

100 Case 33/76 *Rewe* ECLI:EU:C:1976:188; Case 45/76 *Comet* ECLI:EU:C:1976:191.

101 Gerbrandy 2009, p. 26.

102 Joined Cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:428.

103 Case C-97/91 *Borelli* ECLI:EU:C:1992:491. See also Widdershoven 1996, p. 113.

104 Gerbrandy 2009, p. 27 with reference to Case C-435/99 *Courage* ECLI:EU:C:2001:465.

Member States may themselves lay down the details of an action for damages, for instance concerning the extent of the parties' liability.¹⁰⁵

The case law just described is illustrative of the flexibility of the principle of effective judicial protection, enabling the Court to mould it and have it operating in form of either its safeguard or its instrumental function, depending on which goal the Court wishes to achieve. Yet, what these generations also show, is the quest of the Court to deal with newly arising problems. Even though problems were solved in one generation of case law, new problems will arise that must be dealt with and the case law in which these problems are solved will later become a new generation of case law.¹⁰⁶

The safeguard function and the instrumental function of the principle of effective judicial protection do not necessarily point in the same direction. Sometimes, these two functions may clash. It may generally be stated that whereas the principle of effective judicial protection is beneficial to the individual, this is not necessarily the case for the principle of effectiveness.¹⁰⁷ For instance, providing access to court to all types of parties may be beneficial to judicial protection of all of these parties, but it may undermine the effectiveness of decision-making procedures and financial supervision in general. Another example is the limitations the Court introduced for the application of general principles of national law. The limits to the application of the Dutch principle of legitimate expectations (*vertrouwensbeginsel*) in EU cases are an illustrative example of how the effectiveness of EU law may take precedence over effective judicial protection.¹⁰⁸ This tension between the two functions must be taken into account when applying the normative framework to the findings in this research.

The principle of effective judicial protection in its safeguard function and instrumental function may be viewed in light of the debate in legal literature and case law concerning the applicability of Article 47 Charter in instances where an individual does not have an EU right that must be asserted but rather seeks protection against the enforcement of EU law. In the first situation, the right to effective judicial protection constitutes an 'accessory right',¹⁰⁹ in the latter an independent one. Prechal argues that it should not be necessary to first establish the existence of an EU right or freedom for protection under Article 47 Charter to apply, especially not where an individual seeks to defend itself against the enforcement of EU law: 'a party that contests an obligation stemming from EU law is entitled to a fair trial, without there being a need to establish that a right or freedom has been violated'.¹¹⁰ Bonelli disputes Prechal's point of view and submits that

105 Case C-435/99 *Courage* ECLI:EU:C:2001:465, para 35.

106 Cf. Widdershoven 1996, p. 108.

107 Prechal & Widdershoven 2011, p. 42.

108 Example derived from Widdershoven, see Widdershoven 2011, p. 103-114.

109 Formulation by Hofmann, although not qualifying the right to effective judicial protection as such. See Hofmann 2021, p. 1268.

110 Prechal 2016, p. 148.

a 'systemic deficit in terms of access to justice' lacks and therefore a broader application of the right to effective judicial protection is unnecessary and would bring 'the risk of strong interference with domestic competences'.¹¹¹ Yet, he does acknowledge the paradox of denying protection under Article 47 Charter for those who need it the most, namely those on whom obligations are imposed by EU law.¹¹²

The debate is particularly relevant to the SSM, as within the SSM credit institutions will primarily seek to defend themselves against the enforcement of EU law, more specifically banking regulation and supervision. More in general, I found the observation of Bonelli insightful in that context – 'EU legislation currently covers several other substantive areas and may more and more often *limit* rights of individuals, rather than conferring new rights to them'¹¹³ – substantive banking regulation more often limits rights of credit institutions, its management, and shareholders, than conferring rights to them. I agree with Prechal, that for a party against which banking regulation is enforced, for Article 47 Charter to apply it should not be necessary to establish the violation of a right or freedom, even though the provision reads: 'everyone whose rights and freedoms are guaranteed by the law of the Union are violated has the right to an effective remedy'.¹¹⁴ As Prechal submits, Article 47 Charter will also apply where an individual's interests are adversely affected by an act,¹¹⁵ which is easier to establish.

Organisational function: a third function?

The original aim of the principle of effective judicial protection, i.e. guaranteeing the effectiveness of EU law, is still relevant in areas where EU law is executed via a system of integrated administration, especially where national authorities are involved in the application of EU law. Yet, it is submitted that the increasingly integrated administration of the EU calls for a new interpretation or function of the principle of effective judicial protection, for a new 'generation' of EU case law in which the principle will be applied in its organisational function, guiding and shaping the EU system of judicial protection and coordination the national and the EU judicial level.

In *Berlusconi*, the Court utilised the principle of effective judicial protection to shape the EU system for judicial review of composite procedures by introducing the principle of a single judicial review.¹¹⁶ More specifically, the Court held that, in addition to reviewing the ECB final act, it has jurisdiction to 'examine, in order to ensure effective judicial protection of the persons

111 Bonelli 2019, p. 58.

112 Bonelli 2019, p. 58.

113 Bonelli 2019, p. 52.

114 Prechal 2016, p. 148.

115 Prechal 2016, p. 148 and references to case law.

116 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023. Cf. Wissink 2021, p. 76-77.

concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision'.¹¹⁷ The principle of effective judicial protection thus is used to guide the Court in structuring the system of judicial review to guarantee effective judicial protection.

Indications of a new, third organisational function of the principle of effective judicial protection may also be found in three other judgments around the same period, in which a tendency may be discerned of the Court reinforcing its central position in the EU system of judicial protection and reshaping its role, particularly by bolstering the preliminary reference procedure.¹¹⁸ In these three cases, *Rosneft*,¹¹⁹ *Associação Sindical dos Juízes Portugueses* (also known as the 'Portuguese judges'),¹²⁰ and *Achmea*,¹²¹ the Court employed the principle of effective judicial protection to, respectively, assume jurisdiction in preliminary references on restrictive measures in the area of Common Foreign and Security Policy, construe a Member State obligation to guarantee judicial independence to ensure the proper working of the preliminary reference procedure, and consider a treaty-based investor-state dispute settlement mechanism to be contrary to EU law as it removes cases from the EU system of judicial remedies, including the preliminary reference procedure, as such arbitral bodies are precluded from referring preliminary questions to the Court.¹²² In *Rosneft*, the alternative would have been national court jurisdiction.¹²³ The alternative in *Achmea* would have been to qualify arbitral bodies as 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, to enable them to refer questions for a preliminary ruling.¹²⁴ Bonelli's metaphor is very illustrative of the above-mentioned use of the principle of effective judicial protection in its organisational function: 'the result is that the Court not only guarantees crucial EU values but re-designs the Union legal system in a way that puts it, if not a[t] [sic] the top of the pyramid, at least at the very centre of the network, to use a more 'dialogical' metaphor'.¹²⁵ Bonelli's 'dialogical' metaphor applies specifically to the Court's position in the preliminary reference procedure, that the three above-mentioned cases had in common. For the Court's expansion of jurisdiction in *Berlusconi*, the first metaphor better applies to the EU Court at the top of the pyramid.

117 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 44.

118 This tendency is identified by Bonelli on the basis of *Rosneft*, *Associação Sindical dos Juízes Portugueses* and *Achmea*, see Bonelli 2019, p. 59-61.

119 Case C-72/15 *Rosneft* ECLI:EU:C:2017:236.

120 Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

121 Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

122 Bonelli 2019, p. 60-61.

123 As was advocated by AG Kokott, see Opinion AG Kokott in *Opinion 2/13 (ECHR Accession II)* ECLI:EU:C:2014:2475, para 95-103, as referred to by Bonelli 2019, p. 59-60.

124 As argued by AG Wathelet, see Opinion AG Wathelet in Case C-284/16 *Achmea* ECLI:EU:C:2017:699, para 13 et seq. See also Bonelli 2019, p. 49, fn. 76.

125 Bonelli 2019, p. 61.

2.4.3 Content of the principle of effective judicial protection

2.4.3.1 General

As already stated above, the exact content of the principle of effective judicial protection is due to its nature hard to assess.¹²⁶ One of the reasons is the casuistic nature of the case law.¹²⁷ In addition, the Court's case law does not provide for a single definition;¹²⁸ it rather encompasses a 'bundle of rights'.¹²⁹ The principle of effective judicial protection has been operationalised by the Court in its comprehensive case law. It has introduced various specific requirements that must be met for guaranteeing effective judicial protection.

2.4.3.2 Categorisation

A commonly used distinction within the principle of effective judicial protection is between the procedural element and the substantive element it encompasses.¹³⁰ The procedural element concerns the effective access to a court and the substantive element is the right to an effective remedy or redress. This distinction resembles the two ECHR Articles that together constitute the right to effective judicial protection: Article 6 ECHR enshrining the right to a fair trial and Article 13 ECHR enshrining the right to an effective remedy. It is not always easy to draw a line between the procedural element and the substantive element. Moreover, it depends on the interpretation of whether certain elements qualify as one or the other. Widdershoven, for example, has a broad understanding of the substantive element, as in his view this also includes the substantive quality standards that the judicial procedure must meet.¹³¹ Shelton, in the area of international human rights law, employs a more restricted reading of the substantive element of the principle of effective judicial protection and understands it as 'the outcome of the proceedings'.¹³² Therefore, any procedural rules governing the court proceedings, including for instance those governing the burden of proof or the intensity of judicial review, in Shelton's view qualify as procedural elements, not as substantive elements.

Examples of aspects of judicial protection that qualify as procedural and directly relate to effective access to court are, *inter alia*, the requirements for legal standing and time limits for instituting an action before a court. Aspects of judicial protection that qualify as substantive and directly relate

126 Gerbrandy 2009, p. 27.

127 Gerbrandy 2009, p. 27.

128 Drake 2006, p. 843-844.

129 Safjan & Düsterhaus 2014, p. 3-4.

130 For this distinction, see, e.g., Widdershoven 1996, p. 113 et seq. Cf. Shelton 2015, p. 16-19.

131 Widdershoven 1996, p. 113.

132 Shelton 2015, p. 16.

to obtaining an effective remedy, are, amongst others, the amount of damages awarded by a court.

Another useful categorisation is the one proposed by Gerbrandy, between requirements that apply to access to court, court procedures, and available remedies.¹³³ I will adopt that categorisation in this dissertation, although adding one category: requirements relating to the overall system of judicial protection. In Gerbrandy's categorisation, 'a clear system of judicial protection' falls within the category of access to court.¹³⁴ In my dissertation, I will regard the overall system of judicial protection as a separate category. I have chosen to do so, to distinguish between the 'hard' access rules, such as legal standing requirements, to which the principle of effective judicial protection in its safeguard and instrumental function applies, and the 'softer' prerequisites for access, most specifically that the system of judicial protection is organised clearly, to which the principle of effective judicial protection in its organisational function must be applied. In this view, the requirement of 'a clear system of judicial protection' relates to the situation prior to the actual access to court. It requires the introduction of measures that prevent the system of judicial protection from growing too complex. Accordingly, the requirement of 'a clear system of judicial protection' seeks to prevent problems that relate to access to a court. According to this view, access to court requirements will instead play a role once a party has initiated a judicial action. These requirements may repair or remedy a gap in access to court, for instance by requiring a national court to assume jurisdiction (*Borelli*) or by assuming jurisdiction over the entire decision-making procedure, including the national phase (*Berlusconi*). Yet the access to court requirements will only come into play once a party has initiated judicial proceedings, once it is facing a court. These requirements thus remedy or repair any gaps in judicial protection on an *ad hoc* basis, preventing a situation that will arise that infringes the right to effective judicial protection. In such instances, the gap will be repaired, but the damage has already been done, for instance, because proceedings were instituted before the wrong court(s). Moreover, the access to court requirements set the outer limits of what constitutes effective judicial protection, rather than providing for an 'ideal' or optimum system for effective judicial protection, a system of judicial protection that prevents problems in relation to effective judicial protection beforehand, rather than fixing them on the spot. I will therefore treat both categories of requirements separately.

133 For this categorisation, see Gerbrandy 2009, p. 39-40.

134 Gerbrandy 2009, p. 39. Similarly, J. Hofmann considers 'the precept of clear demarcation of jurisdictions' an element of the right to access to court, yet he distinguishes between access to court and the precept of a clear demarcation of jurisdictions in his analyses, see J. Hofmann 2011, particularly p. 459.

2.4.3.3 *What constitutes effective judicial protection within the SSM?*

Crucial in this research is operationalising the principle of effective judicial protection within the SSM. What constitutes effective judicial protection within the SSM, specifically with regard to the integrated nature of the SSM and its composite procedures?

The elements of the principle of effective judicial protection that are most relevant for this dissertation are selected based on the literature review in paragraph 2.2, in which the most pressing threats regarding judicial protection in an integrated administration and composite procedures as identified in legal literature were discussed. The first threat was the difficulties in allocating legal responsibilities between the various administrative authorities involved and in allocating jurisdiction between the judicial levels due to the complexities of the overall system. The requirement directly relating to this problem is the element of a clear system of judicial protection. Gaps in access to court were identified as a second problem, which directly relates to the requirement of access to court. The third threat was the unreviewability of national law. The requirement that is of particular relevance for this problem is the requirement of ‘full jurisdiction’, meaning that the court adjudicating a case ‘must have jurisdiction to examine all questions of fact and law relevant to the dispute before it’.¹³⁵ The fourth problem was the necessity of litigating at two judicial levels, which directly relates to the right to judicial proceedings within reasonable time. The fifth and final threat discussed in paragraph 2.2 was the national limitations on the liability of national financial supervisory authorities. The right to damages for violations of EU law is of particular relevance here.

The elements of the principle of effective judicial protection that are listed above will be explored in more detail below. These elements will be discussed as elements of the categorisation introduced above: (1) the overall system of judicial protection; (2) access to court; (3) court procedures; and (4) available remedies.

With regard to the overall system of judicial protection within the SSM, the EU principle of effective judicial protection requires a clear system of judicial protection. Gerbrandy discerns this requirement in the *Impact* case, in which the Court held that the division of jurisdiction between courts in a Member State may be conflicting with the principle of effectiveness, where this division ‘would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law’.¹³⁶ J. Hofmann in the context of judicial protection in (multi-jurisdictional) composite procedures refers to ‘the precept of a clear demarcation of jurisdictions’ as an element of the principle of effective

135 See e.g. ECtHR 6 November 2018, 55391/13, 57728/13 and 74041/13, ECLI:CE:ECHR:2018:1106JUD005539113 (*Ramos Nunes de Carvalho E Sá t Portugal*), para 176.

136 Gerbrandy 2009, p. 49 with reference to Case C-268/06 *Impact* ECLI:EU:C:2008:223, para 55.

judicial protection as guaranteed by EU law, as well as codified in the German Constitution and the European Convention on Human Rights.¹³⁷ In German law, this principle is referred to as *Gebot des Rechtswegklarheit* and J. Hofmann refers for this principle to the ECtHR judgment in *De Geouffre de la Pradelle v France*.¹³⁸ In this case, the ECtHR held that under Article 6(1) ECHR, the applicant 'should have had a clear, practical and effective opportunity to challenge an administrative act' and that 'the system was [...] not sufficiently coherent and clear'.¹³⁹ Therefore, the ECtHR found that the applicant did not have 'a practical, effective right of access'.¹⁴⁰ Thus, the principle of effective judicial protection requires a clear system of judicial protection. With regard to the *Impact* case, due to the formula of 'excessively difficult', the principle is not easily infringed due to procedural disadvantages. The ECtHR seems to have adopted a high standard as well, yet formulated it differently and with arguably more room for establishing an infringement: the system of judicial protection must not be such that a practical, effective right of access is not provided for.

The 'negative' formulation of the element of a clear system of judicial protection in both judgments referred to above – the system may not render 'virtually impossible or excessively difficult' the exercise of an EU right and it must not hamper a practical, effective right of access – makes that this requirement will not act as one seeking to optimise the system, but rather as a requirement setting the extreme outer limits of how complex the system may be.¹⁴¹ Yet from the more recent case law, as discussed under 2.4.5.2, it may be inferred that the Court in a composite setting, involving both national and EU authorities, utilises the principle of effective judicial protection in what was referred to as its organisational function. In this function, the principle of effective judicial protection may act as guidance for optimising the EU system of judicial protection. It is submitted that based on the principle in its organisational function, the division of jurisdiction between national courts and EU Courts must be organised as such, that legal certainty with regard to the competent judicial level is maximised while respecting the jurisdictional limits of each of the judicial levels.

With regard to access to a court, it is required that when a party's EU right is infringed, a course of action before a court must be available. Requirements that govern the access to court for an action for annulment

137 J. Hofmann 2011, p. 448, 451.

138 See J. Hofmann 2005, p. 378 with reference to ECtHR 16 December 1992, 12964/87, ECLI:CE:ECHR:1992:1216JUD001296487 (*De Geouffre de la Pradelle v France*), *para 27 et seq. and para 34-35*.

139 ECtHR 16 December 1992, 12964/87, ECLI:CE:ECHR:1992:1216JUD001296487 (*De Geouffre de la Pradelle v France*), *para 34-35*.

140 ECtHR 16 December 1992, 12964/87, ECLI:CE:ECHR:1992:1216JUD001296487 (*De Geouffre de la Pradelle v France*), *para 35*.

141 See also Van Gerven 2000, p. 501-536 who argues in favour of 'adequate (not minimum) judicial protection' as 'the test of minimum effectiveness does not live up to the standard of sufficient judicial protection of Community rights' (p. 529).

are the concepts of a reviewable act and interested party. These requirements do not apply to an action for damages. Therefore, an action for damages could be viewed as a 'remedial' remedy where an action for annulment is not available. Both courses of action, however, do not offer the same level of judicial protection. In general, an action for damages is much more likely to be decided to the disadvantage of the applicant. This raises the question of to what extent and for what types of parties the principle of effective judicial protection requires access to an action for annulment. In the SSM, these parties particularly include shareholders, bondholders and a bank's management. Although they generally are not the addressees of a supervisory decision by an NCA or the ECB, such a supervisory decision could affect them directly or indirectly. The requirement of access to court requires that where a party's EU right is infringed, a course of action must be available before a court. Requirements that govern the access to court for an action for annulment are the concepts of a reviewable act and legal standing. The access to court must be adequate, meaning that it must be guaranteed for the correct groups of parties and entities and with regard to an adequate number of decisional moments.¹⁴² This adequate access may, however, not undermine the effectiveness of financial supervision,¹⁴³ for instance by introducing a judicial review of each preliminary step in a composite procedure.¹⁴⁴

With regard to court procedures, two elements are of particular relevance: 'full jurisdiction' and the right to judicial proceedings within reasonable time. The principle of effective judicial protection requires review by a court having full jurisdiction, meaning that a court must have 'the power to quash in all respects, on questions of fact and law, the decision of the body below'¹⁴⁵ and 'jurisdiction to examine all questions of fact and law relevant to the dispute before it'.¹⁴⁶ The ECtHR further elaborated the concept of full jurisdiction as follows: 'the court must have the power to examine point by point each of the litigant's grounds on the merits, without refusing to examine any of them, and must give clear reasons for their rejection. As to the facts, the court must be able to re-examine those that are central to the litigant's case.'¹⁴⁷ In short, courts are required to exercise an 'effective

142 Gerbrandy 2009, p. 439.

143 Cf., in relation to the effectiveness of enforcement, Gerbrandy 2009, p. 439.

144 See, in the context of the SRM, Joined Cases C-551/19 P and C-552/19 P *ABLV Bank and others v ECB* ECLI:EU:C:2021:369, para 55, where the Court held that the speediness of a resolution procedure could be affected by providing judicial review of the ECB's failing or likely to fail assessment, that precedes a decision on resolution by the SRB.

145 See, e.g. ECtHR 23 October 1995, 15963/90, CLI:CE:ECHR:1995:1023JUD001596390 (*Gradinger v Austria*), para 44; ECtHR 23 October 1995, 15523/89, ECLI:CE:ECHR:1995:1023JUD001552389 (*Schmutzer v Austria*), para 36.

146 See e.g. ECtHR 6 November 2018, 55391/13, 57728/13 and 74041/13, ECLI:CE:ECHR:2018:1106JUD005539113 (*Ramos Nunes de Carvalho E Sá v Portugal*), para 176.

147 ECHR, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)', *Case-law Guide Series* 2020, p. 36.

judicial review'¹⁴⁸ and a court is not considered to have full jurisdiction where 'the reviewing court is precluded from determining the central issue in dispute'.¹⁴⁹ The requirement of full jurisdiction applies to all proceedings as referred to in Article 6(1) ECHR, which include proceedings instituted against a decision resulting from an SSM composite procedure.

Pursuant to the alignment principle of Article 52(3) Charter, Article 47 Charter incorporates the protection under the ECHR right to a fair trial, including the principle of full jurisdiction.¹⁵⁰ Consequently, both the national courts and the EU Courts must provide for full jurisdiction. The principle of full jurisdiction has also been repeatedly applied by the EU Courts where it has been held that a court must have 'full jurisdiction'¹⁵¹ and 'must have power to consider all the questions of fact and law that are relevant to the case before it'.¹⁵²

The principle of full jurisdiction may concern the scope of judicial review, the intensity of the review and the ruling competences. With the scope of the judicial review is meant here the issue of which (administrative) acts and which elements of such acts, viz. the assessment of facts and the application of the law, as well as which laws and rules are to be applied. The intensity of judicial review relates to the issue of how strict the court may review the relevant authority's assessment of facts and application of the law.¹⁵³ The court's ruling competences particularly relate to the issue of whether a court can declare a decision invalid, and whether it may subsequently substitute its own decision for the decision of the relevant administrative authority. This dissertation focuses on the principle of full jurisdiction in relation to the scope of review, particularly with regard to the judicial review of composite procedures encompassing both a national and EU phase. National courts reviewing an NCA act may examine an ECB act that is relevant to the dispute before it and declare it valid but may not declare an ECB act invalid.¹⁵⁴ National courts' limited jurisdiction may be considered compensated or remedied by the possibility of referring a preliminary question on the validity of the relevant ECB act. The limited jurisdiction of EU Courts in reviewing SSM composite procedures relates to the judicial review of national preparatory acts and the application and

148 See e.g., ECtHR 28 June 1990, 11761/85, ECLI:CE:ECHR:1990:0628JUD001176185 (*Obermeier v Austria*), para 70.

149 ECtHR 21 July 2011, 32181/04 and 35122/05, ECLI:CE:ECHR:2011:0721JUD003218104 (*Sigma Radio Television v Cyprus*), para 157.

150 See also Case C-199/11 *Otis* ECLI:EU:C:2012:684, para 47.

151 see Case C-506/04 *Wilson* ECLI:EU:C:2006:587, para 60-61.

152 See, e.g., Case C-579/19 *Association of Independent Meat Suppliers* ECLI:EU:C:2021:665, para 80.

153 The Court in *Association of Independent Meat Suppliers* is very extensive in applying the principle in relation to the required intensity of judicial review, explicitly following the ECtHR case law, see Case C-579/19 *Association of Independent Meat Suppliers* ECLI:EU:C:2021:665, in particular 78 et seq. See also Widdershoven 2022.

154 As follows from Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452.

interpretation of national law. The requirement of full jurisdiction demands with regard to SSM composite procedures that applicants have the opportunity to have the complete decision-making procedure reviewed, regardless of whether an action is instituted at a national court or the EU Courts.

The right to judicial proceedings within reasonable time constitutes an element of the principle of effective judicial protection. In case law no fixed time limits have been formulated.¹⁵⁵ The reasonableness of the length of the proceedings depends on the circumstances of the case. Whether the time elapsed may be considered reasonable according to the case law of both the EU Courts and the European Court of Human Rights (ECHR) depends on the complexity of the case, the conduct of the applicant and the domestic authorities and the importance of the case for the applicant.¹⁵⁶ An example of the latter circumstance is whether the economic continuity of the applicant was compromised directly by the proceedings.¹⁵⁷ In the context of the SSM, a delay in the proceedings concerning the withdrawal of a banking license, therefore, is more likely to be unjustified than a delay in proceedings concerning the imposition of a fine. Delays must be justifiable. The ECHR has held that a stay on national proceedings due to a request for a preliminary ruling will not be taken into account when assessing the reasonableness of the length of the national proceedings.¹⁵⁸ Consequently, where in relation to an SSM composite procedure a national court refers a preliminary question on the validity of an ECB act to the Court, the additional time this will cost will not affect the reasonable-length assessment of the national proceedings.

With regard to the available remedies, the principle of effective judicial protection entails a right to damages for violations of EU law, either by a Member State, in the form of Member State or *Francoovich* liability, or by the EU. For this right to come into existence, several liability requirements must be met. These three liability requirements were formulated in *Bergaderm* concerning the liability of the EU: 1) the rule of law infringed must be intended to confer rights on individuals, 2) the breach must be sufficiently serious, and 3) there must be a direct causal link between the breach and the damage. These requirements also apply to the ECB. The EU and ECB liability requirements mirror the liability requirements for Member State liability as developed in *Brasserie du Pêcheur*.¹⁵⁹ The principle of Member State liability

155 Hofmann 2021, p. 1371.

156 ECHR, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)', *Case-law Guide Series* 2020, p. 89 with reference to case law; Hofmann 2021, p. 1371-1373.

157 See for instance Case C-185/95 P *Baustahlgewebe GmbH v Commission* ECLI:EU:C:1998:608, para 30.

158 ECHR, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)', *Case-law Guide Series* 2020, p. 89 with reference to case law; Hofmann 2021, p. 1371 with reference to ECtHR 26 February 1998, 20323/92, ECLI:CE:ECHR:1998:0226JUD002032392 (*Pafitis v Greece*).

159 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79.

also applies to NCAs. It was held in *Kantarev v Balgarska Narodna Bank*, that national limitations to financial supervisory liability, including NCA liability, may not raise a higher bar for liability than Member State liability.¹⁶⁰

2.4.4 Towards a truly ‘composite’ principle of effective judicial protection

2.4.4.1 *Strengths of the principle of effective judicial protection, and a weakness*

As follows from the above, the rule of law requires aligning the system of judicial protection with the integrated administration. To an important extent, such alignment has already taken place through the principle of effective judicial protection. The principle has proven a useful instrument to adapt the system of judicial protection to the integrated administrative reality to ensure effective judicial protection. One of the first examples of the application of the principle of effective judicial protection in composite procedures is the landmark judgment in *Borelli* which introduced an obligation for national courts to review national preparatory acts that are binding on an EU institution.¹⁶¹ A more recent example in the context of the SSM is *Berlusconi and Fininvest v Banca d'Italia* in which the principle of a ‘single judicial review’ was introduced, centralising judicial review of composite procedures that involve non-binding national preparatory acts at EU level.¹⁶² The solutions crafted by the Court in both judgments pertain to the judicial-institutional organisation of the EU and more specifically the division of jurisdiction between the national courts and EU Courts. Both solutions were created by interpreting the scope of jurisdiction of national courts and the EU Courts, respectively, as such that any potential lacunae in judicial protection and more specifically in access to judicial review are remedied.

The examples of *Borelli* and *Berlusconi* illustrate the Court utilising the principle of effective judicial protection to remedy any judicial protection problems by interpreting the judicial-institutional organisation. These solutions remedy gaps in the effective access to a court, constituting the procedural element of the principle of effective judicial protection. The principle of effective judicial protection has been utilised in areas qualifying as an integrated administration to develop a complete system of judicial protection in which national courts and EU Courts complement each other in situations where judicial protection at the other level is absent. Furthermore, if the national courts have jurisdiction the preliminary reference procedure enables the judicial review of the complete composite procedure and if the EU Courts are competent their exclusive jurisdiction over non-binding national preparatory acts seeks to do the same. Thus, in areas of

160 Case C-571/16 *Kantarev v Balgarska Narodna Bank* ECLI:EU:C:2018:807.

161 Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

162 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

integrated administration the principle of effective judicial protection has shown the ability to shape the judicial-institutional organisation by viewing the national and the EU judicial level as complementary to each other for providing judicial protection in composite procedures.

However, regardless of the adjustments to the system of judicial protection already achieved, national courts remain competent in relation to the legality of national acts and the EU Courts in relation to the legality of EU acts. This strict division of competences leads to the compartmentalisation of composite procedures at the judicial levels, causing misalignment between the cooperative administrative structure inherent to composite procedures and the system of judicial protection. Accordingly, a party affected by a supervisory decision that is adopted via a top-down composite procedure may be required to lodge actions in multiple jurisdictions to obtain redress, either in form of judicial review and subsequent annulment or in form of an action for damages, affecting the right to an effective remedy. In bottom-up composite procedures within the remit of the exclusive jurisdiction of the EU Courts under Article 263 TFEU,¹⁶³ the right to an effective remedy is impaired as a result of the national phase of the procedure being partially unreviewable. What follows from the foregoing is that while gaps pertaining to the right to access to court have been remedied, new gaps have arisen, particularly pertaining to effective remedies.

Again, the current interpretation and application of the principle of effective judicial protection in composite procedures have primarily provided solutions regarding the institutional-judicial organisation of judicial protection and thus to the procedural element of the principle of effective judicial protection: the right to access to court. However, its substantive element, an effective remedy, has hitherto not been the prime focus of the Court when adjudicating composite procedure cases. Yet further alignment between the administrative structure of composite procedures and the system of judicial protection is the essential next step to guarantee effective judicial protection in the current administrative reality.

2.4.4.2 *Strengthening the weakness*

2.4.4.2.1 *Introductory remarks*

The necessary alignment must in my view be attained via further development of the principle of effective judicial protection. For the direction of this development, inspiration will be drawn from the doctrine of ‘imputation’ as developed in EU case law in the context of composite procedures via the legal principle of the duty of care that constitutes an element of the EU principle of good administration.¹⁶⁴

163 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

164 The duty of care is sometimes called the ‘duty of diligence’.

In legal doctrine, the principle of good administration has been put forward as a principle that could overcome the problems of procedural protection and potential lacunae in composite procedures.¹⁶⁵ Mihaescu Evans even submits that ‘the right to good administration is the only means to overcome the formal conception of the administrative composite procedures to give primacy to the protection of individuals over all the obstacles that are likely to stem from the various constellations of decision-making which are present in the multi-step administrative proceedings’.¹⁶⁶ Harlow and Rawlings suggest that the duty of care may ‘help to fill the gap created by network governance, which occurs whenever an administrative process is administered by different entities not susceptible to the same accountability machinery’.¹⁶⁷ In connection with *Berlusconi*, Demková suggests that the Court should ‘review any errors vitiating national preliminary acts through the lens of EU institutions’ compliance with essential procedural requirements in preparing a final measure with all due care’.¹⁶⁸

2.4.4.2.2 *Inspiration from the duty of care*

The duty of care constitutes one of the sub-rights of the EU principle of good administration as currently enshrined in Article 41 Charter.¹⁶⁹ The principle of good administration is both a fundamental right and a general, unwritten, principle of EU law. Similar to the principle of effective judicial protection, the principle of good administration has two ‘faces’: the principle on the one hand seeks to strengthen efficient decision-making, and on the other serves as individual protection against procedural flaws in the decision-making process.¹⁷⁰ It thus has an objective as well as a subjective element to it.¹⁷¹

The duty of care was developed in EU case law as an instrument to review administrative discretion. It seeks to strike a balance between on the one hand respect for the separation of powers and the discretionary powers of an EU institution and on the other providing for an effective legality review as required by the principle of rule of law. It enables the EU Courts to review administrative action, yet without strict interference with the authority’s discretion.

165 See Nehl 2011, p. 643-644.

166 Mihaescu Evans 2015, p. 95.

167 Harlow & Rawlings 2006, p. 16

168 Demková 2019, p. 217.

169 The other sub-rights are the right to be heard, the right to access to one’s file and the obligation of the administration to give reasons for its decisions. The duty of care is inextricably linked to these other procedural rights. Compliance with the duty of care, for example, may be demonstrated via the reasoning of the act.

170 Mihaescu Evans 2015, p. 88-90, 111-112.

171 Mihaescu Evans 2015, p. 112.

Article 41(1) Charter describes the duty of care as the right to have his or her affairs handled impartially, fairly and within a reasonable time, thus encompassing a wide range of procedural standards that the administration must comply with. In EU case law, the standard phrase describing the duty of care is ‘the duty [...] to examine carefully and impartially all the relevant aspects of the individual case’.¹⁷² Put differently, an administrative authority must ‘carry out a detailed and thorough [complete] examination of all information, legal or factual, which may have a bearing on the adoption of a measure’.¹⁷³

One may distinguish between two elements of the duty of care: its procedural and its substantive elements.¹⁷⁴ Similarly, Hofmann distinguishes between factual elements of care and the cognitive requirements concerning whether the information collected substantiates the decision.¹⁷⁵ A decision’s factual basis must meet both quantitative and qualitative requirements.¹⁷⁶ The quantitative obligation requires authorities to collect and examine all relevant aspects of a case which may have a bearing on the adoption of a measure, regardless of whether or not the authority has discretion. The qualitative obligation requires the authority to base its decision ‘on the most reliable information possible’.¹⁷⁷ The substantive or cognitive element of the duty of care consists of assessing the merits of the individual case based on the information gathered.¹⁷⁸ The judicial review of the substantive element entails the question ‘whether a decision is *de facto* compatible with the facts evoked either in the operational part of an act or within its reasoning’ and thus exceeds a mere plausibility test.¹⁷⁹

2.4.4.2.3 *The duty of care in composite procedures: ‘imputation’*

The principle of good administration, including the duty of care, must be complied with in composite procedures by both the Member State and the EU administration.¹⁸⁰ An infringement by the national administration of the duty of care, and of any other error, nevertheless risks remaining unreviewed and unsanctioned in a composite procedure. After all, for an

172 See, e.g., Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* ECLI:EU:C:1991:438, para. 14.

173 Mihaescu Evans 2015, p. 399 and references to case law.

174 Nehl 1999, p. 107. See also Hofmann & Tidghi 2014, p. 150. The notion of duty of care and of proportionality are closely related, see extensively on their relation Hofmann 2020, p. 87-112.

175 Hofmann 2020, p. 98 et seq.

176 Hofmann 2020, p. 98 et seq.; Mihaescu Evans 2015, p. 399-400.

177 See, for example, Case C-276/01 *Steffensen* ECLI:EU:C:2003:228.

178 Nehl 1999, p. 107. See also Hofmann & Tidghi 2014, 150.

179 Hofmann 2020, p. 101. See also Case C-12/03 P *Tetra Laval* ECLI:EU:C:2005:87, para 39.

180 Extensively on the institutional scope of the right to good administration, which includes both the right as a general principle of EU law and as a right codified in the Charter, see Mihaescu Evans 2015, p. 135-151.

EU act to be annulled, the relevant EU authority must be attributed a lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule relating to their application, or misuse of powers. Accordingly, in principle, in composite procedures a national authority's infringement of the duty of care in itself cannot render invalid an EU final decision. Furthermore, the existence of an illegal act by an EU authority is a prerequisite for obtaining compensation in an action for damages.

The existence of an infringement of the duty of care, or of another duty, by the EU authority involved in the composite procedure thus is a necessary prerequisite for a national infringement of the duty of care or any other national error to potentially lead to the annulment of the EU final decision or to non-contractual liability. The duty of care constitutes an essential procedural requirement within the meaning of Article 263 TFEU.¹⁸¹ Moreover, a breach of the duty of care has the potential to translate into a manifest error of assessment.¹⁸² This manifest error test relates to the ground of review 'infringement of the Treaties or of any rule relating to their application'. In such a case, the infringement of the requirement that all the relevant facts of the individual case must be taken into account carefully and impartially leads to a manifest error of assessment. A breach of the duty of care may thus give rise to the annulment of the EU act or trigger non-contractual liability.

The infringement of the duty of care by an EU authority may consist of not remedying or compensating for a failure in the national preparatory phase. In legal literature, this construct or concept that enables national errors to affect the validity of an EU final decision is commonly referred to as 'imputation', i.e. the imputation of errors originating at the national level to the relevant EU authority.¹⁸³ Referring to the concept as 'imputation' may however be somewhat confusing, as it may imply that national errors are imputed to the relevant EU authority even in the absence of an EU infringement of the duty of care. Yet conversely, the concept describes situations where such an EU infringement does exist, and thus where one might as well speak of an independent infringement of EU law, although closely related to a national error, rather than of a national error attributed

181 Hofmann 2020, p. 91 with reference to Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* ECLI:EU:C:1991:438 and Case C-16/90 *Eugen Nölle v Hauptzollamt Bremen-Freihafen* ECLI:EU:C:1991:402.

182 On the frequent overlap between the breach of the duty of care (here: diligence) and the manifest error of assessment, see Joined Cases C-65/21 P and C-73/21 P to C-75/21 P *SGL Carbon SE and Others v Commission* ECLI:EU:C:2022:470, para 28 et seq.

183 Nehl coined the construct as such, see Nehl 2011, p. 643-644, 650-651. Other authors adopted Nehl's terminology, see, e.g., Brito Bastos 2018, p. 101-134 and Mihaescu Evans 2015, p. 98, 147-148.

to the EU level.¹⁸⁴ Despite this terminological confusion, I will also use the term ‘imputation’, as it is the generally accepted term in the relevant EU legal literature.¹⁸⁵

In EU case law, the doctrine of imputation has been developed and fostered via the duty of care, enabling the imputation of errors originating at the national level to the EU authority responsible for adopting the final decision.¹⁸⁶ Nehl describes the concept of imputability as a ‘technical device’ that allows national errors in composite procedures to be justiciable before the EU Courts.¹⁸⁷ In the words of Nehl: ‘errors of appraisal or investigatory errors occurring at national authority level ‘leap’ to the supranational stage of administrative decision-making and then ‘infect’ the final decision by translating into breaches of the principle of care and/or the duty to State [sic] reasons that are imputable to the Commission’.¹⁸⁸

Whether and to what extent national irregularities are imputable to the relevant EU authority through the duty of care depends on the legal framework governing a specific composite procedure. The legal framework provides the abstract concept of the principle of duty of care with its specific content and details the obligations of the relevant EU authority stemming from the duty of care.¹⁸⁹

An example from EU case law where a national error was imputed to the Commission is *Toepfer*.¹⁹⁰ In *Toepfer*, concerning the common market for cereals, Germany adopted protective measures that led to the decision of the German authorities not to issue import licenses for maize to the two applicants. Article 22(1) of Regulation No 19 of the Council of the EEC on the progressive establishment of a common organization of the market in cereals constituted the legal basis of these protective measures. According to the same provision, the protective measures must be communicated to the European Commission that will decide on whether to authorise these national measures. In *Toepfer*, the Commission authorised the German protective measures. This authorising decision was annulled by the Court as the national protective measures did not comply with the condition of Article 22(1) Regulation No 19 for protective measures, namely that serious disturbances would threaten the market for cereals. The Commission could thus be said to have infringed its duty of care which could have entailed

184 See for instance the case law examples discussed and analysed by Brito Bastos: Brito Bastos 2018, p. 101-134. In these case law examples, the EU authority involved independently infringed EU law.

185 Brito Bastos uses the term ‘derivative illegality’ to refer to the concept of imputation, see Brito Bastos 2018, p. 103. This term however also fails to demonstrate that illegality is not so much derivative, but resulting from an independent infringement by the relevant EU authority.

186 Nehl 2011, p. 644; Mihaescu Evans 2015, p. 97; Nehl 1999, p. 136.

187 Nehl 2011, p. 644.

188 Nehl 2011, p. 644.

189 See also Budinská & Tegelaar 2023, p. 346.

190 Joined Cases 106-107/63 *Toepfer* ECLI:EU:C:1965:65. See also Brito Bastos 2018, p. 122.

checking the correctness of the national assessment and, if necessary, correcting it.

2.4.4.2.4 *Rationale for 'imputation'*

The normative foundation or rationale of the concept of imputation in composite procedures has been described by various scholars. Cassese summarises the rationale of this development as follows: 'The protection of the individual should not suffer as a result of the division of the proceeding between two different administrations'.¹⁹¹ Nehl asserts: 'The underlying philosophy appears to be that the individual's procedural status shall not suffer from this organisational defect, and it will make no difference at which stage of the procedure a failure occurs and by whom it is caused'.¹⁹² He further argues that '[f]rom the viewpoint of individual parties, it is of the utmost importance that the Commission be given the responsibility for procedural failures committed by the national administration in the "preparatory phase" of the decision-making process'¹⁹³ and that '[t]he practical relevance of and necessity for establishing a concept of imputability is highlighted by the fact that the investigation and clarification of the individual case in this instance [...] is largely dependent on the thorough work of the national authorities on which the Commission must rely when adopting the final decision'.¹⁹⁴ Nehl uses the term 'vertical convergence' to describe the development in EU case law that procedural safeguards, including the right to be heard and the duty to state reasons, must be observed throughout composite procedures.¹⁹⁵ If these procedural rules have not been observed in a composite procedure, either by the national authorities or the EU authorities, this may render the decision adopted by the EU authority involved invalid.¹⁹⁶ Thus, via the doctrine of imputation the ultimate legal responsibility for the legality of the entire composite decision-making procedure, including the national phase, is conferred upon the EU authority responsible for adopting the final decision.

2.4.4.2.5 *Imputation beyond the duty of care: alignment via imputation*

The doctrine of imputation as developed in EU case law thus requires some form of culpable behaviour, for example (a breach of) an EU competence or duty by the relevant EU authority, in order to impute a certain error made by another authority. This is only logical in light of the legal framework governing the actions for annulment and damages. Annulment and

191 Cassese 2004, p. 34.

192 Nehl 1999, p. 81.

193 Nehl 1999, p. 164.

194 Nehl 1999, p. 164.

195 Nehl 1999, p. 7, 80 et seq. See also Cassese 2004, p. 30-34.

196 See, e.g., Case T-450/93 *Lisrestal and Others v Commission* ECLI:EU:T:1994:290.

compensation both require an illegal act. No regime of strict or vicarious liability applies to EU institutions where national authorities are responsible for preparing or implementing EU acts. Furthermore, not all national errors will lead to the invalidity of the final EU act.

However, even though the duty of care encompasses a wide range of duties, there will be situations where national errors cannot be imputed to the EU level because no duty was infringed. Whilst the rationales of imputation also apply to these situations, including that individuals should not suffer from the division of tasks between various administrations, the absence of (a breach of) a duty of care by the relevant EU authority precludes imputation. In *Borelli*, for instance, the Court found that an unfavourable national opinion was binding on the Commission. Based on the relevant provision of the applicable Council Regulation, when the national authority issued an unfavourable opinion, the Commission could 'neither follow the procedure for the examination of the project in accordance with the rules laid down in that regulation nor *a fortiori* review the lawfulness of the opinion thus issued.'¹⁹⁷ The Commission's duty of care thus did not comprise a general duty to review the lawfulness of the national opinion. The problem of the applicant suffering from the compartmentalisation of composite procedures in judicial protection will then persist because the Commission cannot be sued for an omission.

Situations such as in *Borelli*, that from the perspective of the rationale of imputation do call for imputation, but lack the possibility of actual imputation due to the lack of (a breach of) a duty, require a broader application of the concept of imputation. The normative foundation of imputation lies in the protection of parties affected by a composite procedure and not letting them suffer the consequences of the division of administrative responsibilities between national authorities and EU authorities. It is precisely that rationale that in my view must also inform the interpretation and application of the principle of effective judicial protection in composite procedures.

Yet what exactly would entail this interpretation and application of the principle of effective judicial protection in composite procedures that are informed by the rationale that parties should not suffer the consequences of the division of tasks and responsibilities between various administrative authorities? One of the requirements of effective judicial protection in composite procedures should be that judicial protection is *aligned* with the administrative unity of a composite procedure. How this alignment should be achieved to guarantee effective judicial protection in SSM composite procedures, will depend, *inter alia*, on the type of composite procedure and whether it concerns an action for annulment or an action for damages. Therefore, the specifics of the necessary alignment will be discussed in the subsequent chapters, addressing the action for annulment and the action for damages for several types of SSM composite procedures, respectively.

197 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para. 11.

2.5 CONCLUSION

This chapter sought to develop the normative framework for this dissertation. The EU principle of effective judicial protection constitutes the core principle of the framework. This principle originates from the principle of effectiveness and was developed in the context of the decentralised implementation of EU law. The primary objective of both principles has been to guarantee the effectiveness of EU law in general in the Member States. This primary objective translates into the principle's instrumental function. The other two functions of the principle of effective judicial protection that were distinguished in this chapter are the principle's safeguard function, concerned with the protection of EU rights, and its organisational function, helping the Court guide and shape the EU system of judicial protection. It is submitted that in an integrated administration, and more specifically the SSM, the organisational function of the principle is of particular relevance.

As regards the content of the principle of effective judicial protection, it was found that the exact content of the principle of effective judicial protection is hard to assess. The Court's case law is casuistic, and the principle encompasses a 'bundle of rights'. To help enable operationalising the principle in the SSM, several sub-rights were selected based on a literature review that will together provide for the effective judicial protection part of the normative framework. These sub-rights are a clear system of judicial protection, adequate access to court, full jurisdiction of a court, the right to judicial proceedings within reasonable time and the right to damages for violations of EU law.

I argued that although the principle has shown to be effective in remedying lacunae with regard to the right to access to court, its role in guaranteeing the substantive element of the principle of effective judicial protection, i.e. the right to an effective remedy, has been limited in composite procedures. The result is a misalignment between the cooperative administrative structure that characterises a composite procedure and the system of judicial protection. Yet the rule of law requires alignment of the system of control with the system of executive action. I, therefore, proposed expanding the current interpretation and application of the principle of effective judicial protection by adding alignment as a necessary element of effective judicial protection. For how such alignment must be achieved, the EU Courts may draw inspiration from another principle: the principle of good administration, and more specifically its element of duty of care. It was demonstrated that the duty of care has the potential to 'impute' errors originating from one administrative level to the other, empowering the competent judicial level to exercise judicial scrutiny over the entire composite procedure, instead of exclusively over the phase of the procedure falling within its jurisdiction. The rationale of the concept of imputation is to protect parties affected by a composite procedure by not letting them suffer the consequences of the division of administrative responsibilities between national authorities and EU authorities. The exact

form and content of the necessary alignment will depend on the specifics of the composite procedure and the judicial action. These procedures will be analysed in the subsequent Chapters, most notably in Chapter 5 and 6. These analyses result in the recommendations given in Chapter 7.

The Single Supervisory Mechanism: A Brief History

An integrational (r)evolution

3.1 INTRODUCTION

The Euro Area Summit Statement issued by the eurozone leaders on Friday 29 June 2012 set in motion the establishment of pan-European and centralised banking supervision and crisis management: the European Banking Union. The SSM is one of the three pillars of the Banking Union. With the SSM, the function of prudential supervision has been Europeanised and centralised at the ECB. Together with the SRM, providing for pan-eurozone resolution of credit institutions and investment firms, and a European Deposit Insurance Scheme (EDIS) (not yet in force), providing for a pan-eurozone deposit guarantee scheme, this has led to a transfer of banking policy from the level of the eurozone Member States to the Union level.¹

The Banking Union constitutes a new stage in EU integration. Traditionally, the ‘coordination’ or harmonisation of financial regulation has been the primary method of integration. The harmonisation process’ objective has been the creation of a single financial market as part of the ‘common market’ or ‘internal market’. According to Article 26 TFEU, the internal market comprises ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.’ The legislation aiming to create a single financial market is traditionally enacted using the internal market provisions as a legal basis, currently Article 114 TFEU, which is known as the ‘harmonisation clause’. Focal point of financial regulation has therefore been abolishing differences in the regulatory frameworks of the Member States as these would raise barriers for cross-border activities. A unification of national laws has however traditionally not been the objective; the principles underlying the integrational initiatives are minimum harmonisation and mutual recognition of national regulatory regimes. But the call in 2009 in the De Larosi re Report for a ‘consistent set of rules’ or ‘harmonised set of core rules’² set in motion the movement towards a ‘single rulebook’.³ Accordingly, Tridimas already in 2011 observed that the trend in EU financial regulation is ‘towards uniformity rather than harmonization’.⁴

1 Ver n 2014.

2 De Larosi re Report 2009, p. 27-29.

3 This term can be traced back to the Commission’s Communication on European financial supervision, see European Commission, Communication from the Commission on European financial supervision, COM(2009) 252 final, p. 4, 14.

4 Tridimas 2011, p. 783.

But harmonising financial regulation is not enough when striving for integration; supervision must not be let out of sight. Because, as Moloney puts it, '[r]egulation does not operate in a vacuum: it must be operationalized through supervision'.⁵ Although a single definition of financial regulation and financial supervision cannot easily be formulated and a strict distinction between them is not always possible to make, in this chapter financial regulation will be referred to as the set of rules governing the financial sector⁶ and financial supervision will be referred to as concerning the process of monitoring and enforcing financial regulation.⁷ As supervision has traditionally been a national responsibility and because financial supervisory authorities generally act with large discretionary powers, the various national supervisory frameworks and supervisory practices demonstrate differences which also affect the impact and effectiveness of (harmonised) financial regulation in the various Member States. Integrational efforts in the field of financial supervision have long been limited to enhancing 'supervisory convergence' and cooperation within a decentralised structure of financial supervision.

In view of these developments, the SSM must be regarded partly evolutionary, in the sense that it comprises elements that build on the EU's traditional approach to financial integration, and partly novel and revolutionary, because it moved from a decentralised approach to a centralised approach. In this chapter, a brief historical overview will be given of the process of financial, and more in particular banking, integration within the European Union, so as to put the SSM in context. The focus of this chapter will not be on integration in an economic sense, but on regulatory as well as supervisory integration.

3.2 THE EUROPEAN PROJECT: A COMMON MARKET

3.2.1 Treaty of Rome

The Treaty of Rome of 1957 (its successor is the Treaty on the Functioning of the European Union), establishing the European Economic Community, laid down 'the foundations of an ever-closer union'.⁸ One of these foundations was the objective of establishing a 'common market', also known as the single market.⁹ This single market is based on the four fundamental freedoms: the freedom of movement of goods, services, persons and capital.

⁵ Moloney 2014a, p. 944.

⁶ For this definition of regulation, see De Larosière Report 2009, p. 13. Lastra and Wymeersch use a similar definition and refer to regulation as rule making, see Lastra 2015, p. 112 and Wymeersch 2005, p. 988, respectively.

⁷ Lastra 2015, p. 112. See also De Larosière Report 2009, p. 13.

⁸ Treaty of Rome, p. 2.

⁹ Art. 2 and 3 Treaty of Rome.

Creating a single financial market was initially not intended to be part of the common market¹⁰ and the Treaties did not contain a separate chapter on ‘financial integration’.¹¹ An explanation for the fact that a single financial market was initially not included in the European project, is that finance and financial regulation due to their importance for, *inter alia*, economic, monetary and budgetary policy ‘stand at the core of national sovereignty’, which the Member States at that time were unwilling to give up.¹²

Discussions on financial integration were initiated by the European Commission in the sixties and early seventies.¹³ One of these initiatives was the appointment of a group of experts to investigate ‘the problems confronting the capital markets of the Community as a result of implementation of the Treaty’ which culminated in the Segré Report of 1966 on ‘The Development of a European Capital Market’^{14,15} The report suggests that ‘some harmonization of the operating rules and control systems’ governing, among others, banks is a prerequisite for the integration of the European capital markets.¹⁶ The report may be regarded the first foundation of the path towards European financial integration¹⁷ and it sowed the seeds for the Commission’s ambition to create a single banking market by harmonising banking legislation with one single Directive. Opposition by France, Italy and the United Kingdom led, however, to the withdrawal of an initial draft.¹⁸

3.2.2 First integrational efforts in banking: harmonisation and European passport

The legislative initiatives following the Commission’s earlier preferred ‘global approach’, i.e. a single Directive harmonising banking legislation, represent a new step-by-step strategy.¹⁹ This strategy can also be found

10 Teixeira 2017, p. 536.

11 Murlon-Druol 2016, p. 918. See also Dorrucci et al 2015, p. 30. Teixeira states that ‘[t]he Treaty of Rome of 1957 did not envisage a financial market as one of the components of the common market.’ See Teixeira 2017, p. 536. He derives this from the original version of Art. 67 Treaty of Rome which stated that the liberalisation of capital movements was to take place only ‘to the extent necessary to ensure the proper functioning of the common market.’

12 Teixeira 2017, p. 536.

13 Murlon-Druol 2016, p. 916

14 Report of a Group of experts appointed by the EEC Commission, The Development of a European Capital Market, November 1966, p. 5.

15 Murlon-Druol 2016, p. 916

16 Report of a Group of experts appointed by the EEC Commission, The Development of a European Capital Market, November 1966, p. 271.

17 Murlon-Druol 2016, p. 918; Moloney 2014b, p. 1611, fn. 9.

18 Dragomir 2010, p. 67, fn. 2; Story & Walter 1997, p. 14.

19 Murlon-Druol 2016, p. 917-918.

in the preamble of the First Banking Directive:²⁰ ‘given the extent of these differences [between the laws of the Member States as regards the rules to which banks are subject], the conditions required for a common market for credit institutions cannot be created by means of a single Directive ; whereas it is therefore necessary to proceed by successive stages’.

The first legislative integrational efforts in banking can be traced back to the 1970s. They aimed at harmonising the national laws of the Member States as it was believed that the existing differences between those laws would obstruct banks from providing their services cross-border. They also marked a step towards liberalisation of the banking business.²¹ The first attempt to create a single financial market, was the introduction of the Directive on the abolition of restrictions on freedom of establishment and freedom to provide services for self-employed activities of banks and other financial institutions.²² What followed was the First Banking Directive on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.²³ This Directive aimed at harmonising ‘certain minimum requirements’ representing the initial stage towards introducing uniform authorisation requirements for banks and creating a system in which banks can offer their services cross-border by means of setting up a branch in another Member State, without having to obtain additional authorisation in the host Member State. Such a system, currently known as the European ‘passporting’ regime, was introduced with the Second Banking Directive.

In addition to the harmonisation of certain authorisation requirements, with the First Banking Directive a Banking Advisory Committee was created, in the First Banking Directive referred to as the Advisory Committee.²⁴ This Banking Advisory Committee was composed of representatives of the banking supervisory authorities of the Member States and its main tasks were ‘to assist the Commission in ensuring the proper implementation’ of banking regulation and to ‘assist the Commission in the preparation of new proposals to the Council concerning further coordination in the sphere of credit institutions.’²⁵ It was emphasised in the First Banking Directive that the Banking Advisory Committee would not ‘concern itself with concrete

20 Council Directive 77/780 of 12 December 1977 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

21 Tridimas 2019, p. 784.

22 Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions.

23 Council Directive 77/780 of 12 December 1977 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

24 Art. 11 First Banking Directive.

25 Art. 11(2) First Banking Directive.

problems relating to individual credit institutions.²⁶ In the context of the Banking Advisory Committee, Mourlon-Druol cites former vice-president of the European Commission Henri Simonet, who, when presenting the draft Second Banking Directive, stated that ‘the question is not only to harmonise texts, but also and above all to harmonise mentalities. The existence of a Committee will allow these authorities to periodically confront their ideas and their conceptions concerning problems of common interest and should facilitate this rapprochement of mentalities, necessary preliminary to the rapprochement of legislations and practices that the Commission should pursue’.²⁷ Simonet here clearly distinguishes between financial regulation, ‘texts’, and financial policy and supervision, ‘mentalities’, while emphasising the necessity of ‘rapprochement’ of the latter for achieving a harmonised regulatory framework. The Banking Advisory Committee may be regarded the precursor of what is currently known as the European Banking Authority (EBA), which is one of the three European Supervisory Authorities (ESAs).

With the Second Banking Directive of 1993 a single ‘European passport’ for banks was introduced.²⁸ It implemented the call for a single banking license urged in the Commission’s White Paper on ‘Completing the Internal Market’ of 1985.²⁹ Thus, the regime in the Second Banking Directive enabled banks to provide their services cross-border directly or through a branch office (but not through a subsidiary) throughout the EU on the basis of a single license obtained in the home Member State. As a result, Member States were under the obligation to recognise banking licenses granted by another Member State, regardless of differences in regulatory regime. Similar passporting regimes were later introduced for other financial institutions. The principles underpinning the passporting regime are mutual recognition of national laws (instead of relying exclusively on the instrument of harmonising national laws³⁰), minimum harmonisation of financial regulation, home-country control and the free movement of capital and services.³¹

26 Art. 11(3) First Banking Directive.

27 Mourlon-Druol 2016, p. 922 with reference to BAC 94/1985, n°99, Communication de M. Simonet, Proposition d’une directive du Conseil visant à la coordination des dispositions législatives, réglementaires et administratives concernant l’accès à l’activité des établissements de crédit et son exercice, 28 November 1974.

28 Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC.

29 European Commission, White Paper on Completing the Internal Market, 1985, COM(85) 310 final.

30 Moloney 2014a, p. 328 with reference to European Commission, White Paper on Completing the Internal Market, 1985, COM(85) 310 final, par. 64.

31 See, *inter alia*, Haentjens & De Gioia-Carabellese 2020, p. 11-13; Teixeira 2017, p. 540; Brescia Morra 2014, p. 7.

3.3 THE LAMFALUSSY PROCESS: STRENGTHENING SUPERVISORY CONVERGENCE

Within the euro area, one of the biggest steps in financial integration has been the introduction of the Economic and Monetary Union (EMU) and a single currency. These objectives were already included in the Maastricht Treaty of 1992. '[T]o reap the full benefits of the euro', the Commission initiated the Financial Services Action Plan (FSAP) in 1999, comprising more than 40 initiatives to further harmonise financial regulation to be realised by 2005.³² Tridimas refers to the legislation enacted as a result of the FSAP as 'a second generation of Directives'.³³ The objectives pursued by the FSAP were: The creation of a single EU wholesale market in financial services, open and secure retail markets, and stronger prudential regulation and supervision.

To pave the way for this ambitious project, a 'Committee of Wise Men' was tasked to critically assess the traditional legislative procedure. They published their findings in the famous Lamfalussy report of 15 February 2001 and proposed an alternative to the traditional legislative process, that in the view of the Committee was: 'too slow, too rigid, complex and ill-adapted to the pace of global financial market change.'³⁴ A new 'four-level approach to lawmaking' was advocated: what is now known as the Lamfalussy process. This 'multi-level framework of governance' would introduce comitology procedures for adopting financial regulation as well as committees of national regulators advising the Commission on technical legislation and promoting supervisory convergence.³⁵ Although initially the Lamfalussy framework had only been developed for the securities markets, on 3 December 2002 it was decided by the finance ministers in the ECOFIN Council that the framework should be extended to all financial sectors, i.e. also to the banking and insurance sector.³⁶

Following the recommendations of the Lamfalussy report, three advisory fora were established: the Committee of European Securities Regulators (CESR),³⁷ the Committee of European Banking Supervisors (CEBS)³⁸ and the Committee of European Insurance and Occupational Pensions

32 Communication of the Commission, Financial Services: Implementing the Framework for Financial Markets: Action Plan, COM(1999)232, 11 May 1999.

33 Tridimas 2011, p. 790.

34 Lamfalussy Report 2001, p. 7, 14-15, 43, 87-88.

35 Teixeira 2017, p. 542.

36 Council of the European Union (2002), 'Ecofin Council Minutes 3 December 2002', Ecofin Council, 3 December 14368/02 (Presse 361).

37 Commission Decision 2004/7/EC of 5 Nov. 2003 establishing the Committee of European Securities Regulators, O.J. 2004, L 3/32.

38 Commission Decision 2004/5/EC of 5 Nov. 2003 establishing the Committee of European Banking Supervisors, O.J. 2004, L 3/28-29.

Supervisors (CEIOPS).³⁹ These 'Level 3 Committees', composed of high level representatives from the national supervisory authorities, acted as independent advisory groups to the European Commission when preparing Level 2 legislation, i.e. implementing legislation elaborating the details of Level 1, which is legislation containing the framework principles. The other main tasks of these three fora were related to 'Level 3': contributing to a consistent and timely application of legislation in the Member States, stimulating convergence of supervisory practices and enhancing supervisory cooperation, including the exchange of information.

Moloney refers to the establishment of these Level 3 Committees as a 'supervisory convergence' model.⁴⁰ With 'supervisory convergence' she refers to 'the encouragement of a European 'supervisory mindset' such that NCAs [National Competent Authorities, JT] would, in effect, become 'mini EU supervisors', exercising similar powers, sharing information freely, and making supervisory decisions based on a common approach to resource allocation, risk management, and supervisory objectives.'⁴¹ The supervisory convergence model is built on a decentralised supervisory framework, in which it is the national authorities which are exclusively responsible for carrying out financial supervision.

3.4 FINANCIAL CRISIS: A CATALYST FOR REGULATORY AND SUPERVISORY REFORM

3.4.1 De Larosière Report: 'Building on existing structures'⁴²

The financial crisis of 2008 brought various weaknesses in the European financial regulatory and supervisory framework to the surface. With the aim to advise on the future of European financial regulation and supervision and to devise practical proposals, Jacques de Larosière was entrusted with a mandate to chair a group of experts. On 25 February 2009, this resulted in the De Larosière Report. The group of experts concluded that the supervisory framework employed in the European Union had not been one of the primary causes behind the crisis, but that 'there have been real and important supervisory failures, from both a macro and micro-prudential standpoint.'⁴³ Problems in the supervisory framework addressed in the De Larosière Report include the lack of a consistent set of harmonised substantive rules,⁴⁴ the lack of convergent and effective supervisory and

39 Commission Decision 2004/6/EC of 5 Nov. 2003 establishing the Committee of European Insurance and Occupational Pensions Supervisors O.J. 2004, L 3/30–31.

40 Moloney 2014a, p. 952 with reference to European Commission, 'Review of the Lamfalussy Process. Strengthening Supervisory Convergence', 2007 COM(2007) 727, p. 7.

41 Moloney 2014a, p. 953.

42 As formulated in the De Larosière Report, see p. 4.

43 De Larosière Report 2009, p. 39.

44 De Larosière Report 2009, p. 27–29.

sanctioning powers,⁴⁵ the lack of adequate macro-prudential supervision⁴⁶ and supervisory failures.⁴⁷ In addition, a coherent regulatory framework for crisis management was considered absent.⁴⁸

More specifically with regard to the Level 3 Committees, the De Larosière Report firstly highlights that they should be responsible for creating a 'a set of consistent core rules', ⁴⁹ i.e. a 'single rulebook'. Legislation should preferably take the form of Regulations, or otherwise maximum harmonisation Directives.⁵⁰ Secondly, the De Larosière Report urges a 'binding mediation mechanism' to deal with cross-border supervisory problems as the peer review arrangements had proven to be ineffective, particularly in safeguarding the interests of the host supervisory authorities in case of cross-border activity in these host Member States.⁵¹ Thirdly, the De Larosière Report criticises the fact that the Level 3 Committees lacked the competence to take and implement common decisions, which prevented them from the ability to engage in effective crisis management.⁵²

With the aim to strengthen the quality of both the European and the national regulatory and supervisory framework, the De Larosière Report proposed a European System of Financial Supervision (ESFS), comprising of a European Systemic Risk Council (ESRC, which is currently known as the European Systemic Risk Board (ESRB)), responsible for macro-prudential oversight, and three ESAs, responsible for micro-prudential supervision. These ESAs are the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). The ESAs are the successors of the former Level 3 Committees, i.e., respectively CESR, CEBS and CEIOPS.

In line with the recommendations of the De Larosière Report to strengthen the position of the former Level 3 Committees, which were mere 'advisory bodies to the Commission',⁵³ the ESA Regulations have empowered the ESAs with additional competences. One of the conclusions of the report was for instance that the peer review arrangements developed within these committees proved ineffective to use as 'peer pressure'⁵⁴ for reviewing national supervisory authorities' compliance with supervisory standards and EU law.⁵⁵ According to the report, the powers that aim at increasing supervisory convergence needed to be strengthened and expanded. To this

45 De Larosière Report 2009, p. 23, 41.

46 De Larosière Report 2009, p. 39.

47 De Larosière Report 2009, p. 40-41.

48 De Larosière Report 2009, p. 32-37.

49 De Larosière Report 2009, p. 27-29, 50-51.

50 De Larosière Report 2009, p. 29.

51 De Larosière Report 2009, p. 40-41.

52 De Larosière Report 2009, p. 41-42.

53 De Larosière Report 2009, p. 47.

54 Moloney 2014a, p. 956.

55 De Larosière Report 2009, p. 40-41. On CESR's Peer Review Panel, see Moloney 2014a, p. 954.

end, the ESAs have been provided with additional legally binding powers in case of 'breach of Union law',⁵⁶ in an emergency situation,⁵⁷ or if a disagreement continues to exist between NCAs in a cross-border situation.⁵⁸ It is in these situations, where the ESAs can direct a binding decision towards the respective NCA: the ESAs thus (may) act as the 'supervisor of national supervisors'.⁵⁹ In addition, although only in exceptional circumstances and conditional on the NCA not complying with the ESA's decision, the ESAs have been conferred the power to direct a decision directly to a supervised entity.

Notwithstanding the establishment of the ESAs and the ESRB, and of the expansion of powers of the ESAs, the ESFS constitutes a 'largely decentralised structure', 'fully respecting the proportionality and subsidiarity principles of the Treaty'.⁶⁰ The De Larosière Report also states that national supervisors that 'are closest to the markets and institutions they supervise, would continue to carry-out day-to-day supervision and preserve the majority of their present competences'.⁶¹ The possibility of extending the role of the ECB in the fields of both macro- and micro-prudential supervision was considered in the report, but the experts concluded that the ECB should not in any way be involved in micro-prudential supervision and provided several arguments for this position, amongst others relating to the impact on the ECB's independence⁶², to conflicts between the monetary policy and prudential supervisory function, and to the limited supervisory mandate excluding insurance companies.⁶³

So even though the De Larosière Report states that the proposals would go beyond the 'evolutionary approach' on which '[s]upervisory reform has so far relied',⁶⁴ the proposals primarily relied on the already-existing regulatory and supervisory structures and did not constitute a sharp deviation from the traditional approach to EU financial supervision.⁶⁵ The exercise of financial supervision remained reserved for the Member States and coordination continued to be governed by the supervisory convergence model. The ESAs' expansion of powers, however, may be considered a shift towards Europeanisation and centralisation of financial supervision.⁶⁶

56 Art. 17 ESA Regulations.

57 Art. 18 ESA Regulations.

58 Art. 19 ESA Regulations.

59 For this qualification, see Himalaya Report 2004, p. 3, 10 and 15.

60 De Larosière Report 2009, p. 47.

61 De Larosière Report 2009, p. 47.

62 See also Smits 1997, p. 325-326.

63 De Larosière Report 2009, p. 42-44.

64 De Larosière Report 2009, p. 69.

65 An important exception is the proposal to confer direct supervisory powers upon ESMA related to credit rating agencies, see De Larosière Report 2009, p. 19-20.

66 See also Scholten & Ottow 2014, p. 83; Ferrarini & Chiarella 2013, p. 27-28.

3.4.2 Banking Union: a pan-European solution

3.4.2.1 *Aligning supervisory and resolution authority with fiscal responsibility*

The financial crisis triggered a number of significant regulatory and supervisory reforms implementing the proposals in the De Larosière Report. However, the ‘architecture of financial stability’ remained primarily national, relying upon national supervision, national resolution and national deposit guarantee schemes.⁶⁷ Also in the midst of the financial crisis, giving up national sovereignty in the field of financial supervision apparently was not an option.

Thus, financial integration achieved in terms of both regulation and financial market structures did not ‘spill over’ to financial supervision and resolution. These functions are generally felt to be aligned with the national fiscal sovereignty of the Member States, and transferring supervisory powers to the European level while the Member States would still carry the fiscal burden would a bank fail therefore was not politically feasible.⁶⁸ Although the potential risks characteristic for national and fragmented prudential supervision had already been addressed in both economic and legal literature⁶⁹ as well as at legislative level,⁷⁰ the political will to organise supervision at European level was therefore long lacking.⁷¹

The national resistance against pan-European supervision and resolution was partly overcome in 2012. As a result of the deepening sovereign debt crisis, the European Stability Mechanism (ESM) was established by a separate Treaty as a fiscal backstop to help solve it. The ESM enables the direct recapitalisation of banks, which was intended to serve as a means to break the vicious link between the banking sector and governments, also known as the ‘doom-loop’. As such, the ESM mutualised the costs for banks among the eurozone Member States.⁷²

As a prerequisite for the mutualisation of risks, the euro area Member States urged, in the Euro area summit statement of 29 June 2012, a centralisation of prudential banking supervision at the ECB.⁷³ It was considered

67 Lo Schiavo 2014, p. 111 with reference to Goyal et al 2013, p. 7.

68 Moloney 2014b, p. 1613-1614.

69 See, *inter alia*, Lastra 2006, p. 298; Schoenmaker 2011, p. 57-59; Padoa-Schioppa 2004, p. 109.

70 See De Larosière Report 2009

71 This may also be explained by the ‘financial trilemma’. This trilemma indicates that of the objectives (1) financial stability, (2) financial integration and (3) national financial policies, only two out of three can be combined. On the basis of this trilemma, Member States would have to give up on their national competences concerning financial policies to safeguard financial stability in an integrated financial market. See Schoenmaker 2011, p. 57-59.

72 Teixeira 2017, p. 546.

73 Press release, European Council, Euro Area Summit Statement (29 June 2012), available at www.consilium.europa.eu/media/21400/20120629-euro-area-summit-statement-en.pdf.

that a misalignment between a fiscal backstop as a euro area responsibility on the one hand and financial supervision remaining a purely national issue on the other, would lead to a lack of incentives to ensure adequate supervision.⁷⁴ Consequently, on 15 October 2013 the SSM Regulation was adopted, designating the ECB as the competent supervisory authority, which means that it is exclusively responsible to carry out prudential supervisory tasks in relation to all credit institutions within the participating Member States. A pan-European and centralised approach to resolution was the necessary follow-up to centralised supervision.⁷⁵ What followed on 15 April 2014 was therefore the adoption of the SRM Regulation, centralising resolution decision-making at the Single Resolution Board (SRB). In November 2014, the ECB assumed responsibility for euro area prudential banking supervision and the SRB assumed its responsibilities in January 2016.⁷⁶

3.4.2.2 *Single Supervisory Mechanism: Europeanised and centralised financial supervision*

With the enactment of the SSM Regulation, the function of prudential banking supervision transferred to the EU level. The ECB now is exclusively competent to carry out the prudential supervision of all credit institutions within the participating Member States.⁷⁷ Article 127(6) TFEU, introduced with the Maastricht Treaty in 1993 as part of the monetary union, forms the legal basis of the SSM. It allows for the conferral of ‘specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.’⁷⁸ What inherently follows from this legal basis is a ‘jurisdictional mismatch between the Banking Union and the single financial market’,⁷⁹ as the single financial market covers all EU Member States, whereas the Banking Union only covers the participating Member States.

Although the ECB has been conferred exclusive supervisory competences, the SSM is explicitly composed of both the ECB and the NCAs. The NCAs, as the ‘local’ supervisors, are to be considered, in the words of the Commission, ‘in many cases best placed to carry out such activities, due to their knowledge of national, regional and local banking markets, their sig-

74 Teixeira 2017, p. 546.

75 Lastra 2006, p. 366.

76 This pan-European system of banking supervision and resolution was also advocated in the Van Rompuy Report of 2012. It proposed an ‘integrated financial framework’, achieved by means of centralising prudential banking supervision at the ECB, introducing a European deposit insurance scheme and a European resolution mechanism, see Van Rompuy Report 2012, p. 4-5.

77 Art. 4(1) SSM Regulation.

78 For a brief overview of the discussion whether Article 127(6) TFEU provides for a sufficient legal basis for the SSM, see Lackhoff 2017, p. 16-17.

79 Teixeira 2017, p. 560.

nificant existing resources and to locational and language considerations'.⁸⁰ Another argument for retaining a role for the national authorities is that it would be practically impossible to confer upon the ECB on a stand-alone basis supervision of 6,000 eurozone banks.⁸¹ Teixeira not only explains this decentralisation by mentioning the practical difficulty, but also argues that a 'sudden' centralisation would not be proportional where it concerns small domestic banks.⁸²

The prudential supervisory responsibilities within the SSM are distributed between the ECB and the NCAs on the basis of the significance of an entity.⁸³ The NCAs are the direct supervisors of the less significant entities in their respective Member States and the ECB acts as the direct supervisory authority of significant entities. The legal basis of the SSM, Article 127(6) TFEU, implies that the SSM Regulation can only confer supervisory competences on the ECB and not on national supervisory authorities.⁸⁴ In *Landeskreditbank Baden-Württemberg – Förderbank v ECB*, the EU Courts shed their light on the distributing framework of the SSM Regulation.⁸⁵ The General Court held that from the key provisions governing the distribution of supervisory responsibilities between the ECB and the NCAs, which is Article 4 in conjunction with Article 6 SSM Regulation, it follows 'that the logic of the relationship between them consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation.'⁸⁶ Thus, the General Court emphasised that the NCAs have only delegated exclusive ECB supervisory powers, and this reasoning may be considered a firm stance in favour of a strong centralisation of prudential supervision.⁸⁷

From the above it follows that a complete centralisation of prudential supervision has not been achieved. The SSM is generally conceived as a semi-strong centralisation.⁸⁸ One of the most important features, for

80 European Commission, Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511 final, p. 5. Cf., concerning the division of responsibilities between national supervisors and ESAs, see De Larosi re Report 2009, p. 47.

81 Tr ger 2014, p. 466; Moloney 2014b, p. 1645.

82 Teixeira 2017, p. 549-550.

83 Art. 6(4) SSM Regulation.

84 More extensively on the legal basis of the SSM, see Ch. 4, para 4.3.2.

85 Case T-122/15 *Landeskreditbank Baden-W rttemberg – F rderbank v ECB* ECLI:EU:T:2017:337, confirmed in Case C-450/17 P *Landeskreditbank Baden-W rttemberg – F rderbank v ECB* ECLI:EU:C:2019:372. More extensively on the General Court judgment, see Smits 2017.

86 Case T-122/15 *Landeskreditbank Baden-W rttemberg – F rderbank v ECB* ECLI:EU:T:2017:337, para 54. More extensively on the 'source' of the NCAs' competences within the SSM, see Ch. 4, para 4.3.4.1.

87 Tr ger 2017.

88 Ferrarini & Chiarella 2013; Ferrarini 2015a, p. 57-69; Ferrarini 2015b, p. 111-130.

instance, is that the NCAs have remained responsible for carrying out the prudential supervisory tasks listed in Article 4 SSM Regulation in relation to less significant credit institutions. The competences that have been transferred to the ECB in respect of these tasks, are commonly referred to as indirect supervision.⁸⁹ This form of indirect supervision is derived from the ECB being responsible for an 'effective and consistent functioning' of the SSM.⁹⁰ To be able to ensure such functioning, overseeing and coordinating powers have been created within the SSM Regulation which make the ECB a 'supervisor of the supervisors'.⁹¹ A qualification we have seen earlier when discussing the ESAs.

Several tools within the SSM Regulation and the SSM Framework Regulation, which sets out the details of the cooperation arrangements between the ECB and the NCAs, aim at enabling the ECB to carry out its 'indirect' supervisory tasks. Firstly, the SSM framework is designed to keep the ECB up to date of the (financial) situation of less significant institutions and the supervision carried out by the NCAs. To this end, the SSM Framework Regulation contains a general⁹² and several specific provisions requiring information exchange,⁹³ rooted in the duty of cooperation in good faith.⁹⁴ NCAs must, *inter alia*, notify the ECB *ex ante* of important supervisory procedures and important draft supervisory decisions⁹⁵ and *ex post*, on a regular basis, at the request of the ECB, of other measures and the performance of their supervisory tasks.⁹⁶ In addition to these oversight tools, the ECB is competent to request information, initiate investigations and on-site inspections in respect of any euro area credit institution directly, regardless its significance.⁹⁷ Secondly, the ECB has been entrusted several coordinating tools with the objective of ensuring high standards of supervision. It has the power to issue regulations, guidelines or general instructions directed towards the NCAs and prescribe how they should exercise their tasks in respect of less significant credit institutions.⁹⁸ These powers may be regarded of a regulatory nature.⁹⁹ In addition, the ECB may at any time, 'when necessary to ensure the consistent application of high supervisory standards', assume direct supervisory powers and thus take over super-

89 See Figure 1 in ECB, 'Guide to banking supervision', November 2014, p. 13.

90 Art. 6(1) SSM Regulation.

91 Schuster 2014, p. 6.

92 Art. 21 SSM Framework Regulation.

93 See particularly Part VII regarding 'Procedures for the supervision of less significant supervised entities', comprising Art. 96-100 SSM Framework Regulation.

94 Art. 6(2) SSM Regulation and Art. 20 SSM Framework Regulation.

95 Art. 6(5)(c) in conjunction with 6(7)(c) SSM Regulation, and Art. 97-98 SSM Framework Regulation.

96 Art. 6(5)(e) SSM Regulation and Art. 99 SSM Framework Regulation.

97 Art. 6(5)(d) in conjunction with Art. 10-13 SSM Regulation, and Art. 138-146 SSM Framework Regulation.

98 Art. 6(5)(a) SSM Regulation.

99 Lamandini, Muñoz & Álvarez 2015, p. 14.

vision of the NCAs.¹⁰⁰ Due to the absence of disciplining powers vis-à-vis NCAs (such as the ESAs have) in the ECB's toolkit, this may effectively serve as a disciplining method.¹⁰¹ In Chapter 4, the division of competences between the ECB and the NCAs and the various cooperation mechanisms within the SSM will be discussed in more detail.

Prudential supervision carried out within the SSM is underpinned by a single rulebook, the rules of which are primarily to be found in the Capital Requirements Directive IV (CRD IV) and the Capital Requirements Regulation (CRR). As we have seen, the wish for a single rulebook had already formally been made in the De Larosièrre Report. The Lamfalussy process as well as the ESAs played an essential role in increasing harmonisation in the field of financial regulation. But the SSM takes the idea of a single rulebook a step further, as it centralises to a large extent the application and enforcement of the rulebook.¹⁰² In addition, the ECB's coordinating powers to issue regulations, guidelines and general instructions to NCAs prescribing how supervision should be carried out by the latter, will increase supervisory uniformity. These features of the SSM will increase the uniformity of the single rulebook for banks. This forms a contrast with the application of the single rulebook as proposed by the De Larosièrre Report, which was to be applied decentralised, i.e. exclusively by the national authorities.¹⁰³ But because the SSM Regulation provides for a division of supervisory competences between the national and EU level and thus (only) provides for semi-strong centralisation, it does not completely depart from a decentralised application of the single rulebook.¹⁰⁴

3.5 CONCLUSION

The Banking Union, and more in particular the SSM, marks a break with the traditional decentralised EU approach to integration of the financial sector. Based on this historical overview, it may be concluded that the SSM comprises both elements that qualify as evolutionary, building on the EU's traditional approach to financial integration rather than departing from it, as well as elements that must be considered novel and revolutionary.

The SSM is evolutionary, rather than revolutionary, in the sense that it builds on already-existing features of financial market integration. Firstly, and already mentioned above, it (still) relies on a structure of decentralised implementation of financial regulation by national authorities. Secondly, the underpinning single rulebook is no novelty as the concept was already

100 Art. 6(5)(b) SSM Regulation.

101 Wymeersch 2014, p. 42.

102 For a conceptualisation of the single rulebook and its application, see Lefterov 2015, p. 23-30.

103 See also Lefterov 2015, p. 24-25.

104 See also Lefterov 2015, p. 25.

introduced with the De Larosière Report. It may however be called a 'Single Rulebook 2.0', as the increased centralised decision-making at the ECB will provide for more convergence in interpretation and application.

The most revolutionary aspect of the SSM is the Europeanisation of financial supervision by centralising it at a single pan-European supervisory authority. Financial integration has traditionally been achieved by regulatory means, i.e. by harmonising national legislation, with the objective of creating a single market by removing barriers. Financial supervision, as an administrative and executive function, remained an exclusive national issue. The SSM deviates from this traditional approach and provides for institutional, rather than legislative, integration. The degree of institutional integration achieved is much higher than was the case with the establishment of the ESFS as the supervisory convergence model based on a decentralised supervisory structure was abandoned. This statement should however be nuanced, considering the SSM does not provide for a full centralisation. Due to the differentiation of supervisory competences based on significance, NCAs will remain key players in the supervisory architecture, applying the single rulebook in their capacity as direct supervisors of less significant institutions. The NCAs are, however, as opposed to a purely decentralised model, integrated in a unified supervisory structure with the ECB as the primary supervisory authority. A second revolution, or, as Teixeira calls it, a 'break', is the divide that the SSM introduces between the jurisdiction of the single financial market on the one hand, comprising all EU Member States, and the jurisdiction of the Banking Union, comprising the participating Member States.¹⁰⁵

The developments in EU integration brought about by the Banking Union and the SSM are unlikely to stop here. Illustrative of their potential influence is the Commission proposal for establishing an EU supervisory authority in the area of AML/CFT, as was already briefly referred to in Chapter 1. These Banking Union developments thus will continue to evolve and are likely to permeate and influence the set-up and integration of financial supervision in other sectors.

105 Teixeira 2017, p. 560.

4.1 INTRODUCTION

The SSM is a ‘mechanism’ construed of the ECB and the NCAs. The SSM itself lacks legal personality.¹ Therefore, the SSM as such cannot be held accountable. For reasons of accountability, including judicial accountability and judicial protection, supervisory action taken within the framework of the SSM and the result of a joint exercise of responsibilities must thus be ascribed or imputed to the ECB, the relevant NCA, or both.² To what authority a supervisory action must be ascribed is essential for, *inter alia*, selecting the right forum to have such an action reviewed, for the substantive law that will apply and for questions concerning (joint) liability. Therefore, fundamental to judicial protection is clarity on the administrative framework of the SSM, and more in particular, on the allocation of responsibilities between the ECB and the NCAs. But painting a clear picture of the allocation of responsibilities may be complicated in an integrated administration such as the SSM. In addition, the SSM’s integrated administration is characterised by great complexity, resulting, *inter alia*, from the involvement of multiple supervisory authorities and the interaction between multiple legal systems.³

This chapter seeks to analyse the characteristics of the SSM’s integrated administration. This chapter is essential for the analyses in the following chapters, that will focus on judicial protection within the SSM. A specific element of an integrated administration are composite procedures, i.e. decision-making procedures that involve authorities from both a Member State and the EU. Where in this chapter the term ‘enforcement’ is used, it is used in a broad sense. It not only encompasses enforcement in the narrow sense, i.e. the use of investigatory and sanctioning functions to ensure compliance with the law, but also the mere application of substantive EU law, for instance when handling an application for authorisation as a credit institution.

1 Just as the European System of Financial Supervision (ESFS) and the Single Resolution Mechanism (SRM), see D’Ambrosio 2015, 78, p. 59-60. See also Lamandini, Muñoz & Álvarez 2015, p. 12, fn. 24. The European System of Central Banks (ESCB) also lacks separate legal personality.

2 See also D’Ambrosio 2015, p. 60.

3 For other authors also discussing the complexity of the SSM’s administration, see Lamandini, Muñoz & Álvarez 2015; Schuster 2014, p. 3.

The focus of this chapter will be on the integrated administration that underlies the actual exercise of prudential supervision within the framework of the SSM. Attention will thus be had on the framework that allocates supervision and governs cooperation between the ECB and the NCAs. It is particularly these features of an integrated administration that will trigger questions of judicial accountability and protection. The internal governance of the ECB, including the composition of its main decision-making bodies, will not be subject of analysis.

This chapter is structured as follows. Firstly, a more general introduction to the concept and development of an integrated administration will be given, including references to the concepts of ‘direct’ and ‘indirect’ administration. Secondly, the SSM will be discussed as a unique example of such an integrated administration. This part includes discussing the SSM’s legal basis and the various (administrative) decentralisation mechanisms, including the SSM’s significant-less significant dichotomy, the set-up of the so-called ‘common procedures’ which constitute composite procedures, Joint Supervisory Teams, on-site inspection teams and ECB instructions addressed to an NCA. It will also briefly set out the SSM architecture of judicial review. As will be shown, the SSM’s administrative framework is characterised by a continuous balancing act between the necessity of decentralisation on the one hand and ensuring a coherent exercise of prudential supervision on the other.

4.2 THE CONCEPT OF AN INTEGRATED ADMINISTRATION

Traditionally, European Union law has been enforced either via ‘direct administration’ or ‘indirect administration’.⁴ In a model of direct administration, EU law is enforced directly by an EU institution. In such a model, EU legislative competences are aligned with executive competences.⁵ In a model of indirect administration, EU law is enforced decentralised, i.e. by the Member States. Legislation is enacted at EU level, but enforcement in individual cases is for national authorities. This model of decentralised enforcement of EU law is commonly referred to as ‘executive federalism’.⁶ In EU law, direct administration is the exception, indirect administration the rule.⁷ Current administrative reality, however, can generally not be captured in terms of direct or indirect administration. Even the enforcement of EU

4 This dichotomy may be criticised for being overly simplistic, see Chiti 2009, p. 11.

5 Schütze 2018, p. 335. The dichotomy of legislative competences and executive competences is closely related to the dichotomy of financial regulation and financial supervision in EU law. More extensively on the latter in the context of the Banking Union, see Ch. 3.

6 Schütze 2010, p. 1385-1427.

7 Hofmann & Türk 2007, p. 253; Hofmann & Türk 2006b, p. 74. The codification of this principle may be found in Art. 291 TFEU, see Schütze 2018, p. 335-336. But also in Art. 4(3), second subpara, TEU (formerly Art. 10 EC Treaty), see Hofmann & Türk 2006b, p. 74.

competition law, often used as the prime example of direct administration, is decentralised to an important extent.⁸ Therefore, one could say that virtually all areas of EU law have elements of an integrated administration.

There is not one definition of the concept of an integrated administration. Hofmann and Türk describe it as 'a system of decentralized yet cooperative administrative structures' between the EU and the Member States.⁹ Van Cleynenbreugel defines it as 'specifically created mechanisms of cooperation between administrative actors from the Member States and from the EU that serve to interweave both layers of governance into a singularly structured administrative law framework'.¹⁰ Central to an integrated administration, is that the national and EU administrative levels are interwoven¹¹ and that a system of administrative cooperation exists between the national and EU level.¹² Although common features of the concept of an integrated administration may be formulated, the exact architecture depends on the policy area. In addition, the model of an integrated administration differs depending on which level of the 'policy cycle' it operates: agenda-setting, legislative rule-making, policy-setting or implementation.¹³

Within the EU, a development towards an increasingly integrated model of administration may be discerned.¹⁴ The explanation put forward by Hofmann and Türk for this development concerns the set-off between the rule and practice of decentralised implementation at the Member State level on the one hand, and the need for a uniform implementation and an internal market on the other.¹⁵ These needs require 'cooperation and coordination' between the Member States and between the Member States and the EU.¹⁶ As will be shown, this set-off between the reality and necessity of a decentralised exercise of prudential supervision and the need for coherence within the system also permeates the SSM's administrative model.

8 Schütze 2018, p. 339-340. The most important instrument of decentralisation in the area of competition is Regulation 1/2003.

9 Hofmann & Türk 2009b, p. 1.

10 Van Cleynenbreugel 2014, p. 3.

11 Hofmann & Türk 2007, p. 254.

12 For this characterization, see Hofmann & Türk 2007, p. 253-271; Eliantonio 2015, p. 65-102; Van Cleynenbreugel 2014, p. 3.

13 Hofmann & Türk 2007, p. 254-255.

14 Hofmann & Türk 2009b, p. 1.

15 Hofmann & Türk 2009b, p. 1-2.

16 Hofmann & Türk 2009b, p. 2.

4.3 THE SSM AS INTEGRATED ADMINISTRATION

4.3.1 Introduction

As already stated in the introduction, the SSM's administrative model qualifies as an integrated administration.¹⁷ The SSM constitutes a unique model of integrated administration, however. As Teixeira formulates it: 'The SSM consists of a unique and unprecedented juxtaposition of European and national competences, which defies any clear definition of categorisation.'¹⁸ Features of an integrated administration occur in various forms in the SSM, including in the governance structure of the ECB (as representatives of the Member States are part of the main decision-making bodies: the Supervisory Board and the Governing Council), and in the so-called Joint Supervisory Teams (JSTs) that comprise of both ECB and NCA staff and are responsible for the day-to-day supervision of significant entities and in various formalised decision-making processes, also known as composite procedures, that involve both and ECB input. These composite procedures include, *inter alia*, the procedure for granting authorisation as a credit institution. This paragraph will focus on the specifics of the SSM's integrated administration. Before zooming in on the specific integrational arrangements, the SSM's legal basis and the rationale for the NCAs' involvement will be discussed, as well as some fundamental issues underlying the SSM's administrative framework.

4.3.2 Legal basis: Article 127(6) TFEU

The legal basis for the SSM is Article 127(6) TFEU.¹⁹ This provision, commonly referred to as the 'enabling clause', was introduced with the Maastricht Treaty as part of the monetary union and reads as follows:

The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

17 For a similar view, see, e.g., Wissink 2015; Ter Kuile, Wissink & Bovenschen 2015. In general and more extensively on integrated administration within the European Union, see: Hofmann & Türk 2009a; Jansen & Schöndorf-Haubold 2011; Della Cananea 2004, p. 197-217; Röhl 2008, p. 75-96.

18 Teixeira 2014, p. 554.

19 See corresponding Art. 25.2 ESCB Statute. More extensively on the political and legal rationale for invoking this legal basis, see Teixeira 2014, p. 546-554.

With the creation of the monetary union, the ESCB was assigned, next to its primary task of defining and implementing the monetary policy of the Community,²⁰ the task to 'contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system'.²¹ Although subject to debate, this task was and is to be exclusively exercised with the instruments provided for in Article 25.1 ESCB Statute:²² The ECB may offer advice and is to be consulted 'on the scope and implementation of Community legislation relating to the prudential supervision of credit institutions and to the stability of the financial system', respectively, by the Council, the Commission and the national competent supervisory authorities responsible for prudential supervision.²³ The ESCB was thus not assigned a supervisory task in the area of prudential supervision, i.e. the ESCB did and does not have the power to enforce prudential regulation and to carry out day-to-day prudential supervision.²⁴

Article 25.2 Draft ESCB Statute, however, determined that '[t]he ECB may formulate, interpret and implement policies relating to the prudential supervision of credit and other financial institutions for which it is designated as competent supervisory authority.'²⁵ With this provision, the ECB (and not the ESCB as a system) could have been afforded its own prudential supervisory function and allowed the ECB to be designated as competent authority in secondary financial legislation.²⁶ Yet, the Member States were hesitant to transfer their competences in the field of financial supervision to the European level.²⁷

Article 25.2 Draft ESCB Statute was amended such as that the ECB was not granted implementing powers concerning prudential supervision and could not be designated as competent authority by means of secondary legislation.²⁸ The final and current version of Article 25.2 ESCB Statute,

20 Art. 127(2) TFEU and Art. 3.1 ESCB Statute.

21 Art. 127(5) TFEU and Art. 3.3 ESCB Statute.

22 The ESCB Statute is annexed to the Treaties as a protocol (Protocol No 4) and forms an integral part of the EU Treaties (Art. 51 TEU). The Draft ESCB Statute was prepared in 1990 by the Committee of Governors of the Central Banks of the Member States of the European Economic Community, see Goodhart 1995, p. 303. This Draft ESCB Statute was submitted as a preparation to the Intergovernmental Conference on EMU in Maastricht, leading up to the Maastricht Treaty.

23 More extensively on the interpretation of Art. 25.1 ESCB Statute, see Smits 1997, p. 343-346. For an overview of textual and systematic arguments promoting a wider interpretation of the ESCB's fifth task, see Smits 1997, p. 339-343.

24 The Draft ESCB Statute, however, included as a fifth basic task of the ESCB 'the formulation, coordination and execution of policies relating to prudential supervision and the stability of the financial system'. This Draft ESCB Statute was prepared in 1990 by the Committee of Governors of the Central Banks of the Member States of the European Economic Community (hereinafter: Committee of Governors). See Goodhart 1995, p. 303.

25 Compare recital 45 and Art. 9(1) first and second subparagraph SSM Regulation.

26 Smits 1997, p. 355.

27 Smits 1997, p. 336; Alexander 2015, p. 162.

28 For a discussion of Art. 25.5 ESCB Statute, see Smits 1997, p. 355-360.

together with Article 127(6) TFEU, however, provide for the option to confer upon the ECB 'specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.' The procedure for assigning such tasks requires unanimity of the Council, on the proposal of the Commission, after having consulted the ECB²⁹ and with the assent of the European Parliament.

Van Rompuy's Report 'Towards a genuine economic and monetary union' of 26 June 2012, which proposed an integrated financial framework, an integrated budgetary framework and an integrated economic policy framework, urged that Article 127(6) TFEU should be 'fully explored' for the proposed centralisation of prudential banking supervision at the European level as part of the integrated financial framework.³⁰ Such exploration had not been carried out earlier,³¹ although the legal basis had been used to confer upon the ECB tasks for supporting the ESRB.³² The exploration led to the use of Article 127(6) TFEU as the legal basis for the SSM. It enabled conferring powers upon the ECB without amending the Treaties and therefore provided for a 'fast-track procedure' that was needed to cope with the financial crisis.

4.3.3 Rationale for the NCAs' involvement

Pursuant to Article 127(6) TFEU, full centralisation of prudential supervision at the ECB, i.e. a model of direct administration, could in theory have been achieved.³³ Instead, the SSM is composed of the ECB and the NCAs together and prudential supervision is shared between the ECB and the NCAs. To achieve such sharing of tasks, the SSM provides for various decentralisation mechanisms which 'redistribute' part of the ECB's supervisory responsibilities to the NCAs. As a result, prudential supervision is not exclusively exercised by the ECB. But even though a complete centralisation at the ECB has not been achieved, the ECB is to be regarded the primary supervisory authority; under Article 6(2) SSM Regulation the ECB alone is 'responsible for the effective and consistent functioning of the SSM'.

29 The ECB's opinion does not need a unanimous decision by the Governing Council as a similar provision as Art. 41.2 ESCB Statute lacks, see Smits 1997, p. 357, fn. 150.

30 Van Rompuy Report 2012, p. 4. The integrated financial framework would be achieved by centralising responsibility for financial supervision at European level, by providing for common resolvability systems for banks and by guaranteeing customer deposits, see Van Rompuy Report 2012, p. 3.

31 Lo Schiavo 2014, p. 115 with reference to Lastra 2006, p. 223 and Smits 1997, p. 76-77.

32 Teixeira 2014, p. 549 with reference to Council Regulation (EU) No 1096/2010 of 17 November 2010 Conferring Specific Tasks Upon the European Central Bank Concerning the Functioning of the European Systemic Risk Board, OJ L 331, 15 December 2010.

33 Although, of course, with due consideration of the EU principles of subsidiarity and proportionality (Art. 5(3) TEU).

Due to the reliance on both the ECB and the NCAs, the SSM remains subject to different administrative systems, different laws and different judicial systems. In view of the SSM's objective of achieving uniformity in prudential banking supervision,³⁴ this choice for decentralisation may be seen as a necessary evil. Uniformity and coherence may of course best be achieved by a truly single supervisory authority. But although on paper a complete centralisation of prudential supervision at the ECB may seem the best solution for achieving the goals, several aspects point in the opposite direction.

Firstly, although much has been harmonised or even unified in the field of prudential regulation, referred to as the 'single rulebook', an important part of substantive prudential regulation remains national in nature. The reason is that an important part of EU prudential rules still takes the form of directives, most notably CRD IV, and therefore must be implemented in national laws. Differences in interpretation are therefore unavoidable. In addition, both CRR and CRD IV contain Member State options and thus explicitly leave room for national divergence.³⁵ These regulatory differences require involvement of NCAs, that are experts in respect of their own regulatory frameworks.³⁶ Although not impossible, should the ECB be the single supervisory authority, it has to apply as many different prudential regulatory frameworks as there are eurozone Member States. Secondly, financial and banking markets may differ considerably across the Member States, necessitating NCA expertise and involvement. Thirdly, a more pragmatic reason, by decentralising certain supervisory tasks, the SSM will not rely exclusively on the ECB's limited resources, but also on that of the Member States.³⁷ A fourth reason for retaining a role for the national authorities is that it would be practically impossible to confer upon the ECB on a stand-alone basis supervision of 6,000 eurozone banks.³⁸

34 Recital 12 SSM Regulation: 'As a first step towards a banking union, a single supervisory mechanism should ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned, and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations. (...)'

35 Nouy adds to these reasons that '[s]ome governments continue to adopt national laws that affect the banking sector', which she calls 'a bit out of order', see D. Nouy in the capacity of chair of the Supervisory Board of the ECB, 'Everything is connected – the international dimension of banking regulation and supervision', Speech King's College, London, 23 October 2017, available at www.bankingsupervision.europa.eu/press/speeches/date/2017/html/ssm.sp171023.en.html.

36 See also recital 37 SSM Regulation: 'National supervisors have important and long-established expertise in the supervision of credit institutions within their territory and their economic, organisational and cultural specificities. They have established a large body of dedicated and highly qualified staff for those purposes.'

37 Ferrarini & Chiarella 2013; Enoch et al 2013, p. 19.

38 Tröger 2014, p. 466; Moloney 2014b, p. 1645.

4.3.4 Fundamental issues concerning the relationship ECB-NCAs

4.3.4.1 *Source of the NCAs' competences*

4.3.4.1.1 *National autonomous competences or EU delegated competences?*

Before discussing the various decentralisation mechanisms within the SSM, some fundamental issues underpinning the relationship between the ECB and the NCAs must be dealt with. The first issue is the qualification of the exercise of prudential supervision by NCAs within the framework of the SSM. Does it constitute the exercise of autonomous supervisory competences, i.e. (national) competences that have *remained* with the NCAs, or the exercise of ECB competences that are delegated to the NCAs? Put differently, must the SSM Regulation be interpreted as *leaving* certain supervisory competences at the national level, or as providing for a conferral of exclusive competences to the ECB and a subsequent delegation of these exclusive competences to the NCAs? These questions are only concerned with prudential supervision covered by the SSM Regulation, i.e. the supervisory tasks conferred upon the ECB by Art. 4(1) SSM Regulation. Supervisory tasks that have not been conferred upon the ECB, including conduct-of-business supervision, supervision in the area of AML/CFT and consumer protection, have *remained* with the national authorities.³⁹

The General Court gave its views on the distribution of competences between the ECB and the NCAs in *Landeskreditbank Baden-Württemberg – Förderbank v ECB*.⁴⁰ In short, the ECB designated the German Landeskreditbank Baden-Württemberg-Förderbank (hereinafter: Landeskreditbank) a significant entity and therefore it would be subject to the ECB's direct supervision. Landeskreditbank, however, contested this decision by arguing that the exception clause applied; 'particular circumstances' justified the classification as less significant.⁴¹

The General Court took the opportunity to investigate and interpret the key provisions governing the distribution of supervisory competences between the ECB and the NCAs, Article 6 in conjunction with Article 4 SSM Regulation.⁴² Landeskreditbank argued that the SSM Regulation only conferred supervisory competence upon the ECB with respect to significant entities and that the prudential supervision of less significant entities had remained a competence of the NCAs (except for the tasks concerning the

³⁹ See Recital 28 SSM Regulation

⁴⁰ Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, confirmed in confirmed in Case C-450/17 P *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:C:2019:372. For a critical analysis of this case, see Tröger 2017.

⁴¹ See Art. 70 SSM Framework Regulation in conjunction with Art. 6(4) second subparagraph SSM Regulation.

⁴² Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para. 54-64.

granting and withdrawal of authorisations and the assessment of qualifying holdings in credit institutions).⁴³ However, the General Court held that it follows from Article 4(1) SSM Regulation that exclusive competence for *all* tasks listed in relation to *all* credit institutions is conferred upon the ECB.⁴⁴ It held that the SSM Regulation does not comprise a division of competences between the ECB and the NCAs.⁴⁵ In its view, the prudential supervisory competences are conferred exclusively to the ECB and are, where the NCAs are called upon in the SSM Regulation, implemented within a decentralised framework by the NCAs.⁴⁶ The prudential supervision exercised by the NCAs thus is to be qualified as a ‘mechanism of assistance to the ECB rather than the exercise of autonomous competence’.⁴⁷ Thus, the purpose of the division of supervisory responsibilities with respect to less significant entities and to the tasks listed in Article 4(1)(b) and (d) to (i) SSM Regulation was ‘to enable decentralised implementation under the SSM of that competence by the national authorities, under the control of the ECB’.⁴⁸ The General Court finds support for this view in, *inter alia*, the recitals that refer to the fact that any supervisory tasks not listed in Article 4(1) SSM Regulation remain within the competence of the Member States,⁴⁹ the recitals stating that the NCAs are responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of supervisory tasks⁵⁰ and in the competence of the ECB to at any time take over supervision of a less significant entity from an NCA.⁵¹

It follows from this judgment that one cannot speak of any SSM supervisory competences that have *remained* with the NCAs, as all competences in relation to the tasks listed in the SSM Regulation have been conferred on the ECB. NCAs do however exercise prudential supervision, in particular vis-à-vis less significant entities, and thus take supervisory decisions on the basis of national (administrative) law, but the ‘source’ of their com-

43 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 50.

44 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 63. For a different view, see Lo Schiavo 2014, p. 126: ‘it is clear that the final Regulation confers exclusive supervision to the ECB only as regards ‘significant’ banks and, in particular, cross-border situations.’

45 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 54.

46 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 54.

47 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 58.

48 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 63.

49 See recitals 15 and 28 SSM Regulation.

50 See recitals 37-40 SSM Regulation.

51 See Art. 6(5)(b) SSM Regulation and Art. 67-69 SSM Framework Regulation. Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 55-62.

petences is European, not national.⁵² So even though prudential banking supervision has become an ECB exclusive competence, these exclusive ECB competences may be said to ‘*de facto* remain shared in their concrete implementation and execution’.⁵³ Nonetheless, NCA supervision, most notably the day-to-day supervision of less significant entities, must on the basis of the *Landeskreditbank* case be qualified as exercising delegated competences, delegated from the ECB to the NCAs.

Important to note here is that the General Court in *Landeskreditbank Baden-Württemberg – Förderbank v ECB* is very explicit on the limits of drawing analogies with case law in the area of EU competition law, an exclusive Union competence. In response to *Landeskreditbank*’s reference to the Opinion of AG Kokott in *Toshiba Corporation and Others*,⁵⁴ the Court held that the ‘legal context’ of that case is not comparable to the one in the *Landeskreditbank* case.⁵⁵ The incomparability follows from the circumstance that national competition authorities may exercise national competence, whereas under the SSM NCAs do not exercise national competence, but ‘are acting within the scope of decentralised implementation of an exclusive competence of the Union’.⁵⁶ In the area of competition law, it is settled case law that national competition rules and EU competition rules belong to ‘two different spheres of competences; national authorities can apply *national antitrust law provisions*, the European Commission EU competition law provisions’ [emphasis in original].⁵⁷ It also acknowledged that national competences and EU competences may be exercised ‘separately and in parallel’.⁵⁸ The difference between the competences of national competition authorities and the competences of NCAs within the SSM thus is that the former have autonomous competences to apply national competition law, whereas NCAs only have a ‘derivative’ EU competence. Within the framework of the SSM, the General Court does not acknowledge parallel (autonomous) national competences but instead only finds exclusive ECB competences.

52 Karagianni & Scholten 2018, p. 186-187, 190.

53 For this view in relation to the (EU exclusive competence in the area of) execution of EU competition law, see Van Cleynenbreugel 2016, p. 54.

54 Case C-17/10 *Toshiba Corporation and Others* ECLI:EU:C:2011:522, para 90.

55 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 71.

56 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 72.

57 Van Cleynenbreugel 2016, p. 56-57 with reference to Case C-17/10 *Toshiba* ECLI:EU:C:2012:72.

58 Van Cleynenbreugel 2016, p. 57 with reference to Case C-428/14 *DHL Express* ECLI:EU:C:2016:27.

4.3.4.1.2 *Delegation and accountability*

The issue discussed above, whether the NCAs' competences are national autonomous competences or EU delegated competences, is key from an accountability perspective.⁵⁹ In case of delegation, the framework should provide for an accountability relationship between the NCAs and the ECB.⁶⁰ Considering that the NCAs essentially carry out ECB competences, on behalf of the ECB, delegated from the ECB to the NCAs by the SSM Regulation, the ECB should be able to not only oversee and steer the NCAs' actions, for example via instructions and guidelines, but also to address and correct an NCA where it does not properly exercise its supervisory responsibilities. However, the SSM Regulation does not confer upon the ECB a form of 'disciplining powers', for instance similar to those of the ESAs vis-à-vis national competent authorities.⁶¹

Yet, the ECB's Governing Council may under Article 271(d) TFEU bring an infringement action before the Court if a national central bank breached the Treaties or the ESCB and ECB Statute.⁶² This infringement proceeding was however provided for within the context of the monetary union, and was not drafted for the SSM specifically, which casts doubts over its relevance and applicability within the SSM.⁶³ Furthermore, the provision refers to 'national central banks', which not necessarily coincides with the NCAs under the SSM Regulation. NCAs that are not a national central bank therefore cannot be subject to an infringement action under Article 271(d) TFEU.

4.3.4.2 *Exclusive ECB competences or exclusive competence of the Union?*

The findings above lead us to a constitutional question that concerns the administrative framework of the SSM and the relationship between the ECB and the NCAs: Is the exercise of prudential supervision an exclusive EU competence (Art. 2(1) TFEU), even though prudential supervision is not expressly mentioned among the areas of exclusive EU competence in Article 3(1) TFEU?⁶⁴ The answer is important, as the constitutional labelling of prudential supervision as an EU exclusive competence or not is not just a matter of definition.⁶⁵ It defines the relationship between the EU and the

59 Extensively on this issue, see Karagianni & Scholten 2018, particularly p. 190 et seq.

60 Karagianni & Scholten 2018, particularly p. 191-192.

61 On the ESA remedying mechanism that applies where a national competent authority incorrectly or insufficiently applies EU law, see Haentjens, Tegelaar & Verheij 2018, p. 978-979.

62 See also Karagianni & Scholten 2018, p. 192.

63 Karagianni & Scholten 2018, p. 192.

64 The list of Art. 3(1) TFEU includes customs union, the establishing of the competition rules necessary for the functioning of the internal market and euro area monetary policy.

65 More extensively on the different categories of Union competences, see Schütze 2018, p. 239 et seq.

Member States within a certain policy field and is decisive for the Member States' competences. Is an area designated as of exclusive EU competence, only the EU may legislate or adopt legally binding acts and Member States may only do so themselves 'if so empowered by the Union or for the implementation of Union acts.'⁶⁶ In addition, the applicability of the principles of proportionality and subsidiarity is dependent on the answer. They only apply in areas where the EU does not have an exclusive competence.

In the *Landeskreditbank* case, the General Court seems to answer the constitutional question in the affirmative.⁶⁷ It not only held that with the SSM Regulation the competences for prudential banking supervision were exclusively conferred upon the ECB, but also that it concerns an exclusive competence of the Union. This may be inferred from paragraph 65 of the judgment, where the General Court held that the principle of subsidiarity as laid down in Article 5(3) TEU is not of relevance for the interpretation of the SSM Regulation and the SSM Framework Regulation, as the principle only applies to areas that do not fall within exclusive EU competence.⁶⁸ The General Court thus seems to find that prudential supervision should be qualified as an exclusive Union competence.

The General Court's finding has been criticised by Tridimas.⁶⁹ As it is only the Treaties that can designate a certain competence as an exclusive Union competence, and the conferral of competence in the area of prudential supervision does not follow from the Treaties but from a decision by the Council in accordance with the procedure as laid down in Article 127(6) TFEU, he argues that the General Court's statement is incorrect where it qualifies the ECB's competences as exclusive Union competences. Prudential supervision would be a shared competence within the meaning of Article 4 TFEU.⁷⁰ In an area of shared competence, by default, Member States may in contrast to an area of exclusive EU competence legislate and adopt legally binding acts in that area, although to the extent that the EU has not exercised its competence.⁷¹

I agree with Tridimas' criticism. From a constitutional perspective, prudential supervision is a shared competence and not an exclusive EU competence. But when taking a more practical perspective, it follows from the EU Courts' judgments in *Landeskreditbank Baden-Württemberg – Förderbank v ECB* that prudential supervision is an exclusive ECB competence and may in that respect be considered a *de facto* exclusive competence of the Union.

66 Art. 2(1) TFEU.

67 See Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para 65.

68 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para. 65.

69 Tridimas 2019, p. 43.

70 Tridimas 2019, p.43; Jansen, Gullo & Aggarwal 2013, p. 195-196.

71 Art. 2(2) TFEU.

4.3.5 Decentralisation mechanisms

4.3.5.1 *General*

As discussed above, the SSM Regulation has conferred upon the ECB exclusive prudential supervisory competences but has simultaneously delegated competences to the NCAs. This delegation is realised by means of various decentralisation mechanisms. These mechanisms are the redistribution of direct on-going supervision of less significant entities by NCAs and the involvement of NCAs in the ‘common procedures’,⁷² i.e. authorisation and qualifying holdings. These mechanisms are characterised by a strong cooperation between the ECB and the NCAs; cooperation is one of the main features of the SSM.⁷³ The principles underlying their cooperation are codified in Article 6(2) SSM Regulation: ‘Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information.’ In addition, all decentralisation mechanisms are characterised by a strong ECB involvement.

4.3.5.2 *Significant-less significant dichotomy for ongoing supervision*

4.3.5.2.1 *General*

Central to the decentralisation achieved by the SSM Regulation is the distinction between significant and less significant entities.⁷⁴ Significant entities fall under direct ECB supervision and less significant entities under direct NCA supervision. As a result, day-to-day prudential supervision is exercised by the ECB vis-à-vis significant entities and by NCAs vis-à-vis less significant entities.⁷⁵ The tasks excluded from this division are the authorisation and withdrawal of authorisations (task (a) in Art. 4(1) SSM Regulation) and the assessment of notifications of acquisitions and disposals of qualifying holdings in credit institutions (task (c) in Art. 4(1) SSM Regulation), also known as the ‘common procedures’.⁷⁶ Tasks (b) and (d) to (i) of Article 4(1) SSM Regulation are subject to the significant-less significant dichotomy.

72 See Part V of the SSM Framework Regulation which is titled ‘Common Procedures’.

73 De Bellis 2015, p. 78-79.

74 Whether an entity should be classified as significant and consequently falls either under direct or indirect ECB supervision, is to be determined on the basis of its size, importance for the economy of the Union or any participating Member State, the significance of the cross-border activities and direct public financial assistance. The criteria for determining whether an entity qualifies as significant or less significant are to be found in the SSM Regulation and the SSM Framework Regulation: Article 6(4) SSM Regulation and Article 50-66 SSM Framework Regulation.

75 Art. 6(4) SSM Regulation.

76 Art. 6(4), 14 and 15 SSM Regulation; Art. 73-79 SSM Framework Regulation (authorisation), Art. 80-84 SSM Framework Regulation (withdrawal of authorisation) and Art. 85-87 SSM Framework Regulation (qualifying holdings).

4.3.5.2.2 Direct ECB supervision of significant entities

To carry out its supervisory tasks in respect of significant entities, the ECB has been conferred various supervisory powers. The ECB's supervisory powers are to be found in Article 9 to 18 SSM Regulation. Article 9 SSM Regulation comprises the 'basic principles with regard to the conferral of powers to the ECB'.⁷⁷ It states the sources of the ECB's 'direct' powers and contains the ECB's power to issue instructions vis-à-vis NCAs.

It follows from Article 9 SSM Regulation that the ECB has been conferred the powers that are included in the SSM Regulation as well as 'all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation'. It follows from Article 4(3) SSM Regulation that relevant Union law encompasses Regulations, as well as national law transposing EU prudential rules and Member State options.⁷⁸ It is therefore, that the ECB, as a novelty in EU law, must apply national law for the purpose of carrying out its prudential supervisory tasks.⁷⁹

From the last sentence of Article 9(1), third subparagraph, SSM Regulation, it may be inferred that Article 9 SSM Regulation contains the general competences and Article 10 up to 18 SSM Regulation the specific competences.⁸⁰ Lackhoff qualifies the specific powers as a *lex specialis* of the general powers and concludes that the general powers may therefore only be used if a power is not already covered by the specific powers.⁸¹

4.3.5.2.3 Direct NCA supervision of less significant entities

General

The NCAs are the direct supervisory authorities for less significant entities. They carry out the prudential supervisory tasks vis-à-vis these entities by using their (to a certain extent harmonised) supervisory instruments and powers. As Wymeersch formulates it, these NCAs 'will continue to perform their supervisory activities on the basis of their national legislation'.⁸² It will

77 Lackhoff 2017, p. 37.

78 Both the ECB and the Commission rely on extensive reading of Article 4(3) SSM Regulation. In their view, it not only includes national powers explicitly mentioned in Union law, but also national powers that are (only) 'intended to underpin a supervisory function under Union law', see European Commission, Commission Staff Working Document, Report from the Commission to the European Parliament and the Council on the SSM Regulation, Brussels 11 October 2017, COM(2017) 591 final, p. 27; European Commission, Report from the Commission to the European Parliament and the Council on the SSM Regulation, COM(2017) 591 final, p. 8; ECB Letter to Significant Institutions re Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law, 31 March 2017, SSM/2017/0140, p. 2.

79 For a theoretical conceptualisation of this novelty, see Witte 2014, p. 105-109.

80 Lackhoff 2014, p. 21-22.

81 Lackhoff 2014, p. 21-22. Schuster agrees, see Schuster 2014, p. 9.

82 Wymeersch 2014, p. 41.

thus be the NCAs that take the supervisory decisions vis-à-vis credit institutions, on the basis of national law and following national (administrative) procedures.

Reliance on NCAs for supervising less significant entities may be criticised in view of the SSM's objective of creating a consistent supervisory framework.⁸³ Consistency must be ensured within a decentralised framework of prudential supervision. The SSM therefore must strike a balance between the necessary reliance on NCAs on the one hand and a coherent and unified supervisory framework on the other. This balance between decentralisation and unification and the ECB's final responsibility for the functioning of the system necessitate a coordinating and overseeing role for the ECB.

ECB's oversight of NCA supervision

General

To ensure coherent and unified supervision within a decentralised framework, the ECB has been attributed several coordinating and monitoring tools to streamline and control supervision exercised by the NCAs, commonly referred to as 'indirect supervision'.⁸⁴ Within this 'indirect' supervision of the ECB, one may distinguish between three elements: harmonising supervisory practices of NCAs in a general way, coordinating cooperation between the ECB and NCAs and assessing specific NCA supervisory action.⁸⁵ In addition to these tools, an important aspect of indirect supervision is the NCAs' duty to share information with the ECB. The ECB's indirect supervision coexists with and is subject to the coordinating and regulating role EBA fulfills within the SSM.

Relationship between the ECB and the EBA

EBA is one of the three ESAs and has its focus on the banking sector. EBA consists of cooperating banking supervisory authorities. Its primary task is of a regulatory, rather than a supervisory, nature aiming at supervisory convergence. To enhance such convergence, EBA is empowered to issue Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS), containing detailed rules elaborating first-level legislation, such as CRR. EBA also issues instruments that qualify as soft law instruments, which include recommendations, guidelines and Q&As. These soft law

83 Recital 12 SSM Regulation: 'As a first step towards a banking union, a single supervisory mechanism should ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned, and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations. (...)'

84 See, *inter alia*, Figure 1 in ECB, 'Guide to banking supervision', November 2014, p. 13; Lackhoff 2017, p. 221-225.

85 This distinction is made by Lackhoff 2017, p. 221.

instruments may be addressed to both market participants and supervisory authorities.

Also the ECB adopts guidelines, recommendations and decisions in its exercise of prudential supervision.⁸⁶ These instruments must be in compliance with EU law, including legislative and non-legislative acts, and the ECB is subject to EBA's RTSs, ITSs and guidelines.⁸⁷

ECB's information position

The SSM framework is designed to keep the ECB up to date of the (financial) situation of less significant institutions and the supervision carried out by the NCAs. To this end, the SSM Framework Regulation contains a general⁸⁸ and several specific provisions requiring an information exchange,⁸⁹ rooted in the duty of cooperation in good faith.⁹⁰ NCAs must, *inter alia*, notify the ECB *ex ante* of important supervisory procedures and important draft supervisory decisions⁹¹ and *ex post*, on a regular basis, on request of the ECB, of other measures and the performance of their supervisory tasks.⁹² In addition to these oversight tools the ECB has in relation to the NCAs, the ECB is competent to request information, initiate investigations and on-site inspections in respect of any euro area credit institution directly, regardless its significance.⁹³

Harmonising supervisory practices of NCAs

The harmonisation of financial regulation does not prevent differences from existing between supervision. Not only do directives leave discretion to the Member States as to how to implement and interpret it, but in addition, financial regulation contains primarily substantive rules for supervised entities and generally does not interfere with supervisory practices, including methodologies used and supervisory priorities. This may lead to significant differences in supervision and enforcement of financial regulation between the Member States.⁹⁴ Even the finalisation of a single rulebook would therefore not be able to eliminate all existing differences.⁹⁵

86 Art. 4(3), second subpara, SSM Regulation.

87 Art. 4(3), second subpara, SSM Regulation.

88 Art. 21 SSM Framework Regulation.

89 See particularly Part VII regarding 'Procedures for the supervision of less significant supervised entities', comprising Art. 96-100 SSM Framework Regulation.

90 Art. 6(2) SSM Regulation and Art. 20 SSM Framework Regulation.

91 Art. 6(5)(c) in conjunction with 6(7)(c) SSM Regulation, and Art. 97-98 SSM Framework Regulation.

92 Art. 6(5)(e) SSM Regulation and Art. 99 SSM Framework Regulation.

93 Art. 6(5)(d) in conjunction with Art. 10-13 SSM Regulation, and Art. 138-146 SSM Framework Regulation.

94 More extensively on this distinction between financial regulation and supervision within the SSM, see Wymeersch 2012, p. 4-6.

95 More extensively on the single rulebook and on the relevance of the difference between regulation and supervision for application of the single rulebook, see Lefterov 2015, more in particular, p. 23-24.

The room to maneuver between prudential regulation and prudential supervision causing differences in supervision and enforcement of prudential regulation has been sought to counter by conferring the ECB the power to 'steer' NCA supervision. The 'steering' instruments, 'soft law', available to the ECB are the issuance of regulations, guidelines or general instructions directed towards the NCAs that prescribe how they should exercise their tasks in respect of less significant credit institutions.⁹⁶ Schuster sees the role of the ECB here as 'supervisor of supervisors'.⁹⁷ Although not explicitly mentioned, the SSM Regulation does also provide the basis for non-binding recommendations directed towards NCAs.⁹⁸ These instruments aim to provide for common supervisory standards and for rules on cooperation.⁹⁹ Regulations, guidelines and general instructions are binding on the NCAs.¹⁰⁰ Recommendations are not.¹⁰¹

Even though the NCAs will remain responsible for the direct supervision of less significant entities and will continue using their national supervisory powers, instruments and practices, the performance of their activities will thus be streamlined and controlled by the ECB. These coordinating tools are however limited, as they do not include the power to issue individual guidelines addressed to an NCA.¹⁰² The ECB's steering instruments therefore do not include the power to instruct an NCA in specific cases concerning less significant entities.¹⁰³

Take over supervision of NCAs

The ECB may at any time, 'when necessary to ensure the consistent application of high supervisory standards (...) on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institution', and thus take over supervision of the NCAs.¹⁰⁴ According to Wymeersch, this preemptive power not only applies to situations where an NCA applies rules differently, but also in situations where deficient supervision leads to an NCA not meeting 'the high-level standards'.¹⁰⁵ As disciplining powers in relation to NCAs are lacking in the ECB's toolkit, the latter may effectively serve as a disciplining method.¹⁰⁶

96 Art. 6(5)(a) SSM Regulation.

97 Schuster 2014, p. 6.

98 Lackhoff 2017, p. 99, 105.

99 Lackhoff 2017, p. 223.

100 Lackhoff 2017, p. 99, 101-105. On the binding nature of instructions, see Art. 6(3) SSM Regulation.

101 Lackhoff 2017, p. 99, 105-106.

102 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337, para. 61.

103 Lackhoff 2014, p. 21; Lackhoff 2017, p. 223.

104 Art. 6(5)(b) SSM Regulation and Art. 67 SSM Framework Regulation.

105 Wymeersch 2014, p. 42. See also Lackhoff 2017, p. 153.

106 Wymeersch 2014, p. 33, 42.

The Deutsche Bundesbank in 2013 posed the question whether this power provides for a 'right of intervention' in specific cases, on a case-by-case basis, or if this power provides for a complete (future) conferral of supervisory responsibility to the ECB.¹⁰⁷ The SSM Framework Regulation points in the latter direction. Article 67 SSM Framework Regulation, containing the criteria for an ECB decision pursuant to Article 6(5)(b) SSM Regulation, speaks of 'to exercise directly the supervision' of a less significant entity or group. This also is the commonly accepted interpretation.¹⁰⁸ The ECB has used this power multiple times.¹⁰⁹ In most cases the ECB took over supervision 'with a view to ensuring the consistent application of high supervisory standards, as they [the less significant entities, JT] were expected to start meeting the significance criteria in the near future.'¹¹⁰

4.3.5.3 *Common procedures*

4.3.5.3.1 *General*

As stated earlier, the decentralisation mechanism based on significance does not apply to granting authorisation, withdrawal of authorisation and the assessments of qualifying holdings in credit institutions. Therefore, the ECB is exclusively responsible for these tasks in respect of all credit institutions.¹¹¹ Yet, another decentralisation mechanism does underpin these procedures. A specific mechanism of cooperation and assistance of NCAs is provided for in relation to these 'common procedures' that qualify as composite procedures. The NCAs fulfill important preparatory functions. The ECB's 'Guide to banking supervision' even states that these procedures are 'done jointly with the NCAs',¹¹² implying a view that rather sees the relationship between the ECB and the NCAs as one between peers than one of manager-assistant. In these procedures the NCAs act as single point of

107 Deutsche Bundesbank, 'European Single Supervisory Mechanism for banks – a first step on the road to a banking union', Monthly Report July 2013, p. 18.

108 See Lackhoff 2017, p. 152; Letter of D. Nouy in the capacity of chair of the Supervisory Board of the ECB to a Member of the European Parliament, 23 April 2018, available at www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter180426_Giegold.en.pdf?356f39a0f181af7b67a225b88e3a25f3; Letter of D. Nouy in the capacity of chair of the Supervisory Board of the ECB to a Member of the European Parliament, 2 May 2016, available at www.bankingsupervision.europa.eu/ecb/pub/pdf/160502letter_melo.en.pdf.

109 For an overview, see Letter of A. Enria in the capacity of chair of the Supervisory Board of the ECB to a Member of the European Parliament, 16 April 2020, available at www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter200416_Giegold~507f397489.en.pdf.

110 Letter of A. Enria in the capacity of chair of the Supervisory Board of the ECB to a Member of the European Parliament, 16 April 2002, p. 2, available at www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter200416_Giegold~507f397489.en.pdf.

111 Art. 6(4) SSM Regulation.

112 ECB, 'Guide to banking supervision', November 2014, p. 26.

entry for applications and carry out an assessment on their own. The NCAs' assisting task concerns the drafting of decision to be send to the ECB. In each of these decision-making procedures the ECB ultimately takes the decision that concludes the procedure.

The substantive rules governing the common procedures have in common that they have their basis in CRD IV and therefore are implemented into national laws. One reason for the close involvement of the NCAs in these procedures is that the rules governing these are for the most part implemented in national laws, implementing CRD IV.¹¹³ The national stages of these procedures, including the time limits, are governed by national (administrative) law.

4.3.5.3.2 NCAs: single point of entry, independent assessment and draft decision

In both the procedure for granting authorisation and for the assessment of qualifying holdings in credit institutions, the NCAs function as single points of entry. Applicants must submit their application to the relevant NCA in accordance with national law.¹¹⁴ The NCAs thus act as a 'front desk' in these procedures.

The role of NCAs in the procedure for authorisation and for the authorisation of qualifying holdings in credit institutions is not confined to merely operating as a 'front desk', i.e. without any substantive decisional task.¹¹⁵ The NCAs will carry out an independent assessment on the basis of national law. In most cases this independent assessment is 'initial' in the sense that it precedes an assessment by the ECB. However, in the authorisation procedure the NCA's assessment may be final, if the NCA rejects the application.

In the procedure for authorisation, the NCA will assess whether the credit institution complies with all authorisation requirements as set out in national law.¹¹⁶ As the authorisation requirements in CRD IV are implemented into national laws and are of a minimum harmonisation nature, national laws may include additional requirements for authorisation. Should the applicant not comply with national law, then the NCA will take a final decision rejecting the application.¹¹⁷ The NCA will take this decision on the basis of national law, following national (administrative) procedures. In case of rejection by the NCA, the ECB is not involved in the decision-making process. The ECB remains however updated of the procedure as

113 European Commission, Commission Staff Working Document, Report from the Commission to the European Parliament and the Council on the SSM Regulation, Brussels 11 October 2017, COM(2017) 591 final, p. 25.

114 Art. 14(1) SSM Regulation (authorisation); Art. 15(1) SSM Regulation (assessment of qualifying holdings).

115 On the different roles of national authorities in composite procedures more in general, see Brito Bastos 2018, p. 107.

116 Art. 14(2) SSM Regulation and Art. 74 SSM Framework Regulation.

117 Art. 14(2) SSM Regulation and Art. 75 SSM Framework Regulation.

the NCA must notify the ECB of any application within 15 working days, of the time limits applicable and the NCA must send a copy of the decision rejecting authorisation to the ECB.¹¹⁸ The NCA shall notify the applicant of this draft decision.¹¹⁹

If the applicant does comply with the national requirements for authorisation, the procedure becomes two-staged. After the NCA assessed the application, it prepares a 'draft decision' proposing that the ECB grant authorisation.¹²⁰ The NCA will notify the applicant of the draft authorisation decision.¹²¹

The NCA also carries out an independent assessment in the procedure governing the authorisation of a qualifying holding in a credit institution. As opposed to the authorisation procedure, the assessment by the NCA in this procedure is always an initial assessment as it cannot culminate in a final decision taken by the NCA. The course of the procedure is comparable to that of the two-staged authorisation procedure: the NCA forwards 'the notification and a proposal for a decision to oppose or not to oppose' to the ECB¹²² and the ECB shall then 'decide whether to oppose the acquisition on the basis of the assessment criteria set out in relevant Union law'.¹²³ As follows from the SSM Framework Regulation, the ECB shall also take into account in its assessment the NCA's 'draft decision'.¹²⁴

Withdrawal of authorisation may be proposed by the NCAs by sending a proposal to the ECB.¹²⁵ The SSM Framework Regulation refers to this proposal as a 'draft decision'.¹²⁶ The ECB may thus also be the initiator for withdrawal. The ECB then takes 'a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority'.¹²⁷

4.3.5.3.3 *ECB's assessment and decision-making power*

After the NCA carried out its own assessment under national law in each of these procedures, it submits a 'proposal' or 'draft decision' to the ECB, except in the situation where an application for authorisation is rejected by the NCA. The phrasing in the SSM Regulation and the SSM Framework Regulation of the ECB's subsequent actions and assessments differs per type of procedure. In the banking authorisation process, the SSM Regulation states that the ECB can 'object' to the draft NCA decision. In contrast,

118 Art. 73(1), 73(2) and 75 SSM Regulation, respectively.

119 Art. 88(3)(d) SSM Framework Regulation.

120 Art. 14(2) SSM Regulation and Art. 76(1) SSM Framework Regulation.

121 Art. 88(3)(a) SSM Framework Regulation.

122 Art. 15(2) SSM Regulation.

123 Art. 15(3) SSM Regulation.

124 Art. 87 SSM Framework Regulation.

125 Art. 14(5) SSM Regulation.

126 Art. 80-81 SSM Framework Regulation.

127 Art. 14(5), second subparagraph, SSM Regulation.

the provision in the SSM Regulation governing the ECB's assessment in the process for the assessment of acquisitions of qualifying holdings does not mention the NCA draft decision. It states that the ECB shall decide whether to oppose to the acquisition on the basis of the assessment criteria set out in relevant Union law. What the consequences of these differences are for the decision-making in practice remains unclear. The differences in phrasing may be unintended and may not seek to establish any difference between the ECB's decision-making powers in practice. In addition, the question may be raised how these differences affect, *inter alia*, the legal effects of the ECB decisions and the legal standing of parties.¹²⁸ It also raises questions with regard to derivative illegality, i.e. whether a defect that occurred in the decision-making procedure at national level can affect the legality of the subsequent EU decision.¹²⁹

In the authorisation process, the ECB has been conferred what is described as a right to 'object to' the draft decision proposing to grant authorisation.¹³⁰ The SSM Framework Regulation speaks about the ECB 'objecting to' or 'supporting' the draft decision.¹³¹ This phrasing seems to imply that the ECB's assessment will primarily rely on the NCA's draft decision and does not comprise a whole new independent assessment of all the facts and circumstances of the application. However, from the SSM Framework Regulation it follows that the ECB bases its decision on its own assessment of the application, which means an assessment on the basis of the authorisation requirements,¹³² the draft decision and any comments provided by the applicant as part of its right to be heard.¹³³ This leads to the conclusion that the ECB's assessment extends beyond a mere assessment of the draft decision. If the ECB subsequently considers the applicant to be in compliance with both Union and national law, it will adopt a decision granting authorisation.¹³⁴ If the applicant does not comply, it objects to the draft decision.

If the ECB does not take a decision within the prescribed maximum period of ten days, with a possible extension to twenty days,¹³⁵ the draft authorisation decision of the NCA shall be deemed to be adopted by the ECB.¹³⁶ This silent endorsement mechanism may raise questions concerning the attribution of such decision to either the ECB or the NCA and consequently concerning judicial protection against it. One can argue, that the

128 More extensively on the concept of legal effects and legal standing in actions for annulment within the SSM, see Ch. 5.

129 More extensively on the issue of derivative illegality in composite procedures, see Brito Bastos 2018, p. 101-134.

130 Art. 14(3) SSM Regulation.

131 Art. 78 SSM Framework Regulation.

132 Art. 77(1) SSM Framework Regulation.

133 Art. 78(2) SSM Framework Regulation.

134 Art. 78(4) SSM Framework Regulation.

135 Art. 14(3) SSM Regulation and Art. 77(2) SSM Framework Regulation.

136 Art. 14(3) SSM Regulation and Art. 78(3) SSM Framework Regulation.

substance of a decision being adopted as a result of the ECB's silence, is mainly the responsibility of the NCA. Again, it is the NCA which is responsible for notifying the applicant of this decision.¹³⁷

With regard to the assessment of qualifying holdings in credit institutions, the ECB's decision-making power is phrased as a new, independent assessment: 'The ECB shall decide whether to oppose to the acquisition on the basis of the assessment criteria set out in relevant Union law'.¹³⁸ It follows from the SSM Framework Regulation that the ECB's assessment comprises both an assessment of the proposed acquisition as well as of the NCA's draft decision.¹³⁹

In the procedure governing the withdrawal of authorisation, the ECB assesses the draft decision while taking into account the 'reasons for urgency' as put forward by the NCA.¹⁴⁰ It follows from the SSM Framework Regulation that the ECB's assessment must take into account the following: assessment of the circumstances justifying withdrawal; (where applicable), the NCA's draft decision; consultation with the NCA, and where the NCA is not the resolution authority, the national resolution authority; and, any comments provided by the credit institution pursuant to the right to be heard.¹⁴¹

4.3.5.3.4 *Interim conclusion*

What follows from the framework governing the decision-making process in each of the common procedures, is that both the NCAs and the ECB carry out, at least in theory, similar assessments. The ECB not only merely reviews the NCA draft decision, but also carries out its own independent assessment of the application. That the ECB not merely 'validates' these national draft decisions may be considered necessary with a view to the objective of the SSM to create consistency in prudential supervision.¹⁴² The 'independence' of this assessment also follows from the fact that the right to be heard applies at ECB level in these procedures.¹⁴³ As a result, the ECB must in its assessment also take into account any comments given by the applicant. Moreover, the ECB has the final decision-making power and, although it bases its assessment also on the draft decision, is in principle not bound by an NCA draft decision. For example, the ECB may reject an application for authorisation, also where the relevant NCA proposes to grant it.

137 Art. 14(4) SSM Regulation and Art. 88(3)(d) SSM Framework Regulation.

138 Art. 15(3) SSM Regulation.

139 Art. 87 SSM Framework Regulation.

140 Art. 81(1) SSM Framework Regulation.

141 Art. 83(2) SSM Framework Regulation.

142 See Ferrarini & Chiarella 2013.

143 The principle of due process is codified in Art. 22 SSM Regulation and specified in Art. 31 SSM Framework Regulation. Art. 77(1) (authorisation), Art. 81 (withdrawal authorisation on proposal NCA) and Art. 87 (assessment of qualifying holdings) state that the right to be heard applies to these procedures.

4.3.6 Involvement NCA staff in JSTs and on-site inspection teams

4.3.6.1 General

Another more practical feature of the integrated administration within the SSM, is the involvement of NCA staff in Joint Supervisory Teams (JSTs) and on-site inspection teams.

4.3.6.2 Joint Supervisory Teams

JSTs are central to the day-to-day supervision of significant entities.¹⁴⁴ These JSTs were not provided for in the SSM Regulation but were introduced by the ECB in its SSM Framework Regulation. A JST comprises both ECB and NCA staff.¹⁴⁵ So even though the ECB is the direct supervisory authority for significant entities, taking the supervisory decisions, the role of the NCAs is still important in the area of direct ECB supervision.¹⁴⁶

For each significant entity a JST is set up.¹⁴⁷ The tasks of the JSTs include the performing of the Supervisory Review and Evaluation Process (SREP), participating in the preparation of a supervisory examination programme and implementing it and implementing ECB supervisory decisions.¹⁴⁸

The hierarchy between the ECB and the NCAs is reflected in the composition of the JST, as it is led by a 'JST coordinator' that is always an ECB staff member.¹⁴⁹ In addition, although the NCAs themselves may appoint staff members to become members of a JST, the ECB reserves the right to require the NCA to 'modify the appointments'.¹⁵⁰ The JST coordinator is responsible for ensuring the coordination of the work within the JST and the other members are under the obligation to follow the coordinator's instructions.¹⁵¹ The JST coordinator is further assisted by 'NCA sub-coordinators', that each NCA designates if they appoint more than one staff member in the JST.¹⁵² Such NCA sub-coordinators can instruct the members that are appointed by the same NCA, but these instructions may not conflict with the instructions of the JST coordinator.¹⁵³

144 Other forms of cooperation in the area of direct ECB supervision are the ECB's right to instruct NCAs and staff exchanges and secondments between the ECB and the NCAs, see Lo Schiavo 2014, p. 131.

145 Art. 3(1) SSM Framework Regulation.

146 Wymeersch 2014, p. 33.

147 Art. 3(1) SSM Framework Regulation.

148 Art. 3(2) SSM Framework Regulation.

149 Art. 3(1) and 6 SSM Framework Regulation. Critical on the ECB's 'dominance' in JSTs, see Tröger 2014, p. 482.

150 Art. 4(3) SSM Framework Regulation.

151 Art. 6(1) SSM Framework Regulation.

152 Art. 6(2) SSM Framework Regulation.

153 Art. 6(2) SSM Framework Regulation.

4.3.6.3 *On-site inspection teams*

The ECB has the power to carry out on-site inspections.¹⁵⁴ These inspections are carried out by on-site inspection teams. These may comprise ECB staff, but also other persons may be authorised by the ECB, including NCA staff, to do so.¹⁵⁵ They together then form the on-site inspection team. The ECB shall designate the head of the on-site inspection team from among ECB and NCA staff members.¹⁵⁶ The other members of the on-site inspection team must follow the instructions of the head.¹⁵⁷ The head is responsible for coordination between the on-site inspection team and the respective JST.¹⁵⁸ The function of the head of the on-site inspection team is comparable to that of the JST coordinator.¹⁵⁹ Important to note here, is that, in contrast to the JST coordinator, the head of the on-site inspection team may also be an NCA staff member. In addition to the NCA staff member involvement in on-site inspection teams, NCA staff may also be involved by an on-site inspection not in their capacity as inspection team members, but in their capacity of NCA staff assisting the team.¹⁶⁰ Lackhoff refers to both these teams as ‘the on-site inspection team in the broader sense’.¹⁶¹

4.3.7 NCAs acting on the basis of ECB instructions

4.3.7.1 *General*

The ECB can only take a binding decision itself, if it has been conferred a power to do so. If the ECB has been assigned a task, but lacks a corresponding power to adopt specific decisions, it may need to use its power to issue an instruction to the relevant NCA. The power to issue a specific instruction vis-à-vis an NCA requesting it to make use of its national powers may be found in Article 9(1), third subparagraph, SSM Regulation:¹⁶² ‘To the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers.’ The power to issue instructions to an NCA fits the assistant-manager relationship between the ECB and the NCAs and stems

¹⁵⁴ Art. 12 SSM Regulation.

¹⁵⁵ Art. 12(2) SSM Regulation.

¹⁵⁶ Art. 144(2) SSM Framework Regulation.

¹⁵⁷ Art. 146(1) SSM Framework Regulation.

¹⁵⁸ Art. 146(2) SSM Framework Regulation.

¹⁵⁹ Lackhoff 2017, p. 183.

¹⁶⁰ Art. 12(4) SSM Regulation.

¹⁶¹ Lackhoff 2017, p. 183, fn. 856.

¹⁶² Further specified in Art. 22 SSM Framework Regulation.

from the obligation of the NCAs to assist the ECB in the implementation of any acts relating to the exercise of supervisory tasks.¹⁶³ Article 18 SSM Regulation lays down the ECB's power of instruction requesting an NCA 'to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with the acts referred to in the first subparagraph of Article 4(3) and any relevant national legislation which confers specific powers which are currently not required by Union law.' These two types of ECB instructional powers are discussed hereinafter.

4.3.7.2 *Specific instruction concerning significant entities*

As discussed above, pursuant to Article 4(3) SSM Regulation the ECB's powers also derive from national law that implements EU law. As a result, the ECB may take supervisory action on the basis of powers laid down in national law. From the ECB letters that were sent to all significant entities in 2016 and 2017, it follows that the ECB assumed competence for an extensive array of supervisory powers granted under national law.¹⁶⁴ Among these powers are the approval of acquisitions in a non-credit institution or a credit institution outside of the EU, the approval of mergers and de-mergers involving significant institutions and the approval of a significant institution's statutes.

Even though this mechanism of enforcing substantive banking law provides the ECB with a wide range of powers, there are limits to this mechanism, for instance where it concerns purely national law that does not qualify as 'relevant Union law'.¹⁶⁵ To make up for these limits, under the SSM Regulation, the ECB can issue case-specific instructions to an NCA requiring it to take a particular course of action with regard to an individual significant entity.¹⁶⁶ Such instructions may encompass an instruction to make use of national powers 'where this Regulation does not confer such powers on the ECB'.¹⁶⁷

The ECB's power to issue specific instructions to an NCA with regard to the supervision of a significant entity has a notably distinct function from the power to issue regulations, guidelines and general instructions to NCAs to 'streamline' the decentralised exercise of prudential supervision of less significant entities. The former power gives the ECB the possibility of requesting specific supervisory action of an NCA.

163 Art. 6(3) SSM Regulation.

164 See ECB Letter to Significant Institutions re Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law, 31 March 2017, SSM/2017/0140. See also Decision (EU) 2019/322 of the European Central Bank of 31 January 2019 on delegation of the power to adopt decisions regarding supervisory powers granted under national law (ECB/2019/4) OJ L 55/7. See also Bassani 2019, p. 108-122.

165 For a selection of supervisory powers laid down in national legislation that may not be within the scope of Article 4(3) SSM Regulation, see Bassani 2019, p. 126-131.

166 Art. 6(3) SSM Regulation.

167 Art. 9(1), third subparagraph, SSM Regulation.

The NCA is under the obligation to follow an instruction that the ECB addressed to it.¹⁶⁸ ECB instructions thus are binding upon the relevant NCA. Moreover, these instructions are intended to produce legal effects and therefore qualify as a reviewable act under Article 263 TFEU (action for annulment).¹⁶⁹

The scope of the ECB's power of instruction remains somewhat ambiguous due to the broad phrasing of Article 9(1), third subparagraph, SSM Regulation. In an attempt to provide more clarity on the potential range of national powers that could be exercised indirectly by the ECB, Bassani proposes a two-step approach to determining whether the ECB has such a power of instruction.¹⁷⁰ Firstly, the supervisory action sought by the ECB must fall within its tasks as listed in Article 4(1) and 5 SSM Regulation. Secondly, the ECB is not granted the power to undertake such a supervisory action by an EU directive. One of the examples that Bassani cites as an illustration of a national power that could be exercised indirectly by the ECB through an instruction is the national power to replace or restrict the powers of managers and board members for reasons other than not complying with the fit and proper requirements.¹⁷¹

Moreover, the provisions governing the power of instruction are silent on the level of detail of these instructions.¹⁷² It could be argued that the ECB may adopt instructions ranging from very detailed instructions that include a decision merely to be rubberstamped by the NCA before addressing it to the relevant credit institutions, to instructions that essentially serve as a mere encouragement to take some form of action, leaving the decision as to what type of action to the NCA. Certainly, the ECB could opt to issue an instruction leaving the decision what action to undertake to the NCA. However, considering the ECB's role as exclusively competent to carry out its supervisory tasks vis-à-vis significant entities, it is more likely that its instructions are specific.¹⁷³ In such a situation, the ECB has for example interpreted the supervisory data collected by the relevant JST and subsequently determined that supervisory action is necessary. Prior to adopting the instruction, the ECB must have concluded that the power that needs to be exercised lies beyond its own supervisory toolbox, yet is an existing national power. Nevertheless, since the instruction entails the exercise of

168 As follows from, *inter alia*, Art. 6(3) and Art. 9(1), third subpara, SSM Regulation and Art. 90(2) SSM Framework Regulation. Similarly, see Türk & Xanthoulis 2019, p. 158; Witte 2014, p. 102; Witte 2015, p. 33; Hernández Saseta 2021, p. 307-308. Bassani, however, argues that ECB instructions are not legally binding on NCA's, yet should rather be qualified as 'recommendations', see Bassani 2019, p. 123-126.

169 See further Ch. 5, para 5.3.2.3.5.

170 Bassani 2019, p. 123.

171 Bassani 2019, p. 128-131.

172 See also Hernández Saseta 2021, p. 309.

173 See further on the issue of 'direct concern' of ECB instructions Ch. 5, para 5.3.5.4.2.

national powers in regard to which the relevant NCA is expert, the ECB instruction may leave some of the details to the NCA.¹⁷⁴

Witte qualifies the ‘mode of executing banking law’ via instructions addressed to an NCA as a two-staged process, consisting of the ECB issuing an instruction to the NCA and a subsequent adoption of a decision by the NCA.¹⁷⁵ The first stage is governed by EU law and the second by national law.¹⁷⁶ Such a process that starts with an ECB instruction and ends with a national decision, raises several questions with regard to judicial protection. For instance, what court is competent to review such a multi-staged procedure.¹⁷⁷ In this dissertation, the construction specific ECB instruction-NCA implementing decision will be referred to as a ‘top-down composite procedure’.¹⁷⁸

4.3.7.3 *Instruction to impose administrative penalties*

Article 18 SSM Regulation encompasses the ECB’s power to impose administrative penalties and to instruct NCAs to impose an administrative penalty. The ECB may impose an administrative penalty directly in case of a breach of provisions laid down in a Regulation, most notably the CRR, by a significant entity¹⁷⁹ and in case of breach of an ECB regulation or decision.¹⁸⁰

The power to impose administrative penalties for a breach of Regulations is limited to administrative pecuniary penalties for significant entities for breaches of a provision in a Regulation. For cases that are not covered by this power, the ECB has the power to impose administrative penalties ‘indirectly’ by means of instructing an NCA to ‘open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with’ national law.¹⁸¹ The SSM Regulation and the SSM Framework Regulation list situations not covered by Article 18(1) SSM Regulation for which this instructional power may be used in respect of significant entities. These include (pecuniary and non-pecuniary) penalties for breaches of national law transposing Directives, including most notably CRD IV and penalties imposed on members of the management board of a supervised entity or any other individuals who under national law are responsible for a breach by a supervised entity.¹⁸² An example of the ECB

174 As argued by Bassani 2019, p. 125 and Hernández Saseta 2021, p. 309.

175 Witte 2014, p. 98.

176 Witte 2014, p. 98.

177 Witte also poses and answers this question, see Witte 2014, p. 99-103.

178 See further Ch. 5, para 5.2.3.

179 Art. 18(1) SSM Regulation. Article 18(1) SSM Regulation only applies to significant entities, as argued by Lackhoff 2017, p. 214.

180 Art. 18(7) SSM Regulation.

181 Art. 18(5) SSM Regulation.

182 Art. 18(5), second subparagraph, SSM Regulation and Art. 134(1) SSM Framework Regulation.

exercising this power of instruction concerned the alleged infringement of the remuneration rules as implemented into national law by the Dutch credit institution Rabobank. On 8 February 2019, the ECB addressed its instruction to DNB and one year later DNB imposed a fine on Rabobank of 2 million euros.¹⁸³

The ECB's power does not include 'direct influence on the sanctioning proceeding and its outcome'.¹⁸⁴ However, the penalties imposed by the NCA must be 'effective, proportionate and dissuasive'¹⁸⁵ and the ECB may review this in its capacity as 'supervisor of the supervisors'.¹⁸⁶

4.3.8 SSM architecture of judicial and legal review

Due to the integrated nature of the SSM, the judicial review of decision taken within the framework of the SSM may also be referred to as integrated. The architecture of the SSM system of judicial review comprises both the national levels as well as the EU level. This subparagraph seeks to briefly set out this architecture. In Chapter 5, the legal framework of the action for annulment and the interaction between the national and the EU judicial levels will be discussed more extensively.

ECB supervisory decisions may be contested in front of the EU Courts or the Administrative Board of Review (ABoR).¹⁸⁷ Review by the ABoR is limited to an 'internal administrative review', which means that review 'shall pertain to the procedural and substantive conformity with this Regulation'.¹⁸⁸ In parallel to the ABoR review, the route to judicial review under Article 263 TFEU by the EU Courts is open. An ABoR procedure is not a precondition for instituting an action for annulment before the Court.¹⁸⁹

NCA decisions may be challenged before the competent national courts. Review by the ABoR is not available for NCA decisions,¹⁹⁰ neither is review by the EU Courts. However, NCA preparatory decisions that are non-binding on the ECB may be reviewable as part of an annulment procedure against the ECB final decision, as was held by the Court in the *Berlusconi*

183 The decision imposing the fine was published on DNB's website, see www.dnb.nl/nieuws-voor-de-sector/2020/dnb-legt-aan-cooperatieve-rabobank-u-a-rabobank-bestuurlijke-boetes-op-wegens-het-niet-correct-toepassen-van-europese-beloningsregels-in-2014/. The ECB also published the fine on its website, see www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html.

184 Lackhoff 2017, p. 218.

185 Art. 18(5), first subparagraph, SSM Regulation.

186 Lackhoff 2017, p. 218.

187 Art. 24 SSM Regulation.

188 Art. 24(1) SSM Regulation.

189 Lackhoff 2017, p. 237.

190 Art. 24(1) SSM Regulation states that review by the ABoR is open for 'decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation'.

case.¹⁹¹ If the final decision has been taken by an NCA, it may occur that it was preceded by an ECB act, for instance in form of an instruction directed at the relevant NCA. In such a situation, by means of requesting a preliminary reference procedure, applicants may seek judicial review of the ECB act at the EU level. This situation will result in a two-staged judicial review.¹⁹²

4.4 CONCLUSION

With the SSM, prudential banking supervision has become a Union competence exclusively conferred upon the ECB. Paradoxically, the centralisation of prudential supervision at the ECB has led to decentralisation, as the exercise of prudential supervision is shared between the ECB and the NCAs. Although supervisory competence in relation to all prudential supervisory tasks in respect of all credit institutions, regardless their significance, is exclusively conferred upon the ECB, the NCAs are an essential element of the SSM. Several decentralisation mechanisms 'redistribute' the exercise to NCAs and thus to the national level. A complete centralisation has therefore not been achieved. A decentralised implementation and enforcement by NCAs at the national levels may however conflict with the SSM's objective of ensuring a coherent and unified supervisory framework. To strike a balance between the necessary decentralisation on the one hand and the objective of ensuring coherence, the ECB has been positioned in the SSM as a central supervisory authority. The relationship between the ECB and the NCAs is undoubtedly of a hierarchical nature. The ECB carries the ultimate responsibility for the functioning of the system, oversees, monitors and controls supervision by the NCAs of less significant entities and may at any time take over supervision of an NCA.

191 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023. More extensively on this judgment, see Ch. 5, para 5.3.4.5.3.

192 See Ch. 5, para 5.3.5.

5.1 INTRODUCTION

As we have seen in the previous chapters, European prudential banking supervision has become an EU competence but is exercised within an integrated administration: the SSM.¹ Consequently, supervisory action taken within the framework of the SSM is often a joint responsibility. The type of joint responsibility that this chapter will focus on are decisions that result from four selected SSM composite procedures, involving both NCA and ECB decision-making. Such composite procedures encompass two jurisdictional ‘stages’ or ‘layers’: national and European.

While a composite procedure culminates in a final decision that constitutes a joint effort, from an administrative law perspective, the final decision is not ‘joint’ or ‘mixed’, but either of a Union or a national nature.² A composite procedure either concludes with a final national decision or an EU final decision. Within the context of the SSM, an SSM composite procedure either culminates in an NCA decision or an ECB decision.

Integrated administration in general and composite procedures, in particular, are well-known for posing problems to judicial protection.³ The leading cause for these problems is the paradox of an increasingly integrated administrative system on the one hand and a traditional ‘dualistic’ judicial system on the other. For judicial review of composite procedures, this paradox leads to a highly integrated decision-making procedure culminating in a joint final decision, while judicial review is organised dualistically. Considering the problems caused by the paradox, it has been argued that ‘the real challenge to the EU legal system is [...] to find ways to adapt the means of judicial supervision to the emerging reality of an integrated administration.’⁴

This chapter seeks to investigate to what extent the division of jurisdiction in actions for annulment relating to SSM composite procedures is problematic, i.e. how this may hamper effective judicial protection. The chapter is structured as follows. Firstly, the concept of a composite proce-

1 This chapter contains and builds on Tegelaar 2022, p 119-136, Tegelaar 2018, p. 283-300, and Budinská & Tegelaar 2023, p. 329-351.

2 Hofmann 2009b, p. 52; Hofmann 2019, p. 2-3 with reference to Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 43. See also Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802, para 94.

3 See, e.g., Hofmann 2009b, p. 52.

4 Hofmann 2009a, p. 157.

ture will be elaborated, including the core characteristics of the selected SSM composite procedures and the distinction between bottom-up and top-down composite procedures. Secondly, the scope of jurisdiction under Article 263 TFEU will be analysed more broadly. This analysis includes the concept of a reviewable act under EU law and, more specifically, what decisions within the SSM qualify as an EU act. In addition, special attention will be given to the Article 263 TFEU concept of legal effects. The analysis of the scope of jurisdiction under Article 263 TFEU will be concluded by discussing the legal standing requirements. Thirdly, the division of jurisdiction in bottom-up composite procedures is analysed. To this end, the Court's case law on the doctrine governing the division of jurisdiction will be discussed, including the milestone judgments in *Borelli*, *Sweden v Commission* and *Berlusconi and Fininvest v Bank of Italy* that together form the core of the Court's approach. This section will conclude with discussing the EU Courts' role as *juges the droit national* in light of the principle of effective judicial protection, now that the Court held in *Berlusconi* that it is exclusively competent to review both the ECB final decision and any non-binding NCA preparatory acts. Fourthly, jurisdiction in top-down composite procedures is analysed. To this end, the EU legal standing requirements will be discussed, which play a central role in the doctrine governing the division of jurisdiction in top-down composite procedures. Fifthly, the Dutch framework governing the national action for annulment will be discussed. That section seeks to investigate how the EU framework for actions for annulment interacts with the Dutch framework in composite procedures. The chapter concludes with an application of the normative framework to the findings in order to answer the question of whether effective judicial protection falls short. Recommendations to remedy any shortcomings will be formulated in Chapter 7, again based on the normative framework.

This chapter will focus on the division of jurisdiction between the EU Courts and the national courts in actions for annulment concerning SSM composite procedures. The focal point is an analysis of the Court's doctrine governing the distribution of jurisdiction in composite procedures. Article 263 TFEU is central to this distribution. It provides for the EU Courts' exclusive jurisdiction to review the legality of EU reviewable acts. It defines the EU Courts' jurisdiction *ratione materiae*, i.e. subject-matter jurisdiction, and the EU Courts' jurisdiction *ratione personae*, i.e. what parties have legal standing under Article 263 TFEU. The analyses in this chapter will be carried out separately for bottom-up composite procedures and top-down composite procedures, because the elements that are decisive for the division of jurisdiction differ for each of these types of composite procedures. For bottom-up composite procedures, the EU jurisdiction assessment revolves around the question at which level – EU or national – the 'exclusive decision-making power' lies. This concept is developed by the Court and not included in Article 263 TFEU. Yet, it defines the Court's jurisdiction *ratione materiae* in bottom-up composite procedures. In top-down procedures, the Article 263 TFEU concept of legal effects and the legal standing

requirements of that same provision are central to the jurisdictional division. Legal effects concern the Court's jurisdiction *ratione materiae* and legal standing requirements the Court's jurisdiction *ratione personae*.

5.2 COMPOSITE PROCEDURES

5.2.1 Definitions

Composite procedures are a specific type of integrated administration.⁵ The concept of a composite procedure is not legally defined and the Court has so far never used the term.⁶ Nevertheless, in legal scholarship several definitions have been formulated. Eliantonio defines it as a procedure 'entailing the input of administrative actors from different jurisdictions, and in which the final decision, issued by a Member State or a EU authority, is based on procedures involving more or less formalized input of the various authorities'.⁷ Alonso de León proposes: 'administrative procedures in which both national and European administrative actors cooperate and share responsibility for the decision or measure adopted by them'.⁸ The ReNEUAL (Research Network on EU Administrative Law) Model Rules include the following definition: 'an administrative procedure where EU authorities and the authorities of a Member State or of different Member States have distinct functions which are inter-dependent'.⁹ Similarly, Brito Bastos argues that a distinctive characteristic of composite procedures, as opposed to other administrative procedures (that are in the view of Brito Bastos, always multi-staged), is 'the decisional interdependence between national and EU authorities', i.e. the preceding stages are necessary for the final decision.¹⁰ He derives this element of a composite procedure from *Carl Kühne and Others*, where the Court referred to a national measure 'which constitutes a necessary step in the procedure for the adoption of a Community measure'.¹¹

5 More extensively on the concept of composite procedures in EU law, see, *inter alia*, Jansen & Schöndorf-Haubold 2011; Eliantonio 2015, p. 65-102; Röhl 2008, p. 75-96.

6 Although in the *Berlusconi* case, the Court quotes the term 'composite procedure' as used by the Italian Consiglio di Stato, see Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 38. Yet, the term 'composite procedure' had a central position in AG Campos Sánchez-Bordona's Opinion in *Berlusconi*, see Opinion AG Campos Sánchez-Bordona in Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:502.

7 Eliantonio 2015, p. 68-69.

8 Alonso de León 2016, p. 187.

9 Art. I-4(4) ReNEUAL Model Rules.

10 Brito Bastos 2018, p. 105 and references to case law; Brito Bastos 2020, p. 66-67.

11 Brito Bastos 2020, p. 66-67 with reference to Case C-269/99 *Carl Kühne and Others* ECLI:EU:C:2001:659, para 57.

I will not seek to add another definition to the already-existing catalogue. Essential to establish at the beginning of this chapter is that the SSM procedures that will be used as case studies in this chapter qualify as composite procedures on the basis of all these above-mentioned definitions. They all qualify as composite procedures, because they concern administrative procedures in which both the relevant NCA and the ECB carry out distinct functions that are subsequent, closely interrelated and concluded with one final decision vis-à-vis the addressee.

The selected SSM procedures are:

- a. Procedure for authorising a credit institution;
- b. Procedure for withdrawing authorisation as a credit institution;
- c. Procedure for authorising a qualifying holding in a credit institution;
- d. ECB instruction addressed to an NCA instructing it to take a specific action under national law vis-à-vis an individual credit institution (encompassing both an ECB instruction requiring an NCA to exercise a national power in case the SSM Regulation does not confer such a power upon the ECB (Art. 9(1), third subpara, SSM Regulation) and an ECB instruction requiring an NCA 'to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with' national law (Art. 18(5) SSM Regulation).

These SSM procedures have been selected as they involve the formalised cooperation between the NCA and the ECB where both levels exercise decision-making authority. The analyses of these composite procedures in this chapter will be based on the codification of the legal framework of these composite in the SSM Regulation and the SSM Framework Regulation. Yet the legal framework is a simplification of how cooperation transpires in practice. Therefore, the description and analyses of the composite procedures in this chapter will necessarily leave out the details of the cooperation in practice. This approach will nevertheless match the EU Courts' formalistic approach, where the legal framework of the composite procedures serves as the basis for their analyses.¹² Other SSM composite procedures, in which the NCAs primarily fulfill a role in transferring information to the ECB, will not be discussed in this chapter. Although challenges in judicial protection may also arise in this type of procedures, the focus of this chapter will be on procedures that involve substantive and formalised decision-making by multiple authorities and thus in which the final decision may be regarded a joint responsibility.

12 See further para 5.3.4.6.

5.2.2 Core characteristics of the selected SSM composite procedures

Chapter 4 addressed the legal framework of the SSM, the delineation of tasks between the ECB and the NCAs and the various cooperation mechanisms, including composite procedures. To be able to detect specific problems in the judicial review of SSM composite procedures, it is necessary to establish their core characteristics. Firstly, the selected procedures are characterised by substantive decision-making by both the NCA and the ECB. Both the NCA and the ECB have a substantive decisional task. Procedures (a), (b) and (c) comprise an NCA ‘draft decision’ or ‘proposal for a decision’ and culminate in an ECB final decision. Procedure (d) comprises an EU instruction implemented by an NCA final decision. The selected composite procedures are formalised and their various steps are codified in the SSM Regulation and the SSM Framework Regulation. Due to the fact that both the NCA and the ECB have decisional tasks, these procedures must be distinguished from composite procedures in which an NCA merely acts as a front desk: receiving the request or notification and forwarding it to the ECB. Examples of such SSM composite procedures are the procedures governing the right of establishment and the exercise of the freedom to provide services.¹³ Secondly, because of the formalised nature of the composite procedures, the division of decisional responsibilities enjoys transparency to a certain degree. Especially for procedures (a), (b) and (c), for interested parties, it is clear that both the relevant NCA and the ECB are involved and what their respective decisional tasks are. Such transparency reduces the complexity of a composite procedure and is an important prerequisite for judicial accountability and thus judicial protection. In contrast, regarding procedure (d), it may not always be clear for the addressee of an NCA final decision that it was preceded by an ECB instruction. The power of instruction as codified in Article 9(1), third subparagraph, SSM Regulation is formulated very broadly, ‘[t]o the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB’. The same applies to the instruction power as laid down in Article 18(5) SSM Regulation: ‘In the cases not covered by paragraph 1 of this Article, where necessary for the purpose of carrying out the tasks conferred on it by this Regulation, the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with the acts referred to in the first subparagraph of Article 4(3) and any relevant national legislation which confers specific powers which are currently not required by Union law.’

13 See Art. 11 and 12 SSM Framework Regulation, respectively. For a complete overview of SSM composite procedures, see the table in D’Ambrosio 2012, p. 177-179.

5.2.3 Bottom-up and top-down composite procedures

Within the broad concept of composite procedures, a further categorisation is helpful.¹⁴ In light of the selected SSM procedures that will be used as case studies in this chapter, a relevant distinction is based on the direction of the procedure: from national to EU level, which will be referred to as 'bottom-up' composite procedures, or from EU level to national level, which will be referred to as 'top-down' composite procedures.¹⁵ To which category a certain decision-making procedure belongs is relevant for the division of jurisdiction between the EU Courts and the national courts.

SSM bottom-up procedures are initiated at the NCA level and concluded at the ECB level. They include the procedure for authorising a credit institution (a), the procedure for withdrawing authorisation as a credit institution (b), and the procedure for authorising a qualifying holding in a credit institution (c). The procedure where an ECB instruction is addressed to an NCA entailing the obligation to adopt an specific decision vis-à-vis an individual credit institution or to open sanctioning proceedings under national law (d) is a top-down composite procedure, as it is initiated at the ECB level and culminates in an NCA act.

5.3 JURISDICTION OF EU COURTS

5.3.1 General

This paragraph will map the jurisdiction of the EU Courts under Article 263 TFEU. But before analysing Article 263 TFEU, a brief introduction to the broader context of the division of jurisdiction between the EU Courts and the national courts is necessary. The division of jurisdiction within the EU is based on the idea that national courts should have broad competence in enforcing EU law, as that would benefit the latter's effectiveness.¹⁶ The *acte éclairé* and the *acte claire* doctrine developed by the Court in its judgments in *Da Costa*¹⁷ and *CILFIT*,¹⁸ respectively, stem from this idea.¹⁹ Nevertheless, uniformity in the application and interpretation of EU law must be ensured within this decentralised judicial system that to an important extent relies

14 Several authors have sought to categorise composite procedures. See, *inter alia*, Chiti 2009, p. 9-33; Eliantonio 2015, p. 65-102; Della Cananea 2004, p. 197-217; Alonso de León 2016, more particularly p. 192-196.

15 On this categorisation of composite procedures, see Alonso de León 2016, p. 192-193 and Della Cananea 2004, p. 199-203.

16 Craig 2018, p. 281-282.

17 Case 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* ECLI:EU:C:1963:6.

18 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* ECLI:EU:C:1982:335.

19 Craig 2018, p. 282.

on the national courts.²⁰ The *Foto-Frost* judgment illustrates the balancing act. The Court held that national courts may declare an EU act valid but not invalid, explicitly referring to the importance of uniformity in EU law.²¹ Thus, the division of judicial competences leads to a constant balancing act of broad national jurisdiction while ensuring uniform application and interpretation and, above all, the effectiveness of EU law.

Central to the division of jurisdiction between the EU Courts and the Member State courts in composite procedures is Article 263 TFEU, containing the so-called action for annulment. Article 263 TFEU defines the EU Courts' jurisdiction *ratione materiae*, i.e. what acts constitute reviewable acts, and their jurisdiction *ratione personae*, i.e. what parties have legal standing to bring an action under Article 263 TFEU.

Jurisdiction under Article 263 TFEU is exclusive²² and thus automatically precludes national jurisdiction. It follows from the EU principle of conferral²³ that the Treaties define the EU Courts' jurisdictional mandate and that they can only have jurisdiction insofar it is provided for in the Treaties. Article 263 TFEU therefore simultaneously defines and sets the limits to the EU's scope of jurisdiction.

Where Article 263 TFEU does not provide for judicial review at the EU level, jurisdiction lies with the Member State courts, also where it concerns EU law. The national judicial systems complement the EU's 'for the sake of ensuring the effective application and enforcement of Community law'.²⁴ The national courts may therefore be considered the *juges de droit commun*.²⁵ In fact, where Article 263 TFEU does not provide for access to the EU Courts, the national courts must in certain situations provide for 'supplemental judicial protection' as they are according to Article 19(1) TEU required to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law'.²⁶ An example is the obligation for national courts formulated in *Borelli*, after the Court denied jurisdiction to review a Commission decision that was preceded by a binding national decision.²⁷ According to the Court in *Borelli*, national courts must provide for judicial review of national acts that are binding on the EU institution responsible for adopting the final decision, even if such (preparatory) national acts are considered unreviewable under national law. The system of judicial protection therefore is referred to as one of remedial complementarity, 'remedying',

20 Craig 2018, p. 282.

21 Craig 2018, p. 282 with reference to Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452. See in particular para 15 of *Foto-Frost*.

22 See Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452, para 17.

23 Codified in Art. 5(1)(2) TEU.

24 Lenaerts 2007, p. 1625.

25 See, for instance, Lenaerts 2007, p. 1645.

26 Ortlep & Widdershoven 2015, p. 336. See also Safjan & Düsterhaus 2014, p. 5-7.

27 Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

inter alia, the EU Courts' refusal to review EU acts preceded by a binding national act and the strict EU legal standing requirements.²⁸

5.3.2 Reviewable act

5.3.2.1 General

Article 263, first paragraph, TFEU identifies the EU acts that may be the subject-matter of an action for annulment before the EU Courts. It defines the EU concept of a 'reviewable act'. Article 263, first paragraph, TFEU reads as follows:

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

Reviewable acts are thus defined as acts of an EU institution (or body, office or agency), other than recommendations and opinions, that are intended to produce legal effects vis-à-vis third parties.²⁹ In short, the EU Courts are exclusively competent to review i) an act of the EU ii) that is intended to produce legal effects vis-à-vis third parties. We will now zoom in on the concept of a reviewable act and these two conditions will be discussed separately, specifically in light of the SSM.

5.3.2.2 Act of the EU

5.3.2.2.1 General

Review under Article 263 TFEU is open for acts 'of'³⁰ (or 'adopted by'³¹) a Union institution (or body, office or agency), in short: acts of the EU or EU acts. Although this condition may seem quite straightforward, it raises some issues when applied to the SSM. The first issue arises as a result of the EU law novelty that the SSM Regulation requires the ECB to apply national law. Do such decisions qualify as EU acts? The second issue concerns the qualification of NCA acts that are taken within the framework of the SSM.

28 More extensively on complementarity and in which ways it manifests itself, see Safjan & Düsterhaus 2014, p. 5 et seq.

29 An important class of acts that are considered not reviewable under Article 263 TFEU is 'soft law', including guidelines and recommendations issued by the ESAs and the ECB, see Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2018:79.

30 Article 263 TFEU.

31 Case 22/70 *Commission v Council* ECLI:EU:C:1971:32, para 39.

5.3.2.2.2 First issue: ECB acts in the application of national law

When the ECB takes a decision directly on the basis of the SSM Regulation, for instance by applying one of its specific supervisory powers under Article 16 SSM Regulation, no one will question the act's qualification as an EU act. But the SSM Regulation, as a novelty in EU law, requires the ECB to apply national law that transposes banking directives, most notably CRD IV.³² So does such an ECB decision in which national law is applied qualify as an act of the EU?

The SSM Regulation does not contain any provisions setting up a specific system of judicial protection for ECB decisions adopted in the application of national law. It may therefore be argued that the 'default' system must be relied on as set up by the Treaties.³³ In addition, one could argue that the provisions in the SSM Regulation that govern administrative review by the Administrative Board of Review (ABOR) imply that all ECB decisions, whether in the application of national law or not, are to be reviewed at EU level, either by the ABOR or the EU Courts.³⁴ Article 24 SSM Regulation that governs the ABOR procedure states that 'decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation' may be reviewed by the ABOR (section 1) and that that is 'without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties' (section 11). Hence, this provision does not distinguish between ECB decisions based on EU law on the one hand and on national law on the other and thus seems to imply that the application of national law does not change the status of an ECB decision.

From the foregoing, it must therefore be concluded that ECB decisions that result from an application of national law are acts adopted by the ECB that are in that capacity exclusively subject to review by the EU Courts under Article 263 TFEU.³⁵ The decisive element for jurisdiction of the EU Courts is the institution that adopts the act in question, not the legislation (either EU or national) it derives its competences from or the law it applies when taking the decision. This follows directly from the formulation of Article 263 TFEU: it refers to 'acts of the Council, of the Commission, and the European Central Bank' and 'acts of bodies, offices or agencies of the Union'. The EU identity of the institution being decisive and not the law it applies, may not be a surprise, also from a historical perspective. At the time of origin of (predecessors of) Article 263 TFEU it was unheard of that an EU institution could apply national law. Moreover, EU case law in the context

32 See Art. 4(3), first subpara, SSM Regulation.

33 Coman-Kund & Amtenbrink 2018, p. 161.

34 Ter Kuile, Wissink & Bovenschen 2015, p. 182.

35 For a similar view, see Coman-Kund & Amtenbrink 2018, p. 160-161, Witte 2021, p. 237 and Arons 2020, p. 103.

of the SSM shows that the General Court and the Court consider themselves competent to review ECB acts in the application of national law.³⁶

Whether this outcome is desirable in light of the jurisdictional limits of the EU Courts and the expertise of the national courts is a different question. It has for instance been argued that this situation is problematic, as the EU Courts do not have the competence to give an authoritative ruling on the interpretation of national law.³⁷ However, case law in the SSM field shows that the General Court adopted a pragmatic solution. It held in two judgments in *Crédit Mutuel Arkéa v ECB*, with reference to the judgment by the Court of Justice in *Commission v Slovakia*,³⁸ that when assessing the scope of certain provisions of national law, the Court must take into account the interpretation of those provisions by the national courts.³⁹ The General Court added that if national court decisions on interpretation are absent, the EU Courts must rule on the scope of the national provisions in question.⁴⁰ Thus, it does not seem too problematic for the EU Courts to deal with national law autonomously and assess the legality of an ECB decision adopted under national law.⁴¹ But it cannot be denied that this novelty of an EU institution applying national law will pose challenges for judicial review, as recognised by multiple authors.⁴² These challenges include how the EU Courts should best deal with interpreting national law. Should it be interpreted in accordance with the interpretation of the highest national courts?⁴³ What if such interpretation is absent?⁴⁴ And what about the risks of inconsistent interpretation and application of national law implementing

36 See, e.g., Case T-52/16 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:902; Case T-712/15 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:900; Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* ECLI:EU:T:2018:219; Joined Cases C-152/18 P and C-153/18 P *Crédit mutuel Arkéa v ECB* ECLI:EU:C:2019:810.

37 Lamandini, Muñoz & Álvarez 2015, p. 90; Coman-Kund & Amtenbrink 2018, p. 162 with reference to Case C-177/10 *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía* ECLI:EU:C:2011:557, para 60 and Case C-433/13 *Commission v Slovakia* ECLI:EU:C:2015:602, para 81; Schuster 2014, p. 8.

38 Case C-490/04 *Commission v Slovakia* ECLI:EU:C:2015:602, para 81 and case law cited.

39 Case T-52/16 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:902, para 131; Case T-712/15 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:900, para 132.

40 Case T-52/16 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:902, para 131; Case T-712/15 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:900, para 132.

41 Hofmann is similarly optimistic with reference to the judgments in *Crédit Mutuel Arkéa v ECB*, see Hofmann 2019, p. 16-17. Coman-Kund and Amtenbrink seem to be more hesitant of the General Court's stance on independently interpreting national law in the absence of national court decisions in light of the then pending appeal before the Court of Justice, see Coman-Kund & Amtenbrink 2018, p. 164.

42 Coman-Kund & Amtenbrink 2018, p. 159-169; Lamandini, Muñoz & Álvarez 2015, p. 89-91; Ter Kuile, Wissink & Bovenschen 2015, p. 181-183; Schuster 2014, p. 8.

43 Schuster 2014, p. 8.

44 Coman-Kund & Amtenbrink 2018, p. 163.

EU law?⁴⁵ These issues will be addressed further in this chapter.⁴⁶ Yet, these issues do not change the conclusion that ECB decisions in the application of national law qualify as EU acts and in that capacity are exclusively reviewable by the EU Courts.

5.3.2.2.3 *Second issue: NCA act as an ECB or EU act*

A seemingly unsurprising position is that decisions taken by Member State authorities do not qualify as acts of a Union institution. Thus, if an NCA rejects an application for authorisation, review under Article 263 TFEU is not available under the current Treaty text. What, however, calls for a closer reflection on the reviewability of an NCA decision by the EU Courts, is the fact that such an NCA decision is taken within the highly centralised SSM framework and that it is taken on the basis of a competence that is derived from an exclusive ECB competence.⁴⁷ For that matter, the NCA competence could be referred to as ‘derivative’. Do these circumstances have any implications for the status, i.e. EU or national, of an NCA decision?

I will first discuss the status of decisions that an NCA takes independently, i.e. without the ECB being involved in the decision-making process. I will refer to such decision as independent NCA decisions. Such independent NCA decisions can be taken on the basis of directly applicable EU law (such as CRR), on the basis of national law in which EU law is implemented (such as national provisions implementing CRD IV) and on the basis of purely national law, i.e. national law that does not transpose EU law, although it may be used for executing EU law. An example of an independent NCA decision is a decision rejecting authorisation as a credit institution. Secondly, I will discuss the status of NCA decisions that are part of an SSM composite procedure. An example is an NCA draft decision in the procedure for the assessment of qualifying holdings.

Independent NCA decisions

An independent NCA decision means a decision taken within the SSM on the basis of a ‘derivative EU competence’ without any ECB involvement. It is particularly the fact that the ECB has been conferred exclusive competence and that the NCAs have derivative competences, as discussed in Chapter 4, that could point into the direction of NCA decisions having an EU status.

45 With a view to avoiding such risks, Coman-Kund and Amtenbrink propose ‘a close dialogue between the EU and the national courts’, see Coman-Kund & Amtenbrink 2018, p. 164.

46 See para 5.3.4.7.

47 More extensively on the ECB’s exclusive powers as the source of the NCAs’ powers within the SSM, see Ch. 4, para 4.3.4.1.

Firstly, one could argue that NCAs when taking such a decision, are acting as a mere extension of the ECB and that this must lead to attribution of the NCA decision to the ECB. This would lead to reviewability of the NCA decision by the EU Courts. Such attribution or assimilation has, however, not been provided for in the SSM Regulation. Without an explicit provision, it must be concluded that it was not the EU legislature's intent to provide for such an attribution of NCA decisions to the ECB.

Secondly, it could be argued that an independent NCA decision must be considered to be an EU, although not an ECB, act itself.⁴⁸ The main argument for such an 'EU upgrade' would be that NCAs act on the basis of derivative competences that derive from an ECB exclusive competence.⁴⁹ Yet several arguments point into the opposite direction, including, most notably the EU Courts' lack of competence to annul a Member State act.⁵⁰ The Court only once and in a very exceptional case, assumed competence to annul a national decision. This concerned the review of a Latvian national decision that 'relieved [the Governor of the Central Bank of Latvia] from office' in the case *ECB v Republic of Latvia*.⁵¹ Decisive for assuming jurisdiction was that Article 14.2, second subparagraph, of the Statute of the ESCB and of the ECB explicitly provides that a decision to 'relieve from office', 'may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application.' The Court, disagreeing with AG Kokott,⁵² read this provision as an action for annulment.⁵³ This judgment is, however, of a very exceptional nature and must be understood in the specific ESCB context.⁵⁴ The judgment shows that – although the national decision had been taken in the context of the ESCB, where the ECB has the exclusive monetary policy competence – the Court did not assume jurisdiction under Article 263 TFEU, but only because the Statute of the ESCB and the ECB explicitly provided for such an action for annulment. Applying this to the SSM, which does not contain any such provision on an action for annulment for NCA decisions, it must be concluded that independent NCA decisions are not subject to review by the Court but by the relevant national court.⁵⁵

48 For this discussion, see Lamandini, Muñoz & Álvarez 2015, p. 21-22, fn. 89.

49 See Lamandini, Muñoz & Álvarez 2015, p. 21-22, fn. 89. They, however, on the basis of various arguments conclude that NCA acts will be subject to national judicial review. More extensively on the ECB's exclusive competences as the 'source' of NCA competences, see Ch. 4, para 4.3.4.1.

50 See Lamandini, Muñoz & Álvarez 2015, p. 21-22, fn. 89.

51 Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2019:139.

52 Opinion AG Kokott in Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2018:1030, para 68.

53 Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2019:139, para 76.

54 See also Smits 2019 and Smits 2020, p. 140.

55 Similarly for an NCA decision rejecting authorisation, see Brito Bastos 2019, p. 1368.

Hence, assuming an EU Courts' competence to annul an NCA decision taken within the SSM framework would in my view stretch the EU Courts' jurisdiction under Article 263 TFEU too far. Independent NCA decisions, although taken within the framework of the SSM and on the basis of 'derivative' ECB competences, are decisions taken by national authorities in the application of national law, independently from the ECB, and are subject to review by national courts.

NCA decisions in composite procedures

NCA decisions in composite procedures should be distinguished from NCA independent decisions, in that the former are part of a decision-making procedure that also encompasses an ECB act and the latter are not. Does an NCA decision that is part of an SSM composite procedure qualify as an EU reviewable act? The SSM legal framework is silent on judicial review of SSM composite procedures.⁵⁶ But the answer may lie in the Court's case law under Article 263 TFEU. The question will separately be discussed for bottom-up and top-down composite procedures.

The first question is: are NCA acts that are part of a bottom-up procedure to be considered EU acts? An example is the decision-making procedure for granting authorisation. The *Berlusconi and Fininvest v Bank of Italy* judgment in the context of the SSM shows that non-binding NCA decisions which are part of a procedure in which the ECB has an exclusive decision-making power, fall within the Court's exclusive jurisdiction.⁵⁷ But does that also make them an EU act as defined in Article 263 TFEU?

From the Court's considerations in *Berlusconi and Fininvest v Bank of Italy* it must be concluded that the Court did not foresee in any kind of 'EU-upgrade' of national decisions that are preparatory to EU final decisions. On the contrary, it clearly distinguishes between the national (preparatory) acts and the EU act.⁵⁸ The Court's core finding is that it is for the EU Courts 'by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU [...], to rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.'⁵⁹ The Court treats national acts and EU acts here as separate acts, belonging to separate legal orders. In addition, it does not speak of 'reviewing' the national decision or 'ruling on its legality', a formulation that would indicate a strong link with the legality review of reviewable EU acts under Article 263 TFEU. Rather, the Court's task is to 'examine [...] any defects vitiating the preparatory

56 See also Lamandini, Muñoz & Álvarez 2015, p. 87.

57 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

58 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 43-44, 47-48.

59 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 44.

acts or the proposals of the national authorities that would be such as to affect the validity of that final decision' and this 'examining' is something different than the legality review of the EU final act.⁶⁰ In another paragraph the Court states that it will 'determine' whether any defects in the national decision would render the ECB act unlawful.⁶¹ In practice, 'reviewing' EU acts and 'examining' national acts may be similar. Yet the formulations of the Court cannot be otherwise interpreted than that national preparatory decisions preceding an EU act do not constitute an EU act as defined in Article 263 TFEU. Such an interpretation of jurisdiction under Article 263 TFEU would in my view probably mean an unlawful expansion of its scope of jurisdiction. Article 263 TFEU is very explicit: it only encompasses acts that are adopted by an EU institution. Such an expansion would only be possible by means of a Treaty amendment.⁶² National decisions may, however, fall within exclusive jurisdiction of the EU Courts, not because they are EU reviewable acts, but because they are part of a decision-making procedure in which the EU authority has an exclusive decision-making power.⁶³ National courts are precluded to review such national decisions.

The second question is: do NCA decisions that are part of a top-down composite procedure qualify as EU acts? An example is the situation where the ECB addresses an instruction to an NCA, requiring it to make use of its powers under national law by addressing a decision vis-à-vis an individual credit institution. As far as I know, there has been no case law on this issue within the context of the SSM. In the absence of case law, Witte draws analogies with case law in the field of state aid because the construction ECB instruction-NCA implementing decision is comparable to the construction employed to recover subsidies granted by a Member State that the Commission deems incompatible with the internal market.⁶⁴ From case law in the field of state aid, it follows that national decisions implementing the Commission decision to recover subsidies are acts under national law challengeable in national courts.⁶⁵ In addition, expanding the Court's considerations in *Berlusconi and Fininvest v Bank of Italy*, the Court is likely to also treat national acts and EU acts in top-down composite procedures as separate acts, belonging to separate legal orders and subject to separate judicial levels. I therefore consider it most likely that NCA decisions implementing an ECB instruction do not qualify as EU acts.⁶⁶

60 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 44.

61 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 57.

62 See also Lamandini, Muñoz & Álvarez 2015, p. 22, fn. 89.

63 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 43-44.

64 Witte 2014, p. 99 et seq. An important difference, however, is that ECB banking supervision concerns an exclusive ECB competence, while recovering state aid concerns a shared competence.

65 Witte 2014, p. 101.

66 Witte, although not posing the question, assumes the same, see Witte 2014, p. 103.

5.3.2.3 Legal effects

5.3.2.3.1 General

For an EU act to be reviewable under Article 263 TFEU, it must be intended to produce legal effects vis-à-vis third parties. This requirement demands an 'external' effect, introduced to exclude acts that are 'internal' to an institution.⁶⁷

Article 263 TFEU does not clarify what acts are considered to be intended to produce legal effects. It does, however, explicitly exclude recommendations and opinions from direct legality review, for they, according to Article 288 TFEU that lists the legal acts of the Union, 'have no binding force'. The other acts listed in Article 288 TFEU, i.e. regulations, directives, and decisions, are binding according to the same provision and for that reason may be considered to produce legal effects. Acts producing legal effects are, however, not confined to the binding acts listed in Article 288 TFEU, i.e. regulations, directives and decisions. How an act is 'labelled' by the adopting authority is not decisive for its reviewability. In the *ERTA* case, the Court developed a 'substantive test' for determining whether an act is reviewable.⁶⁸ The Court held that measures adopted by an EU institution are reviewable if they are intended to have legal effects, 'whatever their nature or form'.⁶⁹ Reviewable acts may therefore also encompass acts labelled an opinion or recommendation or 'atypical acts',⁷⁰ i.e. acts not listed in Article 288 TFEU. The Court's rationale is that a more restrictive reading of Article 263 TFEU would not be consistent with the objective of review under Article 263 TFEU, i.e. that in the interpretation and application of the Treaties the law is observed.⁷¹

The Court in *IBM v Commission* established when an act is intended to produce legal effects as follows: it must be 'binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position.'⁷² Legal position may be understood as encompassing all of a person's rights and obligations in a legal system.⁷³ A distinct change in a person's legal position in particular happens where an act creates rights or imposes obligations.⁷⁴

67 Schütze 2018, p. 357. This is similar for the Dutch administrative law concept of *besluit*, see Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 38.

68 Case 22/70 *Commission v Council* ECLI:EU:C:1971:32.

69 Case 22/70 *Commission v Council* ECLI:EU:C:1971:32, para 42.

70 For the term 'atypical acts', see Opinion AG Bobek in Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2017:959, para 59.

71 Case 22/70 *Commission v Council* ECLI:EU:C:1971:32, para 40-41. See also Case C-60/81 *IBM v Commission* ECLI:EU:C:1981:264, para 8.

72 Case C-60/81 *IBM v Commission* ECLI:EU:C:1981:264, para 9.

73 Türk & Xanthoulis 2019, p. 154; Senden 2004, p. 236.

74 Senden 2004, p. 236.

5.3.2.3.2 *Lack of clarity*

The concept of legal effects and its application is not free from discussion.⁷⁵ And although the concept of a reviewable act has been further developed in EU case law, it is still surrounded by a lack of clarity.⁷⁶ Questions that have remained unanswered include what legal effects actually are⁷⁷ and what role intent plays when determining whether an act produces legal effects.⁷⁸ The case law does not provide clear-cut answers. Türk even takes the view that the Court's approach to assessing legal effects has become 'as complex, if not more, than the assessment of *locus standi* for private parties'.⁷⁹ These uncertainties may cause problems for effective judicial protection.

5.3.2.3.3 *Legal effects and jurisdiction in composite procedures*

The concept of legal effects is central to the concept of a reviewable act, which in turn is key for the division of jurisdiction in composite procedures. One would therefore expect legal effects to play a central role in the Court's jurisdiction assessments. As will be discussed further below, that is not the case for bottom-up composite procedures. The Court takes a discretion-based approach to assessing jurisdiction, not one based on legal effects. Legal effects do play, however, a role in the Court's jurisdiction assessment in respect to top-down composite procedures, including the construction ECB instruction-NCA implementing decision.

5.3.2.3.4 *What role for legal effects in the Court's jurisdiction assessment in bottom-up composite procedures?*

As stated above, when assessing jurisdiction in bottom-up composite procedures, the Court does not cast its considerations in terms of legal effects.⁸⁰ The terminology the Court uses differs per case, but it is common for the Court to cast its jurisdiction assessment in terms of a national decision that is 'binding on' the EU authority⁸¹ and 'determining the terms of' the EU decision.⁸² It also uses terms such as 'exclusive decision-making power'⁸³

75 For a critical reflection on the difficulties surrounding the ERTA test, see Opinion AG Bobek in Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2017:959, para 67 et seq.

76 See Türk & Xanthoulis 2019, p. 153-154; Türk 2009a, p. 13. See also Conclusion AG Bobek in Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2017:959, para 67-79.

77 Opinion AG Bobek in Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2017:959, para 69-75.

78 Opinion AG Bobek in Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2017:959, para 76-79.

79 Türk 2009a, p. 13.

80 See also Hofmann 2019, p. 10-11.

81 See, for instance, Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 10.

82 See, for instance, Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 10.

83 See, for instance, Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 44, 48.

and ‘discretion’.⁸⁴ Hofmann refers to the Court’s approach as a ‘discretion-based approach’.⁸⁵ AG Campos Sánchez-Bordona discerns in the Court’s case law an approach revolving around the concept of ‘*real* decision-making power’ [emphasis in the original].⁸⁶ Irrespective of the variety of terms used to refer to the Court’s approach, it means that a concept not included in Article 263 TFEU is decisive in the Court’s jurisdiction assessments in bottom-up composite procedures. As will be discussed further below, the reason the Court will only assume jurisdiction in composite procedures where the relevant EU authority exercises decisional dominance is the Court’s view on its jurisdictional limits.

Hofmann is critical of the Court’s discretion-based approach to assessing jurisdiction.⁸⁷ He argues that the notion of discretion has several meanings and the terminology varies in the Court’s case law.⁸⁸ He also argues that the approach used by the Court in *Berlusconi and Fininvest v Bank of Italy* constitutes a ‘binary discretion/no-discretion approach’, that ‘radically differs’ from the earlier developed ‘spectrum-model’.⁸⁹ Moreover, the approach does not mirror the reality of cooperation within composite decision-making procedures.⁹⁰ Hofmann’s criticism towards a discretion-based approach leads him to propose one based on legal effects.⁹¹ An approach that, as Hofmann states, may lead to a different outcome than the discretion-based approach.⁹² As this chapter is dedicated to analysing the current state of the law, I will leave a normative discussion on the Court’s approach to assessing jurisdiction aside.

Important for now is that the concept of legal effects does not play a role in EU case law on jurisdiction where it concerns bottom-up procedures. The concept that the Court does use is referred to as a ‘discretion-based approach’ and as one based on ‘real decision-making power’. As ‘discretion’ has a variety of meanings and may therefore cause ambiguity, and because ‘real decision-making power’ in my view better describes the concept that is central in the Court’s jurisdiction assessment, I will refer to ‘real decision-making power’ for the purpose of this chapter.

84 See, for instance, Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 45.

85 Hofmann 2019, p. 10-11.

86 Opinion AG Campos Sánchez-Bordona in Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:502, para 60.

87 Hofmann 2019, p. 11-14. For some critical remarks on using the concept of discretion as a test for ‘direct concern’, see Türk 2009a, p. 65-66 and references.

88 Hofmann 2019, p. 11-13.

89 Hofmann 2019, p. 13.

90 Hofmann 2019, p. 13.

91 Hofmann 2019, p. 14.

92 Hofmann 2019, p. 14.

5.3.2.3.5 What role for legal effects in the Court's jurisdiction assessment in top-down composite procedures?

In top-down composite procedures, such as the ECB instruction that must be implemented by an NCA decision, legal effects do play a role in the Court's jurisdiction assessment. The Court only assumes jurisdiction if the EU act preceding the national decision qualifies as a reviewable act by assessing whether it is intended to produce legal effects. Decisive for this question is whether the EU act contains an obligation for the Member State or national authority and for that matter has the external effect that is demanded by Article 263 TFEU. If it does, it produces legal effects. As NCAs are obliged to follow ECB instructions on the basis of the SSM Regulation,⁹³ ECB instructions are considered to produce legal effects and therefore are reviewable under Article 263 TFEU.⁹⁴ The reviewability of ECB instructions will thus not depend on, *inter alia*, the margin of discretion left for the national authority on how to implement the instruction,⁹⁵ nor on whether and in what form the instruction is implemented by the NCA.

To give some more background on the use of the concept of legal effects within the construction ECB instruction-NCA implementing decision, the conceptual framework as proposed by Türk and Xanthoulis may prove helpful.⁹⁶ They distinguish between different types of legal effects. *Vis-à-vis* the NCA the ECB instruction has 'primary legal effects', as it directly imposes an obligation on the NCA, i.e. to follow the instruction.⁹⁷ *Vis-à-vis* the addressee of the national act that implements the ECB instruction, the ECB instruction has 'secondary legal effects'.⁹⁸ This means that the ECB instruction does not change the legal position of the addressee of the national act, but 'is determinative for the adoption or content of' the national act.⁹⁹ Although in their paper Türk and Xanthoulis only refer to the situation where the ECB instruction leads to 'the adoption of a national act with binding effects',¹⁰⁰ I believe, as already stated, that an ECB instruction also has legal effects if it is not implemented by a national act producing legal effects, for instance if the NCA starts an investigation with a view to opening national sanctioning proceedings, or if it is not implemented at all.

93 See Ch. 4, para 4.3.7.2.

94 Witte 2014, p. 102; Türk & Xanthoulis 2019, p. 158; Lamandini, Ramos & Solana 2017, p. 249.

95 The margin of discretion of the national authority does, however, play a role in the legal standing requirements under Article 263 TFEU, more specifically for the requirement of 'direct concern'.

96 Türk & Xanthoulis 2019, p. 151-164.

97 Türk & Xanthoulis 2019, p. 158.

98 Türk & Xanthoulis 2019, p. 158.

99 Türk & Xanthoulis 2019, p. 155.

100 Türk & Xanthoulis 2019, p. 158.

One could also think of a Directive: without any doubt a Directive has legal effects, as it imposes on the Member States the obligation to implement it, regardless of whether and how the Member State implement the Directive.¹⁰¹ The SSM Regulation provides that ECB instructions impose the obligation on NCAs to follow the instruction and therefore ECB instructions as a rule produce legal effects and are reviewable under Article 263 TFEU. Yet, for access to judicial review at the national level against the national implementation of an ECB instruction, the existence of a national act producing legal effects is of great relevance. Under Dutch law, for instance, review by administrative courts is in principle only available for implementing measures by the Dutch NCA (*De Nederlandsche Bank*) that qualify as a *besluit*, i.e. an administrative act producing legal effects.¹⁰²

5.3.3 Legal standing

Article 263 TFEU, fourth paragraph, defines the EU Courts' jurisdiction *ratione personae*, i.e. it codifies the legal standing requirements. It reads as follows:

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.

Under Article 263 TFEU private applicants, i.e. applicants other than the Member States or the EU institutions,¹⁰³ have a right to bring an action for annulment if they meet the requirements for legal standing (*locus standi*). The party to whom an EU act is addressed, will in the capacity of addressee have legal standing. In the context of the SSM, a credit institution to which an ECB decision is addressed, will in the capacity of addressee have legal standing. Parties that are not the addressee, must show that the act is of 'direct and individual concern' to them. Direct concern and individual concern constitute separate requirements. In an SSM top-down composite procedure, where the ECB addresses an instruction to an NCA requiring it to take specific action vis-à-vis a credit institution, this credit institution must meet the requirements of direct and individual concern in order to have legal standing, because it is not the addressee of the ECB decision.

101 On legal effects produced by Directives, see Türk & Xanthoulis 2019, p. 155.

102 See further para 5.4.4.

103 Under Article 263 TFEU, Member States as well as the European institutions – known as the 'privileged applicants' – always have standing in annulment proceedings.

To satisfy the requirement of ‘direct concern’, the EU act must directly affect the applicant’s legal situation and leave no discretion to the addressee of the EU act who is entrusted with implementing it.¹⁰⁴ An act leaves no discretion if the implementation is purely automatic and results from EU rules alone without application of other intermediate rules.¹⁰⁵ The requirement of direct concern is of particular relevance for top-down composite procedures, in which an EU act is implemented by a national authority. This issue will be discussed more extensively in paragraph 5.3.5.4.2.

The test for ‘individual concern’ was developed in the *Plaumann* case,¹⁰⁶ since then called the ‘*Plaumann* test’. The *Plaumann* test requires that the EU act ‘affects [him] by reason of certain attributes which are peculiar to [him] or by reason of circumstances in which [he] is differentiated from all other persons and by virtue of these factors distinguishes [him] individually just as in the case of the person addressed.’¹⁰⁷ This test has been heavily criticised and is often referred to as a (too) restrictive approach to legal standing.¹⁰⁸ The requirement of individual concern is unlikely to pose hurdles for legal standing of credit institutions that are – although not the addressee – the subject of an ECB instruction. It will, however, probably pose an insurmountable barrier for the credit institution’s management, shareholders and creditors, including bondholders and depositors. This issue will be discussed more extensively in paragraph 5.3.5.4.3.

5.3.4 Jurisdiction in bottom-up composite procedures¹⁰⁹

5.3.4.1 Introduction

This paragraph aims to further analyse the Court’s approach to assessing jurisdiction in bottom-up composite procedures, i.e. procedures starting at national level that culminate in an EU final decision. As already stated

104 See, e.g., Case T-69/99 *DSTV v Commission* ECLI:EU:T:2000:302, para 24; Case C-386/96 *P Dreyfus v Commission* ECLI:EU:C:1998:193, para 43. It has been argued that ‘discretion’ should not be the relevant criterion when assessing direct concern, but rather a causal link between the decision and the relevant applicant’s damage: ‘what is really central to the notion of direct concern is the existence of a direct relationship of causality between the Community decision and the damage suffered by the applicant’. See Türk 2009b, p. 242-243 with reference to Albors-Llorens 1996, p. 73. However, I do not believe the current case law of the Court as set out above, would justify this analysis.

105 See, e.g., Case T-69/99 *DSTV v Commission* ECLI:EU:T:2000:302, para 24; Case C-386/96 *P Dreyfus v Commission* ECLI:EU:C:1998:193, para 43.

106 Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

107 Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

108 For criticism see, e.g., Arnall 1995; Arnall 2001; Opinion AG Jacobs in Case C-358/89 *Extramet Industrie v Council* ECLI:EU:C:1991:144; Opinion AG Jacobs in Case C-50/00 *P Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197.

109 This paragraph contains and builds on Tegelaar 2022, p. 129-134.

in paragraph 4.3.2.3.4, the central concept in the Court's approach may be defined as 'real decision-making power', although the Court does not use this terminology itself. The approach may be summarised as follows: the judicial level that has jurisdiction, is the judicial level that corresponds with the administrative level that has the real-decision-making power. If the real decision-making power lies with the national level, proceedings must be instituted at the national level. This may be referred to as the *Borelli* line of case law.¹¹⁰ If the real decision-making power lies with the EU level, proceedings must be instituted at EU level. This may be referred to as the *Sweden v Commission* line of case law.¹¹¹ Before analysing the *Borelli* and the *Sweden v Commission* lines of case law, first two more general issues on jurisdiction in composite procedures need discussion, viz. parallel jurisdiction and the scope of jurisdiction.

5.3.4.2 Parallel jurisdiction of national courts and EU Courts?

The EU Courts traditionally take a dualistic approach to the division of competences between the national courts and the EU Courts within the European system of judicial protection.¹¹² National courts have jurisdiction to review acts adopted by national authorities and the EU Courts have jurisdiction to review acts adopted by EU institutions. Extending this approach to judicial review of bottom-up composite procedures would lead to two parallel competent judicial levels: the national level for the national phase and the EU level for the EU phase.¹¹³ EU case law, however, shows a mutually exclusive two-track approach to the division of jurisdiction in bottom-up composite procedures. But before zooming in on the issue of whether parallel jurisdiction is permitted under EU law, this will be distinguished from whether parallel jurisdiction can practically occur.

From a practical perspective, parallel jurisdiction in bottom-up composite procedures will be rare. Proceedings can generally only be instituted against the final decision, i.e. the EU act that concludes the procedure. The final decision in most cases is to be considered the only reviewable act. National acts preceding the EU final act, for instance a national draft decision, proposal or opinion, are usually not reviewable on a stand-alone

110 For this qualification, see Opinion AG Campos Sánchez-Bordona in Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:502, in particular para 63.

111 Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802. For this qualification, see Opinion AG Campos Sánchez-Bordona in Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:502, in particular para 63.

112 See also Eliantonio 2015, p. 101; Brito Bastos 2015, p. 283-285.

113 See also Eliantonio 2015, p. 77-78.

basis under national law due to their preparatory and preliminary nature.¹¹⁴ Situations of parallel jurisdiction will therefore be exceptional. Notwithstanding the exceptionality, the reviewability of national acts preceding an EU final act ultimately remains a matter of national law. In the absence of a harmonised and coordinated EU framework of general administrative law, Member States use their own concepts and definitions of a reviewable act. Due to a lack of coordination between the EU and national administrative law systems, it is not inconceivable that parallel jurisdiction may arise where national law provides for judicial review of any national acts within a bottom-up composite procedure. It therefore is important to investigate whether EU law allows for parallel jurisdiction.

EU case law indicates that parallel jurisdiction is not allowed. It shows a two-track approach in which either the national judicial level or the EU judicial level has jurisdiction.¹¹⁵ The decisive concept is ‘exclusive decision-making power’, that in the view of the Court lies either with the national administrative level or the EU level.¹¹⁶ The Court’s tracks are thus mutually exclusive which bars parallel jurisdiction. Consecutive jurisdiction may still arise where proceedings are brought before a national court that refers a preliminary question on validity to the Court. In the absence of a reverse preliminary reference procedure in which the EU Courts would be allowed to ask preliminary questions to national courts, consecutive national jurisdiction will not arise if the EU Courts have jurisdiction. Moreover, the Court held in *Berlusconi and Fininvest v Bank of Italy* that its scope of jurisdiction will also encompass any non-binding national acts preceding an EU final act.¹¹⁷ The next paragraph will elaborate on the scope of jurisdiction in bottom-up composite procedures.

5.3.4.3 Scope of jurisdiction

In inherently multi-jurisdictional composite procedures, the scope of jurisdiction does not necessarily encompass the complete decision-making procedure, as would be the case in single-jurisdictional decision-making procedures. National courts’ scope of jurisdiction in judicial review of

114 For the finding that national preparatory acts are generally unreviewable under German and Italian law, see Eliantonio 2008, p. 36-37, 43 and 65-66. Under Dutch law, under Article 6:3 General Administrative Law Act, preparatory decisions are also generally not challengeable in a self-standing judicial review, except if the decision directly affects the interests of the interested party independently of the final decision. In EU law, preparatory measures are generally also not reviewable on a stand-alone basis, as the Court held that an act is reviewable ‘only if it is a measure definitively laying down the position of the Commission or the Council in the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision’, see Case C-60/81 *IBM v Commission* ECLI:EU:C:1981:264, para 10. More extensively on the concept of preparatory acts in EU law, see Türk 2009a, p. 17-23.

115 Brito Bastos 2019, p. 1368-1369.

116 Hofmann is critical of the Court’s ‘binary approach’, see Hofmann 2019, p. 13.

117 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

composite procedures is limited to declaring national acts invalid. They cannot declare an EU act invalid, as this is an exclusive competence of the EU Courts.¹¹⁸ If the applicant pleads the illegality of a Union act before the competent national court, the national court may refer a preliminary question on validity to the EU Courts.

In contrast to the limited jurisdiction of national courts, the EU Courts' jurisdiction under Article 263 TFEU extends to both EU acts and preceding non-binding national acts, as was held by the Court in 2018 in the milestone case *Berlusconi and Fininvest v Bank of Italy*. The Court held that by virtue of Article 263 TFEU it is exclusively competent to review as an incidental matter non-binding national decisions that are part of a composite procedure in which the EU authority has 'exclusive decision-making power'.¹¹⁹ *Berlusconi and Fininvest v Bank of Italy* may be considered the opposite of the *Borelli* case, in which the Court considered the national decision to be binding on the Commission, which led the Court to refer jurisdiction to the national level. In a *Borelli* situation, jurisdiction is distributed amongst both the national level – for the national decision – and the EU level – for the EU decision (via a preliminary reference procedure). In contrast, *Berlusconi and Fininvest v Bank of Italy* fully centralised judicial review, creating a 'single judicial review'¹²⁰ for all acts in such a composite procedure. The contrast between the mixed procedure and the single judicial review exclusively at the EU Courts' level may raise problems regarding judicial protection, more specifically in connection with the limited scope of jurisdiction of the EU Courts. These problems will be discussed in paragraph 5.3.4.7.

5.3.4.4 National judicial level is competent

The line of case law in which the Court considered the national judicial level to be competent may be named after the *Borelli* judgment of 1992. It is considered 'the seminal judgment in the law of composite procedures' and the first judgment that addresses the jurisdictional problems with regard to reviewing composite decision-making.¹²¹ *Borelli* is a case comprising a doctrine of guiding value for both national and EU courts in annulment proceedings that involve bottom-up composite procedures.¹²² The *Borelli* judgment is still authoritative today¹²³ and the doctrine is being used as a touchstone in other cases.¹²⁴

118 Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452, para 15.

119 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 43-44.

120 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 49.

121 Brito Bastos 2015, p. 273 with reference to literature cited therein.

122 Brito Bastos 2015, p. 270.

123 Craig 2018, p. 330.

124 Brito Bastos 2015, p. 276; Craig 2018, p. 331. See, inter alia, Case C-269/99 *Carl Kühne and Others* ECLI:EU:C:2001:659; Case C-64/05 *P Sweden v Commission* ECLI:EU:C:2007:802; Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

The *Borelli* case concerned a composite procedure for the granting of funding involving Italian authorities and the European Commission. Borelli, an Italian company, wished to build an oil mill in Pontedassio. To this end, it sought to obtain funding from the European Agricultural Guidance and Guarantee Fund. The applicable legislation, Regulation 355/77, appointed the national authorities as the points of entry for funding applications. Upon application and examination, the relevant national authority would issue an opinion either opposing to or approving the funding and send this opinion to the Commission. The Commission would take the decision either rejecting or granting the funding application. In *Borelli*, the Italian authorities issued a negative opinion opposing to granting the funding application. The Commission therefore rejected the application, of which Borelli was informed by the Commission.

Borelli questioned the validity of the national opinion. Italian law, however, did not allow Borelli to challenge the opinion, as under Italian law it qualified as a preparatory measure that could not be challenged. It therefore sought to challenge the Commission decision at the Court. Borelli argued that the invalidity of the national opinion invalidated the Commission decision,¹²⁵ which ‘encapsulates all the decisions of the institutions and bodies involved in the procedure’.¹²⁶

Starting point for the Court’s considerations was that in an action brought under (now) Article 263 TFEU, the Court has no jurisdiction to rule on the lawfulness of a national measure.¹²⁷ It continued with stating that ‘[t]hat position cannot be altered by the fact that the measure in question forms part of a Community decision-making procedure, since it clearly follows from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted.’¹²⁸ Crucial circumstance in *Borelli* was that under the applicable legislation, a national negative opinion dictated the Commission decision: rejection. The relevant provision, Article 13(3) Regulation 355/77, read: ‘In order to receive aid from the Fund, a project must have been approved by the Member State on the territory of which it is to be carried out.’ As the opinion issued by the Italian authorities was negative and therefore there was no national approval, the Commission could ‘neither follow the procedure for the examination of the project in accordance with the rules laid down in that regulation nor *a fortiori* review the lawfulness of the opinion

125 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 7.

126 Report for the Hearing Case C-97/91 *Borelli* ECLI:EU:C:1992:491, I-6318.

127 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 9.

128 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 10. That that position can be altered by the fact that the measure forms part of an EU decision-making procedure, but is not binding on the EU institution and therefore does not determine the outcome of the procedure follows from the *Berlusconi* case.

thus issued.¹²⁹ The Court therefore concluded that ‘any irregularity that might affect the opinion cannot affect the validity of the decision by which the Commission refused the aid applied for.’¹³⁰ The Court thus held that any errors made by the Italian authorities could not be imputed to the Commission, therefore could not ‘infect’¹³¹ the Commission decision. The Court denied jurisdiction.

Prompted by the principle of effective judicial protection,¹³² the Court ‘referred’ jurisdiction to the national courts. It held that ‘it is for the national courts, where appropriate after obtaining a preliminary ruling from the Court, to rule on the lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case.’¹³³ AG Darmon in his Opinion emphasised that the Italian act ‘is a measure which definitively has an adverse effect’ on the party applying for funding.¹³⁴ The Court demanded national courts to review national acts that must be considered ‘binding’ vis-à-vis an EU authority, even if national law does not provide for judicial review.¹³⁵ Nehl argues that this outcome may be explained by the Court in an attempt ‘to strike a certain balance between the tasks of judicial protection to be carried out by the courts participating in the EU system of judicial review, which corresponds to the separation of the respective spheres of responsibility of the EU and the Member States in the area of co-operative implementation of EU law.’¹³⁶

Borelli offers several insights into the Court’s assessment of jurisdiction in composite procedures. Firstly, as was stated before, the Court’s approach to assessing jurisdiction revolves around the issue of where the real decision-making power lies and not around the concept of legal effects. Secondly, the Court’s jurisdiction assessment is characterised by a procedure-specific approach. Central to the assessment are the specifics of the decision-making procedure in that particular situation, rather than the overall framework for the division of competences in that field or in that Directive. To illustrate the difference, in *Borelli*, crucial for the denial of jurisdiction was that the opinion was negative and consequently dictated the Commission’s rejection. Should the Italian authorities have issued a positive opinion, then the real decision-making power or discretion would have lied with the Commission. The corresponding judicial level would then be the

129 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 11.

130 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 12.

131 For this terminology, see Nehl 2011, p. 644.

132 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 14-15.

133 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 13.

134 Opinion AG Darmon in Case C-97/91 *Borelli* ECLI:EU:C:1992:254, para 32.

135 For a critical view of the *Borelli* judgment from the perspective of national procedural autonomy, see Nehl 2011, p. 650.

136 Nehl 2011, p. 651.

EU level. Following this procedure-specific approach, jurisdiction may be assigned to different judicial levels for one and the same decision-making procedure. Thirdly, for the EU judicial level to assume competence, the national error must be imputable to the EU level. In *Borelli*, the Court held that a negative national opinion precluded the Commission from examining the application or from undertaking an assessment of the lawfulness and therefore any national error could not be imputed to the Commission.¹³⁷

5.3.4.5 EU judicial level is competent

5.3.4.5.1 General

The line of case law in which the Court considered the EU level to be competent, may be referred to as the *Sweden v Commission* line of case law. *Berlusconi and Fininvest v Bank of Italy* may be considered the sequel of *Sweden v Commission*. In *Berlusconi and Fininvest v Bank of Italy* the Court held that if the Court has jurisdiction, jurisdiction extends to the entire composite procedure, encompassing both EU acts and preceding non-binding national acts.

5.3.4.5.2 *Sweden v Commission*

Sweden v Commission concerned an appeal case against the judgment of the Court of First Instance in *IFAW v Commission* involving the procedure governing access to documents as laid down in Regulation No 1049/2001.¹³⁸ Under Article 4(5) Regulation No 1049/2001, a Member State may request an EU institution not to disclose a document originating from that Member State without its prior agreement. In *Sweden v Commission*, the Federal Republic of Germany sent such a request to the Commission, upon which the latter adopted a decision refusing an access request made by the International Fund for Animal Welfare (IFAW).

In *IFAW v Commission*, the IFAW brought an action for annulment against the Commission's refusal. The Court of First Instance interpreted the division of competences in the procedure governing access to documents as such, that the real decision-making power lied with the national level. The national request was considered binding on the EU level, did not have to be accompanied by a statement of reasons and the Commission did not have a duty to examine whether non-disclosure of the document was justified.¹³⁹ In other words, in this interpretation of Article 4(5) Regulation No 1049/2001, a Member State request not to disclose the document dictated the outcome of the Commission decision on the access request, which was rejection. In short, the Commission was bound by the Member State's

¹³⁷ For a critical view of the Court's interpretation of the Commission's role, see Mihaescu Evans 2015, p. 106-107.

¹³⁸ Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802.

¹³⁹ Case T-168/02 *IFAW v Commission* ECLI:EU:T:2004:346, in particular para 58-59.

refusal. A situation that resembles *Borelli*. The situation differs from *Borelli* where it concerns the substantive rules for granting funding and refusing access to documents, respectively. In *Borelli*, these were prescribed by EU law. In *IFAW v Commission*, the Court of First Instance held that where a Member State sent a request not to disclose a document, this refusal is not governed by the Regulation but by national law.¹⁴⁰ The Court of First Instance therefore held that it was for the national administrative and judicial authorities to assess the national non-disclosure decision.¹⁴¹

In the appeal case, the Court interpreted the decision-making procedure differently. The Court of First Instance saw a procedure consisting of two separate stages governed by different laws. The first stage was the Member State's refusal that was governed by (substantive) national laws. The second stage was the Commission's refusal, governed by the Regulation. Yet, in appeal, the Court took the view that the procedure 'did not aim to establish a division between two powers, one national and the other of the Community, with different purposes'.¹⁴² The Court held that the grounds for non-disclosure for both the Member State and the Commission were confined to the ones codified in the Regulation.¹⁴³ In that sense, the Member State was 'merely being given in this respect a power to take part in the Community decision'.¹⁴⁴ Therefore, according to the Court, the procedure in Article 4(1) to (3) 'creates a decision-making procedure the sole object of which is to determine whether access to a document should be refused under one of the substantive exceptions listed, a decision-making procedure in which both the Community institution and the Member State concerned play a part, in the terms state in paragraph 76'.¹⁴⁵ The Member State and the Commission thus together took part in one EU decision-making procedure governed exclusively by the Regulation. They in essence had identical functions within the procedure as they carried out the same assessment, i.e. whether the exceptions of Article 4(1) to (3) apply.

Embedded in the Court's considerations quoted above, lies a distinction between two types of composite procedures: procedures that do not aim to establish a division between two powers, one national and one European, with different purposes, and procedures that do. I would qualify these as 'single' composite procedures and 'separated' composite procedures, respectively.¹⁴⁶ This distinction is of relevance for the question whether the Commission has a 'duty to correct' any defects in the national act before adopting the final decision and therefore for whether any irregularities at

140 Case T-168/02 *IFAW v Commission* ECLI:EU:T:2004:346, in particular para 61.

141 Case T-168/02 *IFAW v Commission* ECLI:EU:T:2004:346, in particular para 61.

142 Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802, para 93 with reference to C-269/99 *Carl Kühne and Others* ECLI:EU:C:2001:659, para 50-54.

143 Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802, para 83.

144 Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802, para 76.

145 Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802, para 93.

146 Hofmann distinguishes between '(vertical) composite procedures' and 'separate but linked procedures', see Hofmann 2019, p. 10.

national level may lead to illegality of the EU final act, for which the former is a condition.¹⁴⁷ Pursuant to the Court's case law, irregularities at national level can only lead to illegality of the EU final act, if the national authorities and the EU authority in the composite procedure decide on similar issues, Brito Bastos refers to this requirement as the 'test of identical subject-matter'.¹⁴⁸ Such duty to correct for the EU administrative level would thus only arise in single composite procedures.

In view of the Court, the procedure governing access to documents constituted a single composite procedure. The Court assumed jurisdiction over such procedures, considering:

'In such a case it is within the jurisdiction of the Community judicature to review [...] whether that refusal was validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State. From the point of view of the person concerned, the Member State's intervention does not affect the Community nature of the decision that is subsequently addressed to him by the institution in reply to the request he made for access to a document in its possession.'¹⁴⁹

From this paragraph, it follows that the Court assumed jurisdiction over the entire procedure, irrespective of whether the refusal was the result of national decision-making or EU decision-making. It assumed jurisdiction to assess whether access to the document was validly rejected and did not show any interest in assessing where the real decision-making power lied.

Sweden v Commission gives the following insights. Firstly, the Court introduced a distinction between two types of composite procedures: single composite procedures and separated composite procedures. Key difference is the extent to which the assessment carried out by the national level and by the EU level in the procedure may be regarded as identical. If both levels in essence do the same, for instance determining whether access to a document should be refused under one of the substantive exceptions listed in EU legislation, it qualifies as a single composite procedure. Secondly, if a composite procedure qualifies as a single composite procedure, the EU Courts have jurisdiction to review the entire procedure.

5.3.4.5.3 *Berlusconi and Fininvest v Bank of Italy*

In *Berlusconi and Fininvest v Bank of Italy*, the Court in more explicit and general language confirmed its judgment in *Sweden v Commission*.¹⁵⁰ In *Sweden v Commission*, the Court casted its judgment in case-specific terms. Yet, in

147 On this condition for 'derivative illegality', see Brito Bastos 2018, p. 123-126.

148 On this condition for 'derivative illegality', see Brito Bastos 2018, p. 124, 126.

149 Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802, para 94.

150 For an extensive account of *Berlusconi and Fininvest v Banca d'Italia*, see Brito Bastos 2019, p. 1355-1378.

Berlusconi, the Court made clear that its judgment in *Sweden v Commission* constitutes a general doctrine. In general statements, the Court clarified that in procedures where an EU institution has an ‘exclusive decision-making power’, it has exclusive jurisdiction to review both the final EU decision and any preceding national acts:¹⁵¹

‘43. Any involvement of the national authorities in the course of the procedure leading to the adoption of such acts cannot affect their classification as EU acts where the acts of the national authorities constitute a stage of a procedure in which an EU institution exercises, alone, the final decision-making power without being bound by the preparatory acts or the proposals of the national authorities (see, to that effect, judgment of 18 December 2007, *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraphs 93 and 94).

44. In such a situation, where EU law does not aim to establish a division between two powers — one national and the other of the European Union — with separate purposes, but, on the contrary, lays down that an EU institution is to have an exclusive decision-making power, it falls to the EU Courts, by virtue of their exclusive jurisdiction to review the legality of EU acts on the basis of Article 263 TFEU (see, by analogy, judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 17), to rule on the legality of the final decision adopted by the EU institution at issue and to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.’

Different in comparison to *Sweden v Commission*, is that the Court contrasts composite procedures that ‘establish a division between two powers – one national and the other of the European Union – with separate purposes’ (separated composite procedures) with procedures where an EU institution has ‘an exclusive decision-making power’. In *Sweden v Commission*, separated composite procedures were set against the specific procedure for access to documents, that ‘creates a decision-making procedure the sole object of which is to determine whether access to a document should be refused under one of the substantive exceptions listed’. In *Berlusconi and Fininvest v Bank of Italy* the Court thus in different and more general terms explained how to distinguish composite procedures where the Court’s jurisdiction does not extend to any preceding national acts (separated composite procedures) from composite procedures where the Court’s jurisdiction does encompass the entire procedure. The distinguishing element thus is whether or not the EU institution has an ‘exclusive decision-making power’.

151 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 43-44. Later confirmed in Case C-414/18 *Iccrea Banca v Bank of Italy* ECLI:EU:C:2019:1036, para 38-39.

After the Court's considerations clearly delineating the exclusive competences of the Court, with reference to *Borelli* it continued immediately with defining the national courts' 'residual' jurisdiction. National courts have jurisdiction over national acts in a composite procedure 'where it is apparent from the division of powers in the field in question between the national authorities and the EU institutions that the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act in which the EU institutions have only a limited or no discretion, so that the national act is binding on the EU institution'.¹⁵² A clear confirmation of the current-day authority and relevance of the *Borelli* judgment.

After confirming and consolidating the two lines of case law – *Borelli* and *Sweden v Commission* – the Court examined the procedure for the assessment of qualifying holdings in credit institutions.¹⁵³ Prior to the establishment of the SSM the assessment of qualifying holdings was an exclusive task of the NCAs. Decisions were to be reviewed by the national courts. The procedure has now been set up as a composite procedure, encompassing both the relevant NCA and the ECB. It is laid down in Article 4(1)(c) SSM Regulation and must be read in conjunction with Article 15(3) and 87 of the SSM Framework Regulation. The procedure implements Article 22 and 23 CRD IV.¹⁵⁴

The Court's examination of the nature of the procedure commenced with referring to the ECB's responsibility for the SSM's effective and consistent functioning, as laid down in Article 6(1) SSM Regulation,¹⁵⁵ and to the ECB's exclusive competence with regard to the assessment of qualifying holdings that Article 4(1) SSM Regulation confers upon the ECB.¹⁵⁶ Yet, because of the Court's procedure-specific approach, the ECB's overall responsibility for the functioning of the SSM and even the conferral of exclusive competence by means of the SSM Regulation with regard to qualifying holdings must not be deemed sufficient to draw the conclusion that the ECB in this particular procedure has the real decision-making power. These circumstances may serve as an indication, but where the real decision-making power lies in a procedure, depends on the specific situation. After setting the scene of the overall division of responsibilities between the ECB and the NCAs, the Court thus had to examine the specific decision-making procedure. It held that in this particular instance the division of tasks must be understood as the NCA having an assisting, registering and preparatory role and that the ECB 'alone has the decision-making power'.¹⁵⁷ This

152 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 45 with reference to Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 9-10.

153 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 52 et seq.

154 More extensively on this procedure, see para 4.3.5.3

155 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 53.

156 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 54.

157 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 55.

emphasis on the marginality of the NCAs' role¹⁵⁸ fits the Court's judgment in *Landeskreditbank Baden-Württemberg – Förderbank v ECB*.¹⁵⁹ From the fact that the Court was quite brief in substantiating its findings, nor discussed the cooperation between the NCA and the ECB in this decision-making procedure in great detail, it may be concluded that the Court found its interpretation self-evident. In view of the Court, the procedure falls within the *Sweden v Commission* line of case law and the Court therefore held that it not only is exclusively competent to review the ECB decision, but also 'as an incidental matter, to determine whether the preparatory national acts are vitiated by defects such as to affect the validity of the ECB's decision'.¹⁶⁰ The exclusivity of the Court's jurisdiction to review national preparatory measures, as is repeatedly emphasised in the judgment, precludes any national jurisdiction pertaining to 'reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals'.¹⁶¹ Bottom-up composite procedures in which the exclusive decision-making power lies with the EU authorities, must for the sake of the effectiveness of such procedures be accompanied by a 'single judicial review' to be conducted 'by the EU Courts alone', the Court held.¹⁶²

From *Berlusconi and Fininvest v Bank of Italy*, the following insights may be taken away. Firstly, it consolidated the *Borelli* and the *Sweden v Commission* lines of case law. Secondly, it introduced the term 'exclusive decision-making power' and coined it the decisive element in its jurisdiction assessment. Thirdly, it assumed exclusive jurisdiction over bottom-up composite procedures if an EU institution has an exclusive decision-making power in the procedure and thus precluded national courts from assuming jurisdiction. As a result, one may speak of a strong centralisation of judicial review. Fourthly, this strong centralisation of judicial review applies to all three of the selected SSM bottom-up composite procedures (procedure for authorising a credit institution, for withdrawing authorisation as a credit institution upon a proposal of the relevant NCA; and, for authorising the acquisition of a qualifying holding in a credit institution), because in all these procedures the ECB must be considered to have the exclusive decision-making power.¹⁶³

158 See also Petit 2019, p. 114.

159 Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:T:2017:337. See also Annunziata 2019, p. 14-15.

160 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 56-59.

161 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 47, 57 and 59. The exact scope of national 'decisions to initiate procedures, preparatory acts or non-binding proposals' that fall within the exclusive competence of the EU Courts is still taking shape. On this issue, see Case T-27/19 *Pilatus Bank and Pilatus Holding v ECB* ECLI:EU:T:2022:46 and Opinion AG Kokott in Case C-750/21 P and C-256/22 P *Pilatus Bank v ECB* ECLI:EU:C:2023:431. This case is currently pending before the Court.

162 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 49.

163 See also Ch. 4, para 4.3.5.3.4.

5.3.4.6 *Interim conclusions on the Court's approach to the division of jurisdiction*

The aim of discussing EU case law on bottom-up composite procedures was to discern in more detail the EU doctrine governing the division of jurisdiction. As was briefly discussed in paragraph 5.3.2.3.4, the decisive concept in this EU doctrine is not legal effects. Yet, it revolves around the concept of 'exclusive decision-making power'. If this lies at the EU level, the EU Courts are exclusively competent to review the entire composite procedure, including non-binding national preparatory acts. If the EU level does not have exclusive decision-making power, but instead is bound by an act of a national authority, judicial review must be sought at the national level against the national act. National courts do not have the competence to declare an EU act invalid. Yet, by means of requesting a preliminary reference procedure, applicants may seek judicial review of the EU act. From the above case law analysis, the following findings may be drawn.

Firstly, the doctrine shaped by *Borelli*, *Sweden v Commission* and *Berlusconi* must be considered to only be applicable to bottom-up composite procedures and not to top-down composite procedures. For the doctrine to be applicable, a composite procedure must entail an EU final decision and a national preparatory act (either binding or non-binding on the relevant EU authority) that precedes the EU decision. Furthermore, the *Berlusconi* judgment is clear on the scope of the principle of a 'single judicial review' exclusively concerning bottom-up composite procedure, involving, as stated by the Court, national 'preparatory acts' or national 'proposals', in which an EU authority exercises the exclusive decision-making power.¹⁶⁴ In addition, the Berlusconi doctrine governs the extent to which national errors may affect the validity of a subsequent EU decision. Such 'derivative illegality' will as a matter of principle only be possible where national acts preceded the EU final decision, and not in top-down composite procedures in which an EU act is implemented by a national authority.

Secondly, the concept of 'exclusive decision-making power' makes that the division of responsibilities between the national authority and the EU authority is key for assessing jurisdiction. Allocating responsibilities may be regarded one of the main challenges that shared administration in general and composite procedures in particular pose to access to court.¹⁶⁵ As Hofmann puts it: 'Effective judicial control [...] relies on the courts' ability to allocate responsibility and to reduce the inherent complexity of EU administrative governance arrangements.'¹⁶⁶

164 However, Hernández Saseta assumes that the *Berlusconi* judgment is equally applicable to the construction ECB instruction-NCA implementing decision, which would lead to the exclusive competence of the EU Courts over both the ECB instruction and any subsequent national implementing decisions, see Hernández Saseta 2021, p. 315.

165 Hofmann & Türk 2007, p. 267; Hofmann 2009a, p. 152. See also Röhl 2008, p. 94-95.

166 Hofmann & Türk 2006a, p. 589.

Thirdly, with the central concept of ‘exclusive decision-making power’, the Court takes a substantive approach to assessing jurisdiction. The exclusive decision-making power not necessarily lies with the authority that adopted the final decision. The *Borelli* case is a striking example thereof.¹⁶⁷ When assessing jurisdiction, it thus is substance over form, or rather: substance over sequence. Although from an accountability perspective this approach may be desirable as it seeks to truly reflect the division of responsibility between the EU and national level in a certain procedure, such an approach may cause uncertainties for parties that wish to challenge the outcome of a composite procedure.

Fourthly, although the approach is substantive to some extent, it abstracts from the details of the real situation and the actual division of decision-making power. The approach is a formalistic one, in that it focuses on how the division of decision-making power is formally regulated in the applicable legislation. The approach in that sense chooses form over substance. This will often lead to an oversimplification of the decision-making procedure and of the cooperation between the national and EU level within. In addition, it offers no room for taking into account the extent to which the EU institution in practice relied upon the preceding national act.¹⁶⁸ In the *Berlusconi* case, for instance, the ECB was considered to have the exclusive decision-making power, because on the basis of the applicable legislation the NCA’s act constituted a non-binding draft decision and the ECB adopted the final decision independently. In practice, however, the ECB may have strongly relied upon the national draft decision, especially in light of the importance of substantive national Italian law in the decision-making procedure, in which the Italian authorities are expert. Such reliance on the national draft decision, would shift the decision-making power to some extent from the ECB to the NCA, due to the NCA’s normative and factual influence of the ECB’s final decision. The Court’s approach that abstracts from the often ‘fuzzier’ real-world division of decision-making power will contribute to legal certainty. On the downside, the approach may assign exclusive decision-making power to the ECB, whether in practice the NCA decision-making strongly influenced the final decision. The Court’s approach would then lead to largely ignoring or at least downsizing the role of NCAs within the decision-making procedure. Whilst national courts are best placed to review acts of an NCA, a bigger role for the national courts would in such a situation be preferred.

167 Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

168 Cf. Almhofer 2018, p. 269, who in the context of non-contractual liability of the EU, and more specifically the EU liability requirement of causation, in top-down situations discusses the Court’s focus on ‘legal discretion’ (*rechtliche Spielraum*) left for national authorities instead of the factual influence of a Union decision on acts adopted by a Member State.

Fifthly and lastly, as also recognised (and criticised) by Hofmann, the Court's approach to assessing jurisdiction is of a binary nature.¹⁶⁹ As follows from the term 'exclusive' decision-making power, it either lies at EU level or national level. As well as the abstract nature of the approach that was discussed above, the binary nature leads to oversimplifying the decision-making procedure, moving away from a realistic view of the division of decision-making power. Again, such a binary approach may enhance legal certainty with regard to selecting the competent judicial level, but it carries the risk of putting too much decisional weight on one administrative level, whereas in practice the final decision is of a joint nature.

5.3.4.7 *The EU Courts as juge de droit national?*¹⁷⁰

5.3.4.7.1 *General*

By assuming jurisdiction over non-binding national preparatory acts, the Court in *Berlusconi* closed an important and in legal literature recognised gap in judicial protection: the unreviewability of national preparatory acts under national law and the assumed limited jurisdiction of the EU Courts to review such acts.¹⁷¹ The Court with *Berlusconi* introduced a 'single judicial review' for the entire composite procedure and precluded national courts from reviewing non-binding preparatory national acts. Although *Berlusconi* brings clarity with regard to the division of jurisdiction in reviewing composite procedures, the EU Courts' newly acquired role in reviewing national acts raises several questions relating to effective judicial protection. The overarching question is: Will the EU Courts fulfill the role of *juge de droit national*? Put differently: Will the 'single judicial review' by the EU Courts provide for a judicial review of the national preparatory acts similar to the review that would have been exercised by the national courts? This question can be divided into several sub-questions which will be discussed separately hereinafter. These sub-questions are:

- Do the EU Courts have jurisdiction to apply national law when reviewing an ECB act?
- Do the EU Courts have jurisdiction to apply national law when 'examining' a non-binding national preparatory act?
- Do the EU Courts have jurisdiction to review the lawfulness of an NCA act and annul it?
- Do the EU Courts have jurisdiction to 'examine' an AML/CFT assessment by an NCA?
- Are the EU Courts sufficiently equipped to apply national law?

169 Hofmann is critical of the Court's 'binary approach', see Hofmann 2019, p. 13.

170 This paragraph contains and builds on Tegelaar 2022, p. 129-134.

171 See, e.g., Eliantonio 2015, p. 78, 83.

5.3.4.7.2 EU Courts' competence to apply national law when reviewing an ECB decision

As already discussed, composite procedures, including SSM composite procedures, are inherently multi-jurisdictional. In principle, the national administrative level applies both national and EU law, and the EU administrative level applies EU law. Yet, as a novelty, in SSM composite procedures the ECB must also apply national law pursuant to Article 4(3) SSM Regulation. This provision requires the ECB to apply 'all relevant Union law', including national law transposing directives and implementing Member State options in regulations. Although the exact scope of this ECB competence has yet to become clear, because, amongst others, the line between national law that transposes a directive and other national law is not always easy to draw,¹⁷² it is clear that the ECB in exercising prudential banking supervision must apply national rules.

It is not self-evident that the EU Courts' scope of jurisdiction automatically aligns with the ECB competence to apply national law, i.e. that the EU Courts have jurisdiction to assess an ECB act in light of national law. The EU system of judicial review has not been built for a situation where an EU institution applies national law. Hence, there may be doubts about whether the Article 263 TFEU ground for review 'infringement of the Treaties or of any rule relating to their application' may be interpreted as also encompassing an infringement of national law by the ECB.¹⁷³ Yet, as 'any rule relating to their application' also includes any secondary EU law, including the ECB requirement laid down in the SSM Regulation to apply national law, I believe that Article 263 TFEU may be interpreted as conferring upon the EU Courts the competence to apply national law as referred to in Article 4(3) SSM Regulation when reviewing ECB acts.¹⁷⁴ In two SSM cases where the ECB applied national law, the General Court has shown that it considered itself competent to review the specific ECB act in light of national law.¹⁷⁵ In *Caisse régionale de crédit agricole mutuel Alpes Provence*, the General Court explicitly stated that 'Article 4(3) of Regulation No 1024/2013 necessarily requires the Court to assess the legality of the contested decisions' in light of both EU law and national law.¹⁷⁶ A related issue is the scope of competence of the Court of Justice in appeal cases. One of the grounds of appeal

172 More extensively on the problems establishing what the scope is of national law as referred to in Art. 4(3) SSM Regulation, see Boucon & Jaros 2018, p. 166-180.

173 See Gagliardi & Wissink 2020, p. 47-48.

174 See also Gagliardi & Wissink 2020, p. 55. For a further discussion of different forms of references to national law in EU law, see Prek & Lefèvre 2017, p. 378-383.

175 Case T-712/15 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:900; Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* ECLI:EU:T:2018:219.

176 Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* ECLI:EU:T:2018:219, para 49.

is ‘the infringement of Union law’ by the General Court.¹⁷⁷ The Court of Justice seems to take the position that this ground of appeal may include national law, as it assessed the General Court’s judgment in *Crédit mutuel Arkéa* in light of national law.¹⁷⁸ It thus may be concluded that Article 4(3) SSM Regulation has brought national law as defined in that provision within the scope of the EU Courts’ scope of jurisdiction.

5.3.4.7.3 *EU Courts’ competence to apply national law when ‘examining’ defects in a non-binding national preparatory act*

Due to the involvement of NCAs in an SSM composite procedure, the scope of national law that is applied within the procedure is broader than the concept of national law as referred to in Article 4(3) SSM Regulation. Lackhoff for instance argues that Article 4(3) SSM Regulation only encompasses national procedural law that implements EU law, including Member State options, and relates to national prudential regulation.¹⁷⁹ In his view, the ECB is not bound to general national administrative law nor general principles of national administrative law.¹⁸⁰ Notwithstanding these limits to the ECB’s competence to apply national law, NCAs in principle are subject to the entire body of national law when acting within the framework of the SSM. This follows from the principle of national procedural autonomy. Consequently, for instance when preparing a draft decision for the ECB, NCAs need to apply not only the national law implementing the applicable Union law, but also any general rules on financial supervision and national administrative law, including general principles of national administrative law. The EU Courts’ review of an ECB decision in light of national law therefore generally does not encompass the entire body of national law that plays a role within the composite procedure. This raises the question whether the EU Courts are competent to apply national law outside of the scope of Article 4(3) SSM Regulation when reviewing national preparatory acts, or any national law at all.¹⁸¹

Starting point for answering the above-mentioned question, is that it follows from *Berlusconi* that the Court is competent to ‘examine’ national preparatory acts preceding an EU act where an EU institution has the exclusive decision-making power. Yet, the judgment is silent on the details of such examination, and particularly on the issue whether the EU Courts will assess national acts in light of national law, or only in light of EU law. What could serve as an indication of the direction the EU Courts will take on this,

177 Art. 58 Protocol (No 3) of the Statute of the CJEU. On this issue, see Gagliardi & Wissink 2020, p. 49.

178 Joined Cases C-152/18 P and C-153/18 P *Crédit mutuel Arkéa v ECB* ECLI:EU:C:2019:810. See Gagliardi & Wissink 2020, p. 47-48.

179 Lackhoff 2017, p. 108-109.

180 Lackhoff 2017, p. 108.

181 See also Demková 2019, p. 216 and Dermine & Elia Antonio 2019, p. 250.

is that the Court directly linked the examination of preparatory national acts to the validity of the final decision, i.e. to 'derivative illegality'.¹⁸² The Court stated: 'it falls to the EU Courts [...] to examine, in order to ensure effective judicial protection of the persons concerned, any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.'¹⁸³ The Court did not speak of 'reviewing the legality' national decisions, but chose the term 'examine'. This difference in formulation already shows the difference in treatment of both types of acts by the Court. The Court reviews the legality of EU acts, but examines defects in national acts. But more importantly, the Court seemed to narrow down the type of defects that are relevant for the Court's examination: defects 'that would be such as to affect the validity of' the final EU decision. It thus seems that not all national defects would qualify as such. What defects would qualify as such?

With this question, we arrive at the issue of derivative illegality. What defects in a national preparatory act may affect the final EU decisions' validity? Brito Bastos concludes after an analysis of the Court's case law concerning derivative illegality in a wide range of fields, that in order for the Court to assume derivative illegality, a national preparatory act must be 'irregular on grounds of EU law [emphasis in the original]'.¹⁸⁴ As the underpinning rationale for the Court formulating this condition for derivative illegality Brito Bastos points at the principle of uniformity of EU law that only allows assessing legality of EU acts on the basis of EU law, the principle of uniformity of EU law, and to the jurisdiction of the Court that only allows for the application and interpretation of EU law, not of national law.¹⁸⁵ Some authors refer to AG Mischo's Opinion in *Association Greenpeace France* to substantiate that the Court must not allow for derivative illegality in case of irregularities on grounds of national law.¹⁸⁶ AG Mischo argued that it was 'impossible to see how the Community Court, which has sole jurisdiction to declare a Community act invalid, could form an opinion as to the existence of an irregularity with respect to national law when it has no jurisdiction to interpret or apply that law in the context of the jurisdiction conferred on it under Articles 173 of the EC Treaty (now, as amended, Article 230 EC) and 177 of the Treaty.'¹⁸⁷ It, however, is debatable whether this argument still holds true, now that the scope of the Court's jurisdiction undoubtedly has been expanded to national law as defined in Article 4(3) SSM Regulation. In addition, the question is whether referring to the Court's limited jurisdic-

182 For this terminology, see Brito Bastos 2018, p. 101-134.

183 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 44.

184 Brito Bastos 2018, p. 126.

185 Brito Bastos 2018, p. 126, 133.

186 Opinion AG Mischo in Case C-6/99 *Association Greenpeace France* ECLI:EU:C:1999:587. See Brito Bastos 2018, p. 127 and Dermine & Eliantonio 2019, p. 250.

187 Opinion AG Mischo in Case C-6/99 *Association Greenpeace France* ECLI:EU:C:1999:587, para 98.

tion is even necessary to make the claim that irregularities on grounds of national law cannot lead to illegality of the final EU act. As Brito Bastos points out, AG Mischo frames his argument in terms of procedural rules limiting the Court's jurisdiction, while he is making a substantive claim: that the Court can only review EU acts and that these cannot be illegal on grounds of national law.¹⁸⁸ The recent developments in SSM cases probably urge for some adaption of the argumentation, for instance by focusing more on the substantive claim, rather than on the Court's jurisdictional limits in relation to national law.

Whether *Berlusconi* may lead to a new direction in the Court's case law concerning derivative illegality, one that does allow for irregularities on grounds of national law to lead to illegality of the EU final act, remains an open question. But one can imagine that from an EU constitutional perspective the case for applying national law outside of the scope of Article 4(3) SSM Regulation when assessing national acts is much weaker than the case for applying national law as referred to in Article 4(3) SSM Regulation when reviewing ECB acts. It is not hard to plausibly argue that Article 263 TFEU in conjunction with Article 4(3) SSM Regulation must be interpreted as such that the EU Courts' competence includes reviewing ECB acts in light of national law as defined in Article 4(3) SSM Regulation. It is more doubtful whether such an expansion of the scope of jurisdiction may be found for national acts and national law outside the scope of Article 4(3) SSM Regulation. However, if the EU Courts would indeed simply 'ignore' national law outside the scope of Article 4(3) SSM Regulation, that would be problematic from both the perspective of the principle of the rule of law and of the principle of effective judicial protection.¹⁸⁹ A balance needs to be struck between the principles of autonomy and uniformity of EU law on the one hand, and the principles of rule of law and effective judicial protection on the other.

5.3.4.7.4 *EU Courts' competence to review the lawfulness of an NCA act and annul it*

Are the EU Courts empowered to review the lawfulness of an NCA act and subsequently annul it? The Treaties do not confer upon the EU Courts such jurisdiction to review the lawfulness of national acts. As the Court emphasised in *Borelli*: 'the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority'.¹⁹⁰ It thus cannot review the lawfulness of an NCA act, let alone annul it. Logically therefore, the Court did not construe its competence in *Berlusconi* as a lawfulness review, but

188 Brito Bastos 2018, p. 127.

189 Similarly with respect to the principle of the rule of law, see Dermine & Eliantonio 2019, p. 250-251.

190 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 9.

rather as a competence ‘to examine [...] any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision’.¹⁹¹

Yet, shortly after *Berlusconi*, the Court for the first time did review and annul a national act in *Ilmārs Rimšēvičs and ECB v Republic of Latvia*, a case in the context of the European System of Central Banks (ESCB).¹⁹² Due to the unique legal context of the case, the judgment may not be extended to judicial review of NCA acts within the SSM.¹⁹³ In *Ilmārs Rimšēvičs and ECB v Republic of Latvia*, the Latvian anti-corruption office adopted a decision temporarily suspending Mr Rimšēvičs, governor of the Central Bank of Latvia, from office. A unique remedy is codified in Article 14.2 ESCB Statute, providing that such national decisions ‘may be referred directly to the Court of Justice by the Governor concerned or the Governing Council [of the ECB, JT] on grounds of infringement of these Treaties or of any rule of law relating to their application’. The Court sought to interpret this remedy and its effects and investigated whether Article 14.2 ESCB Statute constitutes a remedy seeking a declaratory judgment that a Member State has failed to fulfill its obligations, which requires subsequent national measures to give effect to such a judgment, or an action for annulment, which would upon annulment result in immediate voidance of the national act. After an extensive analysis, AG Kokott in her Opinion concluded that the remedy must be interpreted as an action for declaration, taking due account of the separate legal spheres of the EU and the Member States and the serious interference of an annulment of a national act with the national legal order.¹⁹⁴

The Court, however, did not follow AG Kokott’s line of reasoning. It held that Article 14.2 ESCB Statute amounts to an action for annulment and, while deviating from the general division of jurisdiction between the EU Courts and the national courts, provides for the Court’s competence to review the lawfulness of a national act.¹⁹⁵ It supported the existence of this remedy by referring to the specific context of the ESCB: ‘a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails’.¹⁹⁶ By substituting ‘national central banks’

191 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:102, para 44.

192 Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2019:139. Also on this judgment in the context of *Berlusconi*, see Dermine & Eliantonio 2019, p. 246-249.

193 See also Di Bucci 2021, para 8.11 and Dermine & Eliantonio 2019, p. 249.

194 Opinion AG Kokott in Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2018:1030, para 52 et seq.

195 Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2019:139, para 64 et seq.

196 Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2019:139, para 69.

with ‘national competent authorities’, this clarification could have been about the SSM. Yet, despite the similarities, the exceptional legal context of this judgment, particularly the remedy codified in Article 14.2 ESCB Statute, written for a highly specific situation, cannot lead to the general conclusion that the Court has jurisdiction to review the lawfulness of NCA acts nor annul them. The judgment instead reinforces the Court’s unwillingness to expand its jurisdiction by assuming competence to review the lawfulness of national acts, save where an explicit legal basis exists.

5.3.4.7.5 *EU Courts’ competence to ‘examine’ an AML/CFT assessment by an NCA*¹⁹⁷

The SSM Regulation did not confer upon the ECB tasks in the area of anti-money laundering and counter-terrorism financing (AML/CFT).¹⁹⁸ AML/CFT thus has remained a national competence. Yet both the procedure for qualifying holding assessments and the procedure for withdrawal of a banking license may include an AML/CFT assessment. Nevertheless, the decision granting or opposing the acquisition of a qualifying holding or withdrawing a banking license is an exclusive task and power of the ECB.

The ECB published a newsletter acknowledging its missing competence to conduct its own investigations into AML/CFT compliance in withdrawal procedures.¹⁹⁹ The ECB must therefore rely on the investigations by the national authorities. Nonetheless, the question of whether these facts justify a license withdrawal is an ECB competence. The ECB differentiates between fact-finding, which is a national competence, and evaluating and assessing those facts for the purpose of potential license withdrawal, which is an (exclusive) ECB competence. The same competence delineation applies to the assessment of acquisitions of qualifying holdings.

The judgment in *Versobank*, concerning a withdrawal decision, appears to confirm the ECB’s view.²⁰⁰ According to the General Court, ‘the facts constituting breaches of the AML/CFT legislation were established by the [relevant NCA], whereas the legal assessment of whether those facts justified withdrawal of authorisation and the assessment of proportionality were reserved for the ECB.’²⁰¹ The General Court further elaborated that ‘the [NCA’s] findings regarding breaches, which have not been properly chal-

197 This paragraph contains and builds on Budinská & Tegelaar 2023, p. 329-351.

198 See Recital 28 SSM Regulation. Recital 29 SSM Regulation states that the ECB should cooperate, as appropriate, fully with the national authorities that are competent to ensure the fight against money laundering.

199 ECB, ‘The ECB and anti-money laundering: what we can and cannot do’, available via www.bankingsupervision.europa.eu/press/publications/newsletter/2018/html/ssm.nl180516_2.en.html (accessed 01.09.2023).

200 Case T-351/18 *Ukrseľhosprom PCF and Versobank v ECB* ECLI:EU:T:2021:669.

201 ECB, ‘The ECB and anti-money laundering: what we can and cannot do’, available via www.bankingsupervision.europa.eu/press/publications/newsletter/2018/html/ssm.nl180516_2.en.html (accessed 01.09.2023).

lenged by the second applicant, had to be treated by the ECB as established facts and as not requiring, for that reason, a review by the ECB.' As a result, the ECB 'rightly confined itself to verifying whether those breaches did indeed constitute grounds justifying the withdrawal of authorisation.'²⁰²

Considering that the AML/CFT assessment is an exclusive national competence, to what extent does that affect the EU Courts' jurisdiction in judicial review of SSM composite procedures that involve an AML/CFT assessment? Firstly, because the ECB has not been conferred supervisory tasks in the area of AML/CFT national AML/CFT regulation, implementing the EU AML/CFT directives, does not fall within the scope of Article 4(3) SSM Regulation. Therefore, as was already discussed above, the EU Courts lack jurisdiction to review both the NCA preparatory acts and the ECB final decision in light of the national AML/CFT rules. Secondly, AML/CFT compliance is an exclusive national competence and not within the supervisory tasks of the ECB, necessarily resulting in more deference by the EU Courts.

5.3.4.7.6 *Are EU Courts sufficiently equipped to apply national law?*

As just concluded, the EU Courts are competent to apply national law as defined in Article 4(3) SSM Regulation when reviewing the legality of an ECB decision. Notwithstanding their competence to apply national law, a relevant question to ask is: are they well-equipped to carry out the task of applying and interpreting national law?²⁰³ Before an answer will be sought, it is important to reflect on the function of national law whenever an ECB decision is reviewed. Before the EU Courts, national law either has the legal status of question of law, or of question of fact.²⁰⁴ Its qualification depends on the function national law has in a particular judicial procedure, and more specifically in the EU Courts' legal reasoning.²⁰⁵ As submitted by Prek and Lefèvre, where national law is relevant for the major premise of the EU Courts' legal reasoning, i.e. when the EU Courts are stating the rule, national law must be accorded the status of question of law.²⁰⁶ If national law constitutes the minor premise, i.e. making an assertion of facts, it must be qualified as a question of fact.²⁰⁷ Article 4(3) SSM Regulation contains a reference to national law. It requires the ECB to apply national law in certain situations; national law is, in addition to EU law, the ECB's *lex materiae*. When assessing the legality of an ECB act that is adopted by applying national law, national law thus plays a similar role as EU law. Prek and

202 Case T-351/18 *Ukrselhosprom PCF and Versobank v ECB* ECLI:EU:T:2021:669, para. 219.

203 More extensively on this question in light of the principle of effective judicial protection, see Gagliardi & Wissink 2020, p. 41-71.

204 Extensively on this issue, see Prek & Lefèvre 2017, p. 369-402.

205 Prek & Lefèvre 2017, p. 373.

206 Prek & Lefèvre 2017, p. 373.

207 Prek & Lefèvre 2017, p. 373-374.

Lefèvre submit that ‘the proximity between the legal order of the European Union and those of its Member State, implies that rather than being treated as “an entirely extraneous” element, national law should be granted a legal status sufficiently close to that applicable to questions of EU law whenever it serves an equivalent function in the judicial process, so as to ensure that its judicial application is as correct as possible.’²⁰⁸ In such a situation, where national law constitutes the *lex materiae* as applied by an EU institution, national law must be accorded the status of question of law.²⁰⁹

Whether national law qualifies as a question of fact or of law, is important for the question who primarily carries the responsibility of establishing its content: the parties under the rules of evidence, or the EU Court itself.²¹⁰ The status of national law as a question of law, as discussed by Prek and Lefèvre, leads to a shift of responsibility for establishing the content towards the EU Court.²¹¹ It requires a more active involvement of the EU Court in comparison to a question of fact. However, as acknowledged by Prek and Lefèvre, what blurs a black-and-white approach to allocating the task of determining the exact content of national law, is that the EU Courts are, in contrast to EU law, not an expert on national law.²¹² So even though the legal status would compel the EU Courts to take on a more active role, the “extraneous” origin of national law may necessitate of a larger role for the parties that may have a better knowledge of national law.²¹³ But, as argued by Gagliardi and Wissink, placing the burden to provide clarity about the applicable national law on the applicant, generally a credit institution that is the addressee of an ECB decision, would in the SSM context not offer a suitable solution.²¹⁴ Although this is common procedure in trade mark cases, the nature of the situation in the SSM, where an ECB decision is challenged by a credit institution, makes that placing such a burden on the applicant would ‘unreasonably increase the burden of proof on credit institutions’.²¹⁵

How then, if the Court should not rely on the parties, must the EU Courts interpret and apply national law as a non-expert? It is well-established case law that when assessing the scope of certain provisions of national law, the Court must take into account the interpretation of those provisions by the national courts.²¹⁶ The General Court has taken this case law as a starting point in SSM cases in which the ECB applied national law.²¹⁷

208 Prek & Lefèvre 2017, p. 373.

209 Prek & Lefèvre 2017, p. 379, 381. Similarly, Gagliardi & Wissink 2020, p. 49.

210 Prek & Lefèvre 2017, p. 387.

211 Prek & Lefèvre 2017, p. 388-391.

212 Prek & Lefèvre 2017, p. 393.

213 Prek & Lefèvre 2017, p. 393.

214 Gagliardi & Wissink 2020, p. 64.

215 Gagliardi & Wissink 2020, p. 41-71.

216 Case C-490/04 *Commission v Slovakia* ECLI:EU:C:2015:602, para 81 and case law cited.

217 Case T-52/16 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:902, para 131; Case T-712/15 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:900, para 132; Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* ECLI:EU:T:2018:219, para 84.

The General Court added in *Crédit mutuel Arkéa* that if national court decisions on interpretation are absent, it is for the EU Courts to rule on the scope of the national provisions in question.²¹⁸ Gagliardi and Wissink argue that such an ‘autonomous’ competence to interpret national law by the EU Courts may be problematic from the view of effective judicial protection and uniformity of national law.²¹⁹ Their concerns specifically relate to potentially diverging interpretations of national law by the national courts and the EU Courts. To overcome these problems, Gagliardi and Wissink advocate the involvement of national courts and provide several practical proposals.²²⁰ One of the proposals concerns creating a dialogue by requesting a national court on the basis of Article 24(2) of the Statute of the Court of Justice of the European Union to inform the EU Court on the interpretation of national law.²²¹ One can imagine, however, that creating such a dialogue, or even the introduction of a reverse preliminary reference procedure, may not be ideal from the perspective of the right to judicial proceedings within reasonable time.

5.3.5 Jurisdiction in top-down composite procedures

5.3.5.1 Introduction

As already briefly discussed in paragraph 5.3.2.3.5, EU acts in top-down composite procedures that impose an obligation on the Member State or on a national authority produce legal effects and therefore are reviewable under Article 263 TFEU. Yet, whether an affected party also has a right to bring an action under Article 263 TFEU is another issue and revolves around legal standing. The legal standing requirements in Article 263 TFEU are key to the division of jurisdiction in top-down composite procedures.

To satisfy the EU legal standing requirements, an EU act must be of direct and individual concern to the applicant. The concept of ‘discretion’, a concept closely linked to the concept of ‘exclusive decision-making power’ which is central to the division of jurisdiction in bottom-up composite procedures, is decisive for whether an EU act must be considered to be of direct concern to the applicant. According to long-standing EU case law, in a composite procedure, an EU act is of direct concern to the applicant if it directly affects its legal situation and leaves no discretion to the national authority to which the act is addressed and which is responsible for implementing it.

218 Case T-52/16 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:902, para 131; Case T-712/15 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:900, para 132.

219 Gagliardi & Wissink 2020, p. 41-71.

220 Gagliardi & Wissink 2020, p. 65-68.

221 Gagliardi & Wissink 2020, p. 66-67.

The top-down composite procedure in the context of the SSM on which this chapter will focus, is the ECB instruction addressed to an NCA instructing it to take a specific action under national law vis-à-vis an individual credit institution.²²² The credit institution is the addressee of the NCA decision, but not of the ECB instruction. The instruction is addressed to the NCA. For the credit institution to have a right to bring an action for annulment against the ECB decision, it must show that the ECB instruction is of direct and individual concern to it.

For the issue of direct concern, a distinction must be made between an instruction requiring an NCA to exercise a national power in case the SSM Regulation does not confer such a power upon the ECB (Art. 9(1), third sub-para, SSM Regulation) and an ECB instruction requiring an NCA 'to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with' national law (Art. 18(5) SSM Regulation). The key distinction between these two categories is the margin of discretion granted to the NCA. Furthermore, the degree of discretion an ECB instruction requiring an NCA to exercise a national power leaves to an NCA may vary and will depend on the details of the ECB instruction concerned.

Before zooming in on these legal standing requirements, first two more general topics will be addressed: parallel jurisdiction of national courts and EU Courts and the functioning of national courts as a safety net.

5.3.5.2 *Parallel jurisdiction of national courts and EU Courts?*

5.3.5.2.1 *General*

Contrary to bottom-up composite procedures, national and EU jurisdiction may coexist peacefully in top-down composite procedures. In *Rau v BALM*, the Court held that its exclusive jurisdiction to review EU acts does not preclude the existence of parallel national jurisdiction over national decisions implementing an EU act. *Rau v BALM* concerned a Commission decision instructing Germany to take specific measures to increase butter sales. The Court held: 'the possibility of bringing a direct action under the second paragraph of Article 173 of the EEC Treaty [now Article 263 TFEU] against a decision adopted by a Community institution does not preclude the possibility of bringing an action in a national court against a measure adopted by a national authority for the implementation of that decision on the ground that the latter decision is unlawful.'²²³ The Court continued that, should the outcome of the national procedure depend on the validity of the EU act, the national court could submit preliminary questions on validity

²²² More extensively on the ECB's powers of instruction, see Ch.4, para 4.3.7.

²²³ Joined Cases C-133 to 136/85 *Rau v BALM* ECLI:EU:C:1987:244, para 11-12.

of the EU act to the Court.²²⁴ In his Opinion, AG Lenz emphasised that the preliminary reference procedure would prevent such parallel jurisdiction from posing the risk of conflicting judgments.²²⁵ As already stated, it was held in *Foto-Frost* that national courts may declare an EU act valid, but not invalid, because the latter is an exclusive competence of the EU Courts.²²⁶ Yet, national courts can request a preliminary ruling on validity from the Court. One could therefore say that it is not so much the preliminary reference procedure that would prevent conflicting judgments on the validity of the EU act, but the lack of jurisdiction of national courts to review and declare invalid an EU act. On the basis of *Rau v BALM* it may thus be concluded that national jurisdiction and EU jurisdiction may coexist peacefully in situations where an EU act is implemented by a Member State. *Rau v Balm* may also be applied to the situation where the ECB instructs an NCA to take a decision vis-à-vis a credit institution.

Allowing national courts to rule on the national implementation of an EU act may be seen as a way to limit the EU Courts' case load. In addition, if the Court would not allow for parallel jurisdiction, affected parties would often be deprived from judicial redress due to the EU legal standing requirements. In top-down composite procedures, the relevant EU act will most likely be addressed to the Member State or a Member State authority.²²⁷ As a result, an affected party is not the addressee of the EU act and therefore must prove that the EU act is of direct and individual concern to him. This may be a difficult exercise and depends on various elements, such as the margin of discretion that the EU act leaves for the national implementing authority (for direct concern) and the extent to which the affected party is affected 'by reason of certain attributes which are peculiar to [him] or by reason of circumstances in which [he] is differentiated from all other persons and by virtue of these factors distinguishes [him] individually just as in the case of the person addressed.'²²⁸

The Court's case law on *locus standi*, especially where it concerns the requirement of individual concern, has often been criticised for leading to a too strict approach to legal standing. Due to this strict approach, legal literature proposed proceedings before national courts as an alternative route to

224 Joined Cases C-133 to 136/85 *Rau v BALM* ECLI:EU:C:1987:244, para 11. The permissibility of such an indirect action is, however, limited. It follows from the *TWD Textilwerke Deggendorf* case that if the applicant would meet the legal standing requirements in a direct action against the EU act under Article 263 TFEU, but the applicant did not institute proceedings within two months after publication of the EU act (or of its notification to the applicant, or of the day on which it came to the knowledge of the latter), the applicant is barred from calling into question the lawfulness of the EU act in national proceedings, and that EU act becomes definitive. See Case C-188/92 *TWD Textilwerke Deggendorf* ECLI:EU:C:1994:90, para 17.

225 Opinion AG Lenz in Joined Cases C-133 to 136/85 *Rau v BALM* ECLI:EU:C:1986:469, para 31.

226 Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452. See in particular para 15 of *Foto-Frost*.

227 See also Eliantonio 2015, p. 85.

228 Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

direct legality review.²²⁹ By means of this alternative route a legality review by the Court could be obtained by requesting the national court to refer a preliminary question on validity to the Court, the route of the ‘indirect action’.

5.3.5.2.2 *Limits to the availability of an indirect action*

The availability of an indirect action is limited. It follows from the *TWD Textilwerke Deggendorf* case that would an applicant ‘without any doubt’ meet the legal standing requirements in a direct action against the EU act under Article 263 TFEU and was ‘fully aware’ of the relevant EU decision, yet did not institute proceedings within two months after publication of the EU act (or of its notification to the applicant, or of the day on which it came to the knowledge of the latter), the applicant is barred from calling into question the lawfulness of the EU act in national proceedings, and that EU act becomes definitive.²³⁰ An indirect action is allowed in case of doubt about whether a party would have had legal standing.²³¹

Especially in top-down composite procedures, an applicant may not necessarily be ‘fully aware’ of an EU act preceding the national decision. The same applies to the construction ECB instruction-NCA implementing decision. An ECB instruction is not addressed to the relevant credit institution, but to the relevant NCA. The NCA will receive a notification of the instruction, not the credit institution that is the subject of the instruction.²³² Yet it seems unlikely that NCAs will leave the NCA instruction unmentioned in their decision, as the instruction will form the legal basis of the the implementing decision.²³³ General principles relating to the obligation to state reasons are likely to require such a reference to the underlying instruction. A credit institution not starting proceedings at the EU level against an underlying instruction therefore in my view, generally cannot invoke the argument it was not ‘fully aware’ of the instruction.

A similar stance was taken by the Court in *Iccrea Banca v Bank of Italy*, concerning the SRM composite procedure governing the calculation and raising of *ex ante* contributions for the Single Resolution Fund (SRF) involv-

229 Witte 2015, p. 30 with reference to Lang 2003, p. 102.

230 Case C-188/92 *TWD Textilwerke Deggendorf* ECLI:EU:C:1994:90, para 24-26. Confirmed in Case C-135/16 *Georgsmarienhütte and Others v Germany* ECLI:EU:C:2018:582.

231 Case C-207/17 *Rotho Blaas Srl v Agenzia delle Dogane e dei Monopoli* ECLI:EU:C:2018:840, para 26-41.

232 See Art. 17a.3 ECB Rules of Procedure.

233 As an illustration of how such a reference may be made, see the DNB decision of 21 January 2020 to impose administrative sanctions on Rabobank upon an ECB instruction requesting opening proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with national law, available at www.dnb.nl/nieuws-voor-de-sector/handhavingsmaatregel-2020/dnb-legt-aan-cooperatieve-rabobank-u-a-rabobank-bestuurlijke-boetes-op-wegens-het-niet-correct-toepassen-van-europese-beloningsregels-in-2014/.

ing both the SRB and the relevant NRA.²³⁴ Iccrea Banca sought to obtain an indirect review of the SRB decision preceding the implementation by the NRA, and addressed to that NRA, via a preliminary reference procedure. However, the Court held, with reference to *TWD Textilwerke Deggendorf*, that the indirect action was not available, because Iccrea Banca would have had legal standing in a direct action against the SRB decision.²³⁵ The Court does elaborate on the ‘full awareness’, yet declared the preliminary question inadmissible.

Awareness of the existence of an act and knowledge of the exact content of the act are not the same. The latter is key for deciding whether the error or errors alleged originate at the national level or at the EU level, and thus against which of the authorities proceedings must be instituted at what judicial level. Nevertheless, it is settled case law that awareness of the existence of an act triggers an obligation for the relevant party to request the full text ‘within a reasonable period’.²³⁶ The two-month time limit for a direct action starts running from the moment the relevant party becomes aware of the content of and the reasons for the decision.²³⁷ Not having requested the full text may not be invoked to circumvent the time limits applicable to a direct action. As Iccrea Banca did not file such a request with the SRB, the General Court rejected the direct action against the SRB decision as inadmissible.²³⁸

5.3.5.3 National courts as a safety net

As was already stated, the system of judicial protection may be referred to as one of remedial complementarity. National courts function as a safety net by ‘remedying’ gaps in judicial redress where these are ‘left’ by the EU Courts.²³⁹ Safjan and Düsterhaus discern various situations where the national courts have been attributed such a remedial function by the Court.²⁴⁰ A first situation is *Borelli*, where a national act determines the outcome of a subsequent EU act.²⁴¹ As already discussed, in *Borelli* the Court denied jurisdiction and required national courts to review the preceding national act ‘on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case.’²⁴²

234 Case C-414/18 *Iccrea Banca v Bank of Italy* ECLI:EU:C:2019:1036. For a critical analysis of this judgment in light of judicial protection, see Van Rijn 2022, p. 460-466.

235 Case C-414/18 *Iccrea Banca v Bank of Italy* ECLI:EU:C:2019:1036, para 65-75.

236 Case T-494/17 *Iccrea Banca v ECB and SRB* ECLI:EU:T:2018:804, para 33.

237 Case T-494/17 *Iccrea Banca v ECB and SRB* ECLI:EU:T:2018:804, para 33.

238 Case T-494/17 *Iccrea Banca v ECB and SRB* ECLI:EU:T:2018:804.

239 Safjan & Düsterhaus 2014, p. 5-7.

240 Safjan & Düsterhaus 2014, p. 6-7.

241 Safjan & Düsterhaus 2014, p. 6.

242 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 13.

In *Borelli*, the national courts' remedial function did not result from the legal standing requirements, but because the Commission's decision was not reviewable by the Court. Case law where the national courts' remedial function must close the gap in judicial redress left because of the EU legal standing requirements, concerns private applicants challenging an EU act of general application that requires national implementing measures.²⁴³ The Lisbon Treaty relaxed the legal standing requirements for EU acts of general application that do not require national implementing measures,²⁴⁴ but did not do so for those that require national implementation. For EU acts of general application that do not require national implementing measures private applicants need to show direct concern but not individual concern. The requirement of individual concern made a direct action against such an EU act virtually impossible. An applicant would be required to show that such an act 'affects [him] by reason of certain attributes which are peculiar to [him] or by reason of circumstances in which [he] is differentiated from all other persons and by virtue of these factors distinguishes [him] individually just as in the case of the person addressed.'²⁴⁵ In addition to this strict approach to individual concern, the very nature of an EU act of general application makes that it generally is not of individual concern to an applicant.²⁴⁶ Relaxing the admissibility requirements by removing individual concern must prevent that the single route for challenging EU acts of general application that do not require implementing measures was to act unlawfully under national law to trigger a reviewable national act.

However, the Lisbon Treaty did not relax the legal standing requirements for legislative acts nor for EU acts of general application that require national implementing measures. Given that the requirement of individual concern poses similar problems for challenging these acts, judicial redress by means of a direct action under Article 263 TFEU is virtually impossible for private applicants. The Court held that this gap in judicial protection is not incompatible with Article 47 of the Charter and that this provision 'does not require that an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the European Union.'²⁴⁷ The gap is to be remedied by the national courts. The Court requires Member States to provide for an

243 Safjan & Düsterhaus 2014, p. 6.

244 Article 263 TFEU speaks of regulatory acts. The Court in *Inuit Tapiriit Kanatami and Others* held that the concept of regulatory acts in Article 263 TFEU must be interpreted as acts of general application other than legislative acts, see Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625.

245 Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

246 A non-legislative act qualifies as a regulatory act if it applies 'to objectively determined situations and [if] it produces legal effects with respect to categories of persons envisaged in general and in the abstract', see Case T-262/10 *Microban v Commission* ECLI:EU:T:2011:623, para 23.

247 Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625, para 105.

indirect review.²⁴⁸ The dependency on national courts for judicial protection thus has consequences for national procedural autonomy. The principle of effective judicial protection requires the Member States' to provide for indirect review.²⁴⁹ Applicants must be able to institute proceedings against a national act that implements the respective EU act and plead the invalidity of the latter. The relevant national court may then refer a preliminary question on validity to the Court. The Court explicitly stated that such preliminary reference procedures 'constitute, like actions for annulment, means for reviewing the legality of European Union acts'.²⁵⁰ The EU acts that may be reviewed via this route are not limited to reviewable acts as referred to in Article 263 TWEU, as Article 267 TFEU 'confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception'.²⁵¹ The potential of such an indirect challenge in comparison with a direct action, must, however, not be overestimated. AG Jacobs is critical in his Opinion in *Extramet* and *Unión de Pequeños Agricultores v Council (UPA)*.²⁵² He mentions the delays involved, the dependency on the quality of the preliminary questions and the lack of 'a full exchange of pleadings'.²⁵³

The Member States' obligation to provide for indirect review was developed in case law concerning EU legislative and regulatory acts. This raises the question whether this Member State obligation must also be presumed for ECB instructions that instruct an NCA to adopt a decision vis-à-vis a credit institution. However, such an instruction probably does not qualify as a regulatory act.²⁵⁴ Yet, from the perspective of a private applicant, the problems for judicial protection are similar. The legal standing requirements for both an ECB instruction and an EU regulatory act that requires national implementing measures pose an insurmountable barrier for judicial review

248 See Safjan & Düsterhaus 2014, p. 7 with reference to Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625, para 104.

249 See, e.g., Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625, para 99 et seq.

250 Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625, para 95.

251 Case C-322/88 *Grimaldi* ECLI:EU:C:1989:646, para 8. These acts also include soft law, including recommendations and guidelines, see Case C-911/19 *Fédération bancaire française v Autorité de contrôle prudentiel et de résolution* ECLI:EU:C:2021:599, para 52-57. See also Case C-501/18 *BT v Balgarska Narodna Banka* ECLI:EU:C:2021:249, para 82 et seq.

252 Opinion AG Jacobs in Case C-358/89 *Extramet Industrie v Council* ECLI:EU:C:1991:144 and Opinion AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197.

253 Opinion AG Jacobs in C-358/89 *Extramet Industrie v Council* ECLI:EU:C:1991:144, para 72-74.

254 In *Microban v Commission* (T-262/10) the Court held that a (non-legislative) decision qualifies as a regulatory act if it applies 'to objectively determined situations and [if] it produces legal effects with respect to categories of persons envisaged in general and in the abstract.' Considering the nature of a specific ECB instruction, which instructs an NCA to take specific action vis-à-vis an individual credit institution, I believe the Court is not likely to consider such an instruction of general application and therefore not as a regulatory act.

at EU level, although the problems will center around different legal standing requirements. Individual concern will be problematic for EU regulatory acts and direct concern for ECB instructions. For a private applicant the result is exactly the same: it does not have a right to challenge any of such acts directly before the Court. In addition, both types of acts require subsequent national implementing acts which opens the route for judicial review at national level. I therefore consider it likely that the principle of effective judicial protection requires Member States to provide for indirect review and therefore for review of the NCA act that implements the ECB instruction. Yet, indirect review under Article 267 TFEU does not exist as a matter of right to applicants.²⁵⁵ The Court, expanding the *Foto-Frost* judgment, held in *International Air Transport Association* and *Danzer* that the fact that parties contest the validity of an EU act is not in itself sufficient to initiate a preliminary reference procedure and that national courts may reject parties' arguments in support of invalidity of the EU act and conclude that the EU act is valid.²⁵⁶ Yet, if national courts do consider one or more arguments contesting validity to be legitimate, either raised by the applicant or of its own motion, the procedure must be stayed and a reference to the Court must be made.²⁵⁷ Nevertheless, it has been argued that this case law leads to a situation where national courts effectively are the only ones deciding on validity of an EU act and that the only way for redress consist of *Francovich* liability.²⁵⁸

5.3.5.4 Legal standing²⁵⁹

5.3.5.4.1 General

For private applicants to have legal standing they either have to be the addressee of the decision, or, if the decision is not addressed to them, they have to comply with the legal standing requirements of direct and individual concern. In top-down composite procedures in which an EU act is addressed to and implemented by a national authority, the affected party thus must meet the requirements of direct and individual concern.

In a top-down composite procedure, direct concern may be difficult to prove. Whether an applicant is directly concerned will depend on the margin of discretion the instruction leaves for the NCA. As was already touched upon earlier, the *Plaumann* test for individual concern is not likely to pose insurmountable barriers for a credit institution that wishes to directly chal-

255 See Opinion AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197, para 42.

256 Case C-344/04 *International Air Transport Association* ECLI:EU:C:2006:10, para 28-29; Case T-47/02 *Danzer* ECLI:EU:T:2006:167, para 37.

257 Case C-344/04 *International Air Transport Association* ECLI:EU:C:2006:10, para 30, 32.

258 Türk 2009b, p. 246.

259 This subparagraph is partly based on Tegelaar & Haentjens 2019, p. 269-277.

lenge an ECB instruction that preceded the NCA decision addressed to it. For other applicants, such as shareholders, management and creditors, including bondholders and depositors, the *Plaumann* test is likely to cut off the route to direct review under Article 263 TFEU.

5.3.5.4.2 *Direct concern in composite procedures*

The role of (national) discretion

Direct concern may be difficult to establish for EU acts in top-down composite procedures that require national implementation, such as the construction ECB instruction-NCA implementing decision.²⁶⁰ In such composite procedures, direct concern will often determine whether judicial protection must be sought at the national level or at the EU level.²⁶¹

It is settled case law that to satisfy the requirement of direct concern, the EU act must directly affect the applicant's legal situation and leave no discretion to the addressee of the EU act that is entrusted with implementing it.²⁶² An act leaves no discretion if the implementation is 'purely automatic and results from EU rules alone without application of other intermediate rules'.²⁶³ It thus depends on the margin of discretion left to the national implementing authority, whether an EU measure can be considered to be of direct concern.

Discretion is not a clearly defined concept and EU case law is casuistic and ambiguous,²⁶⁴ rendering it difficult to predict whether an applicant has standing in a particular case. Until now, to my knowledge, there have not been annulment judgments on ECB instructions. It therefore is necessary to draw conclusions from case law in other fields, particularly case law on Commission authorisations, EU funds and the recovering of state aid.

EU case law concerning EU authorisations, funds and state aid

A large part of the EU case law on direct concern of EU decisions that is still authoritative today concerns either Commission authorisations addressed to a Member State or Commission decisions addressed to a Member State concerning EU funds. Examples of Commission authorisation decisions are

260 For more situations in which direct concern may prove problematic, see Türk 2009a, p. 54 et seq.

261 See also Türk 2009a, p. 54.

262 See, e.g., Case T-69/99 *DSTV v Commission* ECLI:EU:T:2000:302, para 24; Case C-386/96 *P Dreyfus v Commission* ECLI:EU:C:1998:193, para 43. It has been argued that 'discretion' should not be the relevant criterion when assessing direct concern, but rather a causal link between the decision and the relevant applicant's damage: 'what is really central to the notion of direct concern is the existence of a direct relationship of causality between the Community decision and the damage suffered by the applicant'. See Türk 2009b, p. 242-243 with reference to Albors-Llorens 1996, p. 73. However, I do not believe the current case law of the Court as set out above, would justify this analysis.

263 See, e.g., Case T-69/99 *DSTV v Commission* ECLI:EU:T:2000:302, para 24; Case C-386/96 *P Dreyfus v Commission* ECLI:EU:C:1998:193, para 43.

264 Türk 2009a, p. 65.

decisions granting or rejecting a Member State request to open a tariff quota for unwrought aluminium,²⁶⁵ to suspend customs duties to fruit imported from third countries,²⁶⁶ or to take protective measures with regard to imports of cotton yarn from Greece.²⁶⁷ Commission decisions on EU funds for instance encompass a refusal to recognise subsidies awarded by a Member State as eligible for funding under an EU fund.²⁶⁸

What characterises both types of situations – Commission authorisations and subsidies – is that the Commission and the Member State carry out distinct functions. The Commission decides *in abstracto*, whereas the Member State decides *in concreto*, nonetheless on the basis of the Commission decision. To give an example: the Commission authorises the Member State to take protective measures with respect to imports of cotton yarn from Greece, and the Member State subsequently rejects export contracts with certain Greek exporters. Generally, the Commission authorisation does not directly affect the legal situation of the Greek exporters whose contracts were rejected after the Commission authorisation, yet the national decision to do so does. The authorisation granted by the Commission enables the Member State to implement national protective measures. The Member State may nevertheless decide not to exercise the authorisation.²⁶⁹

However, as was held in *Piraiki-Patraiki v Commission*, the Commission authorisation can also be of direct concern if it is foreseeable that the relevant Member State will implement it by introducing protective measures, thus exercising the authorisation.²⁷⁰ This foreseeability may be discerned not only from an explicit statement by the Member State,²⁷¹ but also from the context of a case where the Member State's future course of action is implicit.²⁷²

Another example where direct concern plays a central role in EU case law are EU funds.²⁷³ In these cases, the Commission for example refuses to recognise certain financial assistance granted by a Member State to a beneficiary as eligible expenditure under a specific EU fund. It is settled case law that such Commission decisions are generally not of direct concern to an applicant. The reason is that the applicable legislation, including that governing the European Regional Development Fund and the European Agricultural Guidance and Guarantee Fund, does not oblige the Member States to recover the sums from the beneficiaries or to decrease the fund-

265 Case C-69-69 *Alcan Aluminium v Commission* ECLI:EU:C:1970:53.

266 Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

267 Case C-11/82 *Piraiki-Patraiki v Commission* ECLI:EU:C:1985:18.

268 See, e.g., Joined Cases C-89 and 91/86 *CNTA v Commission* ECLI:EU:C:1987:337.

269 See, e.g., Opinion AG Roemer in Case C-25/62 *Plaumann* ECLI:EU:C:1963:7, ECR 95, p. 115.

270 Case C-11/82 *Piraiki-Patraiki v Commission* ECLI:EU:C:1985:18, para 7-10.

271 Case 62-70 *Bock v Commission* ECLI:EU:C:1971:108, para 6-8.

272 Case C-11/82 *Piraiki-Patraiki v Commission* ECLI:EU:C:1985:18, para 9.

273 For an overview, see Türk 2009a, p. 59 et seq. and Türk 2009b, p. 236 et seq. See also Eliantonio 2014, p. 86.

ing initially granted to a beneficiary.²⁷⁴ The Member States may decide to reimburse the EU fund without retrieving the sums from the recipients or lowering the amount initially granted.

The situations described above in many respects differ from the construction ECB instruction-NCA implementing decision. Most importantly, Commission decisions, such as discussed above, that certain subsidies awarded by a Member State cannot be reimbursed from an EU fund, do not require that Member State to recover the sums paid from the recipient. The latter is up to the Member State and therefore such a Commission decision generally is not of direct concern to the recipient. It is the Member State action to recover the funds that determines and produces the direct effects for any natural or legal person. In contrast, within the SSM, the NCA's are under the obligation to implement the ECB instruction. Furthermore, the decisions concerning EU funds do not take place within a highly centralised structure such as the SSM.

A situation presenting more similarities with the construction ECB instruction-NCA implementing decision is the construction employed to recover state aid that the Commission deems incompatible with the internal market.²⁷⁵ The construction governing recovering state aid concerns the Commission addressing a decision to the relevant Member State obliging it to recover the aid granted by it from the specific beneficiary. National (administrative) law governs recovering the state aid. As opposed to the Commission authorisations that were discussed above, the Member State has no other choice than to recover the aid from the party to whom it was granted: its discretion does not extend to whether or not to recover the aid.²⁷⁶ As the Court formulated it in *State of Rhineland-Palatinate v Alcan Deutschland GmbH*: 'the role of the national authorities is [...] merely to give effect to the Commission's decision.'²⁷⁷ The similarities between the construction governing recovering state aid and the construction ECB instruction-NCA implementing decision in brief are thus as follows: the EU decision is addressed to the Member State (authority), it prescribes the action to be taken, it defines vis-à-vis which private party the action must be taken, the Member State (authority) is obliged to take the action prescribed and national (administrative) law will be applied to give effect to the EU decision.²⁷⁸

274 See, e.g., Case T-244/00 *Coillte Teoranta v Commission* ECLI:EU:T:2001:124, para 45-46; Case T-453/10 *Northern Ireland Department of Agriculture and Rural Development v Commission* ECLI:EU:T:2012:106, para 48-49.

275 See Witte 2014, p. 99 et seq.

276 Witte 2014, p. 99 with reference to Case C-24/95 *State of Rhineland-Palatinate v Alcan Deutschland GmbH* ECLI:EU:C:1997:163, para 34.

277 Case C-24/95 *State of Rhineland-Palatinate v Alcan Deutschland GmbH* ECLI:EU:C:1997:163, para 34.

278 See also Witte 2014, p. 99 et seq.

Applying the case law: varying degrees of discretion and categories of ECB instructions

Despite the similarities between the procedure for recovering state aid and ECB instructions to be implemented by an NCA, the differences demand some caution in applying the conclusions one-on-one.²⁷⁹ A Commission decision addressed to a Member State requiring it to recover state aid, is very explicit about the desired result, namely recovering state aid from the beneficiary. Substantively, therefore, the decision to recover has undoubtedly been adopted at the EU level, by the Commission. Even though the relevant Member State authority has discretion in determining through which means the aid will be recovered and which laws to apply, the degree of discretion does encompass the choice of whether or not to initiate recovery. Yet, the degree of discretion left for an NCA is more obscure in case of ECB instructions.

First, on the basis of the case law discussed above, it must be concluded that ECB instructions that entail a request addressed to the relevant NCA 'to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with' national law are not of direct concern to the credit institution on which a penalty is subsequently imposed by the NCA.²⁸⁰ An example where the ECB used this power of instruction was on 8 February 2019 in connection with the alleged infringement by Dutch bank Rabobank of the remuneration rules as implemented into national law. It addressed its instruction to DNB that one year later imposed a fine on Rabobank of 2 million euros.²⁸¹ This type of instruction leaves considerable room for discretion to the relevant NCA. The NCA will have to investigate the alleged infringements and will autonomously decide on what sanction to impose. It may even conclude to impose no sanction at all. Therefore, the ECB instruction requesting an NCA to open national proceedings in order to impose appropriate penalties leaves a wide margin of discretion to the NCA. The ECB instruction does not directly affect the legal situation of the credit institution and therefore such an instruction cannot be challenged directly at the EU Courts by the credit institution involved.

Second, as regards ECB instructions under Article 9(1), third subparagraph, SSM Regulation, this situation demonstrates more similarities with the recovering of state aid. Indeed, the degree of discretion awarded to the NCA does not encompass rejecting the action as requested by the ECB.

279 Witte, however, considers the similarities to allow for transposing the conclusions drawn from the analysis of state aid case law to ECB instructions requesting an NCA to take a specific action under national law vis-à-vis an individual credit institution, see Witte 2014, p. 102-103.

280 Art. 18(5) SSM Regulation.

281 The decision imposing the fine was published on DNB's website, see www.dnb.nl/nieuws-voor-de-sector/2020/dnb-legt-aan-cooperatieve-rabobank-u-a-rabobank-bestuurlijke-boetes-op-wegens-het-niet-correct-toepassen-van-europese-beloningsregels-in-2014/. The ECB also published the fine on its website, see www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html.

The NCA is obliged to implement the ECB instruction.²⁸² The instruction will in all likelihood prescribe the national power that the relevant NCA should exercise.²⁸³ After all, the ECB is exclusively competent to carry out the supervision of significant entities. It will analyse the supervisory data, determine which action is necessary and act accordingly by enacting an instruction where the action needed is not within its supervisory toolbox, yet is an existing national power.

However, especially because the instruction entails the exercise of national powers in regard to which the relevant NCA is expert, discretion concerning the precise exercise may be granted to that NCA.²⁸⁴ It may thus be argued that it will depend on the exact content of the ECB instruction, whether it leaves discretion to the relevant NCA and thus whether it is of direct concern to the applicant. Yet, on the basis of the legal framework governing such ECB instructions and the case law discussed above, entrusting certain implementation details to the NCA will not prevent the ECB instruction from being of direct concern to the relevant institution. The NCA is under the obligation to implement the instruction, and even though some details may be left to the discretion of the NCA, the substantive decision that a specific national supervisory power must be exercised vis-à-vis a specific credit institution is made by the ECB. I therefore believe that in general, ECB instructions under Article 9(1), third subparagraph, SSM Regulation will be of direct concern to the credit institution that is the subject of the instruction.

5.3.5.4.3 *Individual concern*

In order for an applicant to have standing before the EU Courts, he must not only be directly, but also individually concerned. The *Plaumann* test requires that the EU act ‘affects [him] by reason of certain attributes which are peculiar to [him] or by reason of circumstances in which [he] is differentiated from all other persons and by virtue of these factors distinguishes [him] individually just as in the case of the person addressed.’²⁸⁵ As already stated, this test constitutes a restrictive approach to legal standing, especially for applicants other than addressee of the national decision implementing the EU act.

The credit institution with which the ECB instruction is concerned, will probably not face many difficulties in showing individual concern.²⁸⁶ The ECB instruction will mention the respective credit institution and therefore

282 See Ch. 4, para 4.3.7.2.

283 See also Ch. 4, para 4.3.7.2.

284 As argued by Bassani 2019, p. 125 and Hernández Saseta 2021, p. 309.

285 Case C-25/62 *Plaumann* ECLI:EU:C:1963:17.

286 This will be different for instructions that do not concern an individual credit institution, but the entire banking sector or a group of banks not defined in the ECB instruction, see Witte 2014, p. 102.

it could well be argued that the ECB instruction is of individual concern to it.²⁸⁷ This is likely to be different for the management, shareholders and creditors of a bank. These applicants will face difficulties in showing individual concern. In the *Plaumann* case, the Court did not deem an importer of clementines to be ‘individually concerned’, because this importer was affected by the relevant decision ‘by reason of a commercial activity which may at any time be practised by any person’. Similarly, the credit institution’s management, its shareholders and creditors will unlikely satisfy the *Plaumann* test.²⁸⁸ In *Plaumann*, the Court extends the test whether the relevant group would remain the same also into the future. More specifically, the Court considers whether the group will be a ‘closed category’.²⁸⁹ Following this reasoning, individual concern will not be established where it concerns the management, shareholders and creditors, assuming new persons may become part of the management, shareholders or creditors of the entity.²⁹⁰

5.3.5.5 *Legal interest*

To be eligible for a direct action under Article 263 TFEU, EU case law further requires that the applicant has a legal interest in annulment of the decision.²⁹¹ This means that ‘the annulment of the measure must of itself be capable of having legal consequences or, in other words, the action must be liable, if successful, to procure an advantage for the party who has brought it’.²⁹² It is settled case law that ‘the applicant’s interest in bringing proceedings requires that the binding legal effects of the contested measure must be capable of affecting the interests of the applicant by bringing about a distinct change in its legal position.’²⁹³

In most cases, the addressee of a decision that adversely affects him may benefit from retroactive avoidance of that decision and therefore have a legal interest. In addition, an applicant’s interest in seeking annulment of a decision may lie in obtaining a judgment that an unlawful act has been committed, which may serve as a basis to start an action for damages.²⁹⁴ The legal interest requirement therefore generally does not play a role in admissibility under Article 263 TFEU.

287 Witte arrives at this conclusion by transposing state aid case law, see Witte 2014, p. 102.

288 This example has been loosely based on an example given by Schillig 2016, p. 120.

289 Chalmers, Davies & Monti 2019, p. 393-394.

290 Similarly for shareholders, see Lackhoff 2017, p. 253.

291 See Case T-247/16 *Trasta Komerbanka AS v ECB* ECLI:EU:T:2017:623, para 52 and cited case law.

292 Case T-310/00 *MCI v Commission* ECLI:EU:T:2004:275, para 44 and cited case law.

293 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka* ECLI:EU:C:2019:323, para 104, with reference to Joined Cases C-462/10 P and C-475/10 P *Deutsche Post and Germany v Commission* ECLI:EU:C:2011:656, para 37.

294 See Case T-247/16 *Trasta Komerbanka AS v ECB* ECLI:EU:T:2017:623, para 20 and cited case law.

For shareholder applicants, however, the legal interest requirement proves to be an insurmountable challenge. It is settled case law that a shareholder applicant in order for it to prove an interest in bringing proceedings must ‘show an interest of *his own* in bringing proceedings separate from the interest in which the company to which the EU act is addressed has in the annulment of that act [emphasis in the original].’²⁹⁵ If such a separate legal interest cannot be shown, ‘he can defend his interest in relation to that EU act only through the exercise of his rights as a member of the company.’²⁹⁶ The rationale behind barring shareholders from instituting proceedings against that EU act, is that the company – in its capacity as addressee of a decision – has a right to bring an action against the EU act.²⁹⁷ The action by a shareholder is considered to be ‘subordinated’ to that of the company.²⁹⁸

The Order of the General Court of 12 September 2017 in *Trasta Komerčbanka* seemed hopeful for shareholders.²⁹⁹ In *Trasta Komerčbanka*, the ECB had withdrawn the banking license of Trasta Komerčbanka and its shareholders wished to challenge the withdrawal. The General Court held in its Order, as an exception because of Trasta Komerčbanka’s liquidation, that the shareholders had a legal interest in bringing the proceedings, because ‘shareholders are, in the present case, precluded from exercising their rights as members in order to safeguard the interests of the company.’³⁰⁰ Under Latvian law, the withdrawal of the license immediately results in liquidation and the appointment of a liquidator. The liquidator immediately revoked the powers of attorney of the Board of Directors, preventing Trasta Komerčbanka from being able to legally present itself in an action for annulment under EU law and protect its own interest.

In an appeal case before the Court, the ECB and the Commission lodged appeals against the Order of the General Court for considering the shareholders admissible.³⁰¹ The Court assessed Latvian law where it concerns the power of the liquidator to revoke the powers of attorney of the Board of Directors in light of the right to an effective remedy. It held that the applicable national law necessarily involves conflicts of interest on the part of the liquidator that may lead to him to not challenging a withdrawal decision

295 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerčbanka* ECLI:EU:C:2019:323, para 105 with reference to case law cited in Case T-247/16 *Trasta Komerčbanka AS v ECB* ECLI:EU:T:2017:623, para 53.

296 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerčbanka* ECLI:EU:C:2019:323, para 105.

297 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerčbanka* ECLI:EU:C:2019:323, para 106.

298 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerčbanka* ECLI:EU:C:2019:323, para 106.

299 Case T-247/16 *Trasta Komerčbanka AS v ECB* ECLI:EU:T:2017:623.

300 Case T-247/16 *Trasta Komerčbanka AS v ECB* ECLI:EU:T:2017:623, para 57-58.

301 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerčbanka AS v ECB* ECLI:EU:C:2019:923.

because annulment could lead to depriving the liquidation proceedings from its legal basis.³⁰² Therefore, according to the Court, the revocation of the powers of attorney infringed the right to effective judicial protection and should not have been taken into account by the General Court.³⁰³ Trasta Komerbanka thus should have been granted legal standing in its action for annulment against the withdrawal decision. On the other hand, the Court held that the General Court erred in law where it considered that the shareholders were directly concerned by the decision to withdraw the banking license and therefore held that the shareholders were not admissible on that basis.³⁰⁴ Thus, while opening the route for an action for annulment to Trasta Komerbanka, the Court cut it off for its shareholders.

Because the Court held that the shareholder were not directly concerned, it did not consider it necessary to examine the ground of appeal concerning the shareholders' legal interest. The question thus remains open whether shareholders may have a separate legal interest from the credit institution when they are 'precluded from exercising their rights as members in order to safeguard the interests of the company'.

AG Kokott's Opinion in this case may, however, serve as an indication that shareholders in a situation of license withdrawal do not have a separate legal interest.³⁰⁵ AG Kokott emphasises the relation between legal interest and direct concern: 'Where a non-privileged applicant brings an action for annulment against an act that has not been addressed to it, the requirement that the binding legal effects of the measure being challenged must be capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (interest in bringing proceedings) overlaps with the conditions laid down in the fourth paragraph of Article 263 TFEU (in particular direct concern).'³⁰⁶ As it is not the withdrawal of the license that has direct effects on the status of shareholders and their ownership of shares, but the liquidation under national law, direct concern cannot be established.³⁰⁷ Trasta Komerbanka's shareholders thus, in the view of AG Kokott, do not have an interest on their own, because the withdrawal does not directly affect their interests. AG Kokott adds, that 'the interest which the shareholders in this case have in securing the future of the company

302 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka AS v ECB* ECLI:EU:C:2019:923, para 60 et seq.

303 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka AS v ECB* ECLI:EU:C:2019:923, para 78.

304 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka AS v ECB* ECLI:EU:C:2019:923, para 115. For a critical review of the Court's judgment, see Simoncini 2020, p. 1867-1886.

305 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka* ECLI:EU:C:2019:323.

306 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka* ECLI:EU:C:2019:323, para 115 with reference to Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany v Commission* ECLI:EU:C:2011:656, para 38.

307 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka* ECLI:EU:C:2019:323, para 119-120.

is also not sufficiently separate from the bank's interest in retaining its licence.'³⁰⁸

5.3.5.6 *Interim conclusions*

As was discussed above, ECB instructions in a top-down composite procedure are intended to produce legal effects because they must be complied with by the relevant NCA. An ECB instruction thus constitutes a reviewable act under Article 263 TFEU. Yet, for an applicant to have a right to challenge such an ECB instruction, it must meet the legal standing requirements. As the NCA is the addressee of an ECB instruction, applicants must meet the requirements of direct and individual concern. After analysing EU case law in other fields, including that of recovering state aid, it was concluded that an ECB instruction within the meaning of Article 9(1), third subparagraph, SSM Regulation that prescribes the national action to be undertaken by the NCA will be of direct concern to the credit institution that is the subject of the instruction. The substantive decision-making to exercise a certain (national) supervisory power takes place at the ECB level and the relevant NCA is subsequently required to exercise that national power. That some of the details of the implementation will be left to the NCA, will not alter that conclusion. The conclusion is different for an ECB instruction requiring an NCA to open sanctioning proceedings, because this type of instruction leaves room for discretion to the relevant NCA and therefore is not of direct concern to the credit institution on which the relevant NCA ultimately imposes a penalty.

The requirement of individual concern is not likely to pose problems for a credit institution that is the subject of the ECB instruction. In contrast, the credit institution's management, its shareholders and creditors are unlikely to satisfy the *Plaumann* test of individual concern. As a result, these applicants cannot institute an action for annulment under Article 263 TFEU. Yet, national courts will function as a safety net for any applicants not eligible under Article 263 TFEU. These applicants can, where the relevant national law so provides, institute proceedings before the competent national courts against the national implementing act. Whether judicial review of a national implementing act at national level is available to parties such as the credit institution's management, its shareholders and creditors depends on national law. As national legal standing requirements are not harmonised at EU level, and as the Member State obligation to provide for judicial review at national level as formulated in *Borelli* merely requires Member States 'to rule on the lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national

308 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka* ECLI:EU:C:2019:323, para 121 with reference to Case T-499/12 *HSH Investment Holdings Coinvest-C and HSH Investment Holdings FSO v Commission* ECLI:EU:T:2015:840, para 42 and 44.

authority which is capable of adversely affecting third parties',³⁰⁹ the issue of whether the credit institution's management, its shareholders and creditors have access to judicial review at national level may, and will, thus differ per Member State. Parties to whom judicial review at national level of the NCA decision is available may request the national court to refer a preliminary question on validity of the ECB instruction as a means of indirectly challenging the ECB instruction. The route of the indirect challenge is also available to credit institutions that would be eligible under Article 263 TFEU, because parallel jurisdiction in top-down composite procedures is allowed, as was held in *Rau v Balm*.

5.4 JURISDICTION OF DUTCH ADMINISTRATIVE COURTS

5.4.1 General

In the above sections, the scope of EU jurisdiction in composite procedures was analysed. The focus of this section is mapping the scope of jurisdiction of Dutch administrative courts in composite procedures. This section seeks to investigate how in composite procedures the EU jurisdictional framework interacts with the Dutch jurisdictional framework. More specifically, does the Dutch jurisdictional framework respect the EU Courts' exclusive jurisdiction and does it offer complementary judicial protection where EU law requires it? The analysis of the interaction between the two frameworks will serve as an example of how judicial protection will work out in composite procedures in practice.

Important to reiterate here, is that general administrative procedure law has not been harmonised at the EU level and therefore is primarily an issue of Member State law. Also in the Netherlands, therefore, the applicable general administrative law, both substantive and procedural, is for the most part of national origin, including most notably the Dutch General Administrative Law Act (GALA, *Algemene wet bestuursrecht* or Awb). Although an EU 'General Administrative Law Act' is lacking, some Europeanisation and harmonisation of administrative law has been achieved via a sectorial, piecemeal approach. The SSM Regulation, for instance, has harmonised the procedure for authorisation. Where EU law provides for such procedural rules, these rules must be followed. Yet, pursuant to the principle of national procedural autonomy, where EU law is silent, national law in principle applies.³¹⁰

The SSM Regulation is silent on issues of reviewability of acts taken within the framework of the SSM and on the division of jurisdiction for reviewing SSM composite procedures. It for instance does not mention

309 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 13.

310 The application of national law finds its limits, however, in the EU principles of equivalence and effectiveness and in the principle of effective judicial protection.

whether NCA draft decisions in an authorisation procedure for qualifying holdings may be reviewed by national courts or not. This caused the uncertainties in the *Berlusconi* case, that involved both an NCA draft decision and an ECB final decision. The Court held in *Berlusconi* that national courts are precluded from reviewing NCA draft decisions in the procedure for the authorisation of qualifying holdings. To what extent this judgment can be applied to the procedure for authorisation as a credit institution remains debatable and will be answered further on in this chapter.

Whilst the SSM Regulation is silent on reviewability and the division of jurisdiction in SSM composite procedures, one has to rely on EU primary law where it concerns EU acts and, pursuant to the principle of national procedural autonomy, in principle on national law where it concerns national acts. However, we have seen that with *Berlusconi* the reviewability of NCA draft decisions in the procedure for the authorisation of qualifying holdings was considered a matter of EU law. With this judgment, the Court made clear that the reviewability of non-binding NCA decisions which are part of a procedure in which an EU institution has an exclusive decision-making power is not a matter of national law. Thus, where it concerns such national decisions, the reviewability is not a matter of national administrative law.

Jurisdiction *ratione materiae* under Dutch administrative law is defined by the concept of *besluit*. For the sake of consistency with the first part of this chapter on EU law, I will also use the term reviewable act when referring to a *besluit*.³¹¹ With decision, I will refer to what under Dutch law is known as a *beschikking*: a reviewable act that is not of a general nature, including rejection of an application for such a reviewable act. An action for annulment at the administrative courts can only be instituted against acts that qualify as a *besluit*.³¹² Within the concept of *besluit*, a distinction can be made between two main categories: *besluiten* not of a general nature (*beschikkingen*) and *besluiten* of a general nature (*besluiten van algemene strekking*). An exception to the rule that an action for annulment may be instituted against a *besluit* exists for two types of *besluiten* of a general nature; an action for annulment is not available to challenge a generally binding regulation (*algemeen verbindend voorschrift*) or a rule of policy (*beleidsregel*).³¹³ However, where this type of *besluit* is underlying a reviewable *besluit* that is challenged via an action for annulment, it may be reviewed by the court via the so-called ‘exceptive review’ (*exceptieve toetsing*). Where a generally binding regulation or a rule of policy is held to be contrary to higher legislation or general principles of law, it may be declared non-binding (*onverbindendverklaring*) or remain disappplied by the court.

311 In the unofficial English GALA translation a *besluit* is translated to ‘order’. The translation is available at www.acm.nl/sites/default/files/old_publication/publicaties/15446_dutch-general-administrative-law-act.pdf.

312 Art. 8:1 GALA.

313 Art. 8:3(1) GALA.

With regard to jurisdiction *ratione personae*: to be able to challenge a *besluit*, parties must qualify as a *belanghebbende*.³¹⁴ A *belanghebbende* is a person who is directly affected by a *besluit*.³¹⁵ Acts that do not qualify as a *besluit*, nor actions brought by non-*belanghebbenden* are admissible. Actions may then be instituted before the civil court, and for that matter acting as a *restrechter*, i.e. the court with residual jurisdiction.

The district court of Rotterdam (*Rechtbank Rotterdam*) is competent in actions for annulment instituted against decisions adopted on the basis of the Dutch Financial Supervision Act.³¹⁶ The court of further appeal is the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*).³¹⁷

The focus of this chapter will be on the requirements of an administrative authority and on the reviewability of DNB preparatory acts. Within the context of SSM composite procedures, these requirements will prove most relevant. More specifically, firstly, it will be discussed whether the ECB qualifies as a *bestuursorgaan* (administrative authority) as referred to in GALA. If it does, ECB decisions would in principle be falling within the jurisdiction *ratione materiae* of the Dutch administrative courts. Secondly, the reviewability of DNB preparatory acts will be discussed within the context of composite procedures.

This chapter is structured as follows. Firstly, the Dutch concept of a reviewable act will be discussed. This shall be analysed according to the criteria needed to qualify as a reviewable act under the Dutch administrative law. More specifically, important to investigate is to what extent a DNB draft decision can be regarded as having legal effects under Dutch law. Secondly, the Dutch legal standing requirements will be examined. Thirdly, the so-called relativity requirement will be touched upon. The relativity requirement shares similarities with the legal standing requirements and will not be of particular relevance to this chapter. Yet, for reasons of completeness, the relativity requirement will be briefly discussed.

314 Art. 7:1(1) GALA in conjunction with Art. 8:1 GALA (regarding *bezwaar* (objection at the administrative authority)); Art. 8:1 GALA (regarding *beroep* (administrative appeal)); Art. 8:104 GALA (regarding *hoger beroep* (further appeal)).

315 Art. 1:2(1) GALA.

316 Art. 8:90(1) GALA in conjunction with Art. 7 Specification of Jurisdiction of Administrative Courts (*Bevoegdheidsregeling bestuursrechtspraak*) (appendix 2 of GALA). A small number of exceptions however apply, see Art. 7 Specification of Jurisdiction of Administrative Courts (*Bevoegdheidsregeling bestuursrechtspraak*) (appendix 2 of GALA) under 'Wet op het financieel toezicht'.

317 Art. 8:90(1) GALA in conjunction with Art. 11 Specification of Jurisdiction of Administrative Courts (*Bevoegdheidsregeling bestuursrechtspraak*) (appendix 2 of GALA). For the exceptions, see Art. 11 Specification of Jurisdiction of Administrative Courts (*Bevoegdheidsregeling bestuursrechtspraak*) (appendix 2 of GALA) under 'Wet op het financieel toezicht'.

5.4.2 Reviewable act (*besluit*)

5.4.2.1 General

The conditions for an act to qualify as a reviewable act (*besluit*) are to be found in Article 1:3(1) of the General Administrative Law Act (GALA, *Algemene wet bestuursrecht* or *Awb*). A *besluit* is i) a written decision, ii) by an administrative authority (*bestuursorgaan*), iii) constituting a public-law legal act (*publiekrechtelijke rechtshandeling*). For an act to qualify as a *rechtshandeling*, it must be intended to have legal effects. These legal effects must be external from the administrative authority adopting the act, i.e. the legal effects arise vis-à-vis a party that is external to the administrative authority that adopts the act.³¹⁸ The Dutch requirement of *rechtsgevolg*, at least at first sight, seems to resemble the requirement of legal effects vis-à-vis third parties for the EU reviewable act.³¹⁹ The requirement that a *besluit* must be a public-law *rechtshandeling* seeks to exclude civil-law acts.³²⁰ An act is a public-law act if it is adopted by an administrative authority on the basis of a competence laid down in public law. A subspecies of a *besluit* is a *beschikking*, a *besluit* that is not of a general nature, i.e. single-case decision-making.³²¹ Within the context of the SSM, DNB decisions that are addressed to a specific credit institution, for instance sanctions or a decision rejecting an authorisation request, qualify as a *beschikking*. A rejection has been explicitly added to the definition of *beschikking* as a rejection does not immediately satisfy the requirement of legal effects.³²² Instead, a decision rejecting an application will lead to a legal status quo. Rejections nevertheless may greatly affect a person's legal situation which requires the availability of legal protection against it.

5.4.2.2 Administrative authority (*bestuursorgaan*)

An administrative authority (*bestuursorgaan*) is defined in Article 1:1(1) GALA. This provision distinguishes between two types, commonly referred to as *a-orgaan* and *b-orgaan*, named after the subsections – a and b – they are defined in. An *a-orgaan* is an organ of a legal person that has been established under public law. Municipalities (*gemeenten*) and provinces (*provincies*) for instance are legal persons established under Article 123(1) Dutch Constitution. A *b-orgaan* is any other person or body vested with public authority. DNB is not established by public law, but is set up under civil

318 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 38.

319 On the EU concept of legal effects, see para 5.3.2.3.

320 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 37.

321 Art. 1:3(2) GALA.

322 Art. 1:3(2) GALA. See Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 38.

law as a public limited liability company (*naamloze vennootschap*). It is being conferred public law supervisory tasks and monetary policy tasks and competences. DNB therefore is a *b-orgaan*.³²³ DNB only qualifies as a *b-orgaan* that is subject to GALA when acting with public authority with which they are vested. Thus, when acting in the capacity as prudential supervisory authority, DNB is a *b-orgaan*.

Strikingly, GALA does not distinguish between national authorities on the one hand and international and EU authorities on the other, nor does it exclude international or EU authorities from the definition of *bestuursorgaan*. Based on GALA, one could therefore think that the ECB may be qualified as a *bestuursorgaan* and as a consequence would be subject to GALA and to jurisdiction of the national administrative courts. Yet, the Explanatory Memorandum to GALA is clear: GALA's scope does not and cannot extend to international treaty bodies that are vested with public authority and can act within the Netherlands.³²⁴ EU institutions and bodies that can take decisions that have legal effect within the Netherlands are explicitly mentioned among those bodies. As acknowledged by the Dutch legislature, the hierarchical relationship between supranational and national law precludes the Dutch legislature prescribing how international treaty bodies should use their powers.³²⁵ The ECB therefore cannot be considered a *bestuursorgaan*.³²⁶ Necessarily, ECB decisions do not qualify as a reviewable act under Dutch law and cannot be reviewed by the Dutch administrative courts. This is in line with the *Foto-Frost* judgment, where the Court held that declaring EU acts invalid falls exclusively to the EU Courts.³²⁷

5.4.2.3 Legal effects (op rechtsgevolg gericht)

For an act to qualify as a reviewable act under GALA, it must be intended to have legal effects. As already stated, these legal effects must be external from the administrative authority adopting the act.³²⁸ The requirement that the act must be intended to have legal effects seeks to exclude legal facts (*rechtsfeiten*), which involve legal effects irrespective of whether they are intended, from the concept of a reviewable act.³²⁹ According to long-

323 Afdeling bestuursrechtspraak van de Raad van State 26 October 2005 ECLI:NL:RVS:2005:AU4987, para 2.2.2-2.2.3.

324 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 29.

325 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 29.

326 Similarly, see Bovenschen et al 2013, p. 367 and Nuijten 2014, p. 470-471. Cf. Spoor & Fleuren 2013, p. 235-236.

327 Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452, para 17.

328 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 38.

329 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 37-38.

standing case law, for an act to be intended to have legal effects, it must be aimed at creating or negating a competence, right or duty regarding one or more parties, or at determining the legal status of a person or entity.³³⁰

5.4.3 Reviewability of DNB preparatory acts

5.4.3.1 General

The SSM Regulation is silent on the reviewability of NCA preparatory acts. Reviewability of such acts by national courts therefore in principle is a matter of national law. Nevertheless, as discussed extensively above, the Court in *Berlusconi* has been very explicit on its exclusive jurisdiction over non-binding preparatory NCA acts in bottom-up procedures that culminate in an ECB final decision. As a result, national courts are precluded from reviewing such non-binding NCA acts. The *Berlusconi* judgment must be interpreted broadly, i.e. as encompassing all non-binding NCA acts that precede an ECB final decision.³³¹ So even though due to the Dutch substantive approach to the concept of *besluit*, the SSM Regulation's qualification of the NCAs' decisional input in procedures where the ECB takes the final decision, such as 'draft decision' and 'proposal for a decision', are not decisive for their reviewability, the *Berlusconi* case requires national courts to refrain from reviewing such preparatory decisions.

The Dutch legislature seems to be of a similar view as the Court in *Berlusconi*. In the Explanatory Memorandum to the act implementing the SSM Regulation it is stated that DNB draft decisions, specifically those that are part of the procedure for assessing qualifying holdings, are not eligible for administrative and judicial review under Dutch law.³³² From the Explanatory Memorandum, it is not entirely clear for what reason such draft decisions are considered not to be reviewable under Dutch law. It seems that the reason put forward is that the final decision is taken by the ECB, and therefore that decision is subject to EU judicial protection.³³³ Although in view of the case law that was discussed extensively above, that conclusion probably is correct, it does not provide a conclusive answer from a Dutch law perspective. Are DNB draft decisions not reviewable because they are not intended to produce legal effects? Did the Dutch legislature have a predictive view that the Court would consider itself competent under Article 263 TFEU to review non-binding national preparatory decisions?

330 See, e.g., Afdeling bestuursrechtspraak van de Raad van State 30 January 2008 ECLI:NL:RVS:2008:BC3065, para 2.5.

331 More extensively on the *Berlusconi* judgment, see para 5.3.4.5.3.

332 Explanatory Memorandum to the Act implementing the SSM Regulation (*Kamerstukken II* 2014/15, 34049, nr. 3), p. 7-8.

333 Explanatory Memorandum to the Act implementing the SSM Regulation (*Kamerstukken II* 2014/15, 34049, nr. 3), p. 7.

Regardless of the Explanatory Memorandum and the *Berlusconi* case, it is important to further investigate to what extent Dutch law indeed categorically rules out national jurisdiction to review NCA preparatory decisions, or not. Even though *Berlusconi* ruled out national courts, including Dutch courts, receiving challenges against NCA preparatory acts in procedures for qualifying holding assessments, the scope of *Berlusconi* and its applicability to other SSM composite procedures, including the authorisation and withdrawal procedure, has not been fully crystallised. It therefore is relevant to investigate the reviewability of DNB preparatory acts for situations where the Berlusconi doctrine will not apply. To this end the following questions will be investigated:

- a. Does a DNB preparatory act qualify as a *besluit*?
- b. Should a DNB preparatory act be qualified as a *besluit* pursuant to the concept of a strategic concept of a reviewable act?
- c. If a or b is answered in the affirmative, do DNB preparatory decisions qualify as a *voorbereidingsbesluit* as defined in Article 6:3 GALA?

5.4.3.2 Does a DNB preparatory act qualify as a *besluit*?

In bottom-up composite procedures, the acts adopted by national authorities that precede the EU final decision, may be regarded as of a preparatory or preliminary nature. The SSM Regulation qualifies the NCA acts in the authorisation procedure and the procedure for the assessment of qualifying holdings as ‘draft decision’ and ‘proposal for a decision’, respectively. Under Dutch law, as well as under EU law, preparatory acts such as draft decisions and proposals are in principle considered as not intended to produce legal effects.³³⁴ Such acts therefore generally are not a *besluit*. But just like EU law, Dutch law takes a substantive approach to the concept of *besluit*. Labelling an act a ‘proposal’, ‘draft’ or ‘advice’, is not decisive for whether or not to qualify that act as a *besluit*. If a preparatory act produces legal effects, an interested party may in principle institute proceedings against that act.³³⁵ Under Dutch law, if a preparatory act does not qualify as a *besluit*, judicial review of such an act may be obtained in the proceedings instituted against the final act.³³⁶ This is similar in EU law.³³⁷

The main question thus is whether a DNB preparatory act is intended to have legal effects. As already stated, for an act to be intended to have legal effects, it must be aimed at creating or negating a competence, right or duty regarding one or more parties, or at determining the legal status of a person

334 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 121.

335 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 121.

336 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 121.

337 Case C-60/81 *IBM v Commission* ECLI:EU:C:1981:264, para 12.

or entity.³³⁸ In all selected SSM bottom-up procedures, the SSM Regulation confers upon the ECB the final decision-making power. Therefore, the legal effects comprising of granting authorisation, withdrawing authorisation and granting authorisation for obtaining a qualifying holding are produced with the ECB final decision and not with the DNB preparatory act. It must therefore be concluded that the DNB preparatory act is not intended to produce legal effects.

5.4.3.3 *Should a DNB preparatory act be qualified as a besluit pursuant to the concept of a strategic concept of a reviewable act?*

Even though a certain administrative act from a ‘legal-dogmatic’ perspective does not qualify as a *besluit*, a court may decide to qualify an act as a *besluit* for reasons of effective judicial protection.³³⁹ To this end, courts in certain situations apply what is commonly referred to as a *strategisch besluitbegrip*, a strategic concept of a reviewable act.³⁴⁰

For DNB preparatory acts, the use of the strategic concept of a reviewable act in case law on a *bestuurlijk rechtsoordeel*, an administrative judgment on the application of the law, may be relevant. A *bestuurlijk rechtsoordeel* is an independent judgment intended as definitive of an administrative authority on the application of a statutory provision with regard to which the administrative authority has administrative powers.³⁴¹ It may be argued that DNB’s draft decision that is sent to the ECB qualifies as something similar to a *bestuurlijk rechtsoordeel*, as it definitively lays down whether or not the applicant fulfilled the material requirements as laid down in national law.³⁴² This viewpoint is however based on the incorrect assumption that only DNB will apply national law, while the ECB is exclusively tasked with applying the requirements as laid down in EU law.³⁴³ But as Article 4(3) SSM Regulation requires the ECB to apply national law in SSM composite procedures, the DNB draft decision cannot be considered a *bestuurlijk rechtsoordeel*: it is not intended as definitive, rather as preliminary.

Although a DNB preparatory act probably cannot be qualified as a *bestuurlijk rechtsoordeel*, the case law on this concept may prove insightful

338 See, e.g., Afdeling bestuursrechtspraak van de Raad van State 30 January 2008 ECLI:NL:RVS:2008:BC3065, para 2.5.

339 See Opinion AG Widdershoven in Afdeling bestuursrechtspraak van de Raad van State 2 May 2018 ECLI:NL:RVS:2018:249, para 3.5.

340 See Opinion AG Widdershoven in Afdeling bestuursrechtspraak van de Raad van State 2 May 2018 ECLI:NL:RVS:2018:249, para 3.5.

341 In Dutch ‘een zelfstandig en definitief bedoeld oordeel van een bestuursorgaan over de toepasselijkheid van een wettelijk voorschrift aangaande de toepassing waarvan dat orgaan bevoegdheden heeft’, see Opinion AG Widdershoven in Afdeling bestuursrechtspraak van de Raad van State 2 May 2018 ECLI:NL:RVS:2018:249, para 3.6 with reference to Schlössels & Zijlstra 2017, p. 175-179.

342 See Nuijten 2014, p. 474.

343 For this view, see Nuijten 2014, p. 474.

where it concerns the considerations of effective judicial protection for allowing a *bestuurlijk rechtsoordeel* to be independently reviewable. It is well-established case law that courts will allow for a *bestuurlijk rechtsoordeel* to be independently reviewable if it considers the alternative route for obtaining review in that specific situation to be 'disproportionately burdensome'.³⁴⁴ In the context of SSM composite procedures, the alternative route is awaiting the final ECB decision and instituting an action for annulment under Article 263 TFEU. Overall, it could be argued that awaiting the ECB final decision in principle is not 'disproportionately burdensome'.³⁴⁵ But, whether or not the alternative is disproportionately burdensome, may depend on how the EU Courts will give substance to their role as *juges de droit national*. If the EU Courts' approach to reviewing NCA preparatory acts does in the view of the Dutch courts not offer effective judicial protection, the strategic concept of a reviewable act can offer an entry to reviewing a DNB draft decision. But this route will be very unlikely for the Dutch courts to take. Firstly, should the national court allow for such independent review, it will act in violation of *Berlusconi* and the exclusive jurisdiction of the EU Courts to review such national preparatory acts. Secondly, recent case law shows that strict requirements apply for allowing a *bestuurlijk rechtsoordeel* to be independently reviewable.³⁴⁶

It follows from the above that a DNB preparatory act is neither a *besluit*, nor must it be considered as such on the basis of the strategic concept of a reviewable act. Therefore, we do not arrive at question c, whether DNB preparatory decisions qualify as a *voorbereidingsbesluit* as defined in Article 6:3 GALA.

5.4.4 Reviewability of DNB acts upon ECB instruction

Where the ECB has been assigned a task in the SSM Regulation but lacks a corresponding power, the ECB may use its power of instruction to fulfill that task. In such a situation the ECB will adopt an instruction addressed to an NCA, requiring the latter to take specific action. The ECB's power to issue specific instructions to an NCA with regard to the supervision of a significant entity has a significant distinct function from the power to issue regulations, guidelines and general instructions to NCAs to 'streamline' the decentralised exercise of prudential supervision of less significant entities. This power gives the ECB the possibility of requesting specific supervisory action of an NCA. The NCA is under the obligation to follow this instruc-

344 In Dutch 'onevenredig bezwarend (of belastend)', see Opinion AG Widdershoven in Afdeling bestuursrechtspraak van de Raad van State 2 May 2018 ECLI:NL:RVS:2018:249, para 3.6 with reference to case law.

345 Similarly, Nuijten 2014, p. 474.

346 See Afdeling bestuursrechtspraak van de Raad van State 24 April 2019 ECLI:NL:RVS:2019:1356.

tion.³⁴⁷ This chapter will only focus on such specific instructions and not discuss ECB's guidelines and general instructions. Guidelines and general instructions of the ECB are soft law instruments that guide the NCAs in carrying out their supervision, but do not involve specific instructions regarding an individual credit institution. These general instructions therefore do not raise the same questions on judicial review as specific instructions.

As was discussed above, in top-down composite procedures, such as the construction ECB instruction-NCA implementing decision, EU case law requires national courts to act as a safety net in certain situations. National courts must, according to EU case law, remedy gaps in judicial redress with a view of ensuring effective judicial protection. Such a gap is left for legislative acts and for EU acts of general application that require national implementing measures. Because the legal standing requirement of individual concern cuts off the route for direct review by the EU Courts, judicial redress must be sought at the national level, against national implementing measures. As EU case law on the reviewability of ECB instructions within the SSM is absent, analogies have been drawn above with case law in the field of state aid. It was concluded that direct concern will be unproblematic for a credit institution challenging an ECB instruction that requires an NCA to take action vis-à-vis that credit institution. Neither will the requirement of individual concern pose problems for a credit institution. This will be different for the credit institution's management, its shareholders and creditors. These parties are unlikely to have legal standing under Article 263 TFEU. As a result, these applicants cannot obtain judicial redress at the EU level. They therefore are dependent on the safety net offered by the national courts for judicial protection against both the national implementing act as well as against the ECB instruction, by requesting a preliminary reference procedure. The national route is also available for credit institutions that would be eligible under Article 263 TFEU, because parallel jurisdiction in top-down composite procedures is allowed, as was held in *Rau v Balm*.

For DNB acts that implement an ECB instruction to be reviewable, they must qualify as a reviewable act as defined in Article 1:3(1) GALA. DNB decisions, for instance a decision imposing a fine, will qualify as such. But this will be different for implementing acts that qualify as factual conduct. The Explanatory Memorandum to the Act implementing the SSM Regulation states that the NCA must implement an ECB instruction by adopting an independent decision.³⁴⁸ However, adopting such an independent decision is not necessarily the only implementing act. To take the example of an ECB instruction requesting an NCA to 'open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accor-

347 As follows from, *inter alia*, Art. 6(3) SSM Regulation. Similarly, see Türk & Xanthoulis 2019, p. 158; Witte 2014, p. 102; Witte 2015, p. 33.

348 It speaks of *eigenstandig besluit*, see Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 8.

dance with' national law,³⁴⁹ imposing a penalty will be the end result of a chain of implementing acts, including for instance opening and conducting investigations. In most instances it is only the decision imposing the fine and the decision to publish the fine that qualify as a reviewable act. Any preceding factual conduct, such as opening and conducting investigations, may be taken into account in the appeal against the reviewable act. Where a reviewable act is absent, actions against factual conduct must be instituted at the civil court, on the basis of tort law.

5.4.5 Legal standing

5.4.5.1 General

To be able to challenge a reviewable act via the administrative court, to have a right of appeal, a party must qualify as a *belanghebbende*, or interested party.³⁵⁰ Interested parties also have other procedural rights, such as the right to be heard.³⁵¹ Roth argues that in Dutch financial legal practice and doctrine, the role of the third party *belanghebbende* is underestimated.³⁵² He for instance refers to the situation that the Dutch supervisory authorities, DNB and the Authority for the Financial Markets (AFM), in almost all instances only invite the (potential) addressees of a decision to make use of their right to be heard.³⁵³

The question of legal standing will only be relevant once it has been established that the act that is challenged qualifies as a reviewable act. As was discussed above, DNB preparatory acts preceding an ECB final decision do not qualify as a reviewable act under Dutch law. Legal standing in relation to such preparatory acts will therefore not be discussed. Within the SSM, legal standing does play a role with regard to DNB decisions that implement an ECB instruction. These DNB implementing decisions are the focus of this paragraph.

The concept of *belanghebbende* is central to GALA's legal standing requirements. An interested party is a party who's interests are directly involved in (*rechtstreeks betrokken bij*) the *besluit*.³⁵⁴ The objective is to limit the group of persons that would qualify as *belanghebbende*.³⁵⁵ The addressee of a decision in most situations qualifies as an interested party.³⁵⁶ Third

349 Art. 18(5) SSM Regulation.

350 Art. 8:1 GALA.

351 Art. 4:8 GALA.

352 Roth 2011, para 1.

353 Roth 2011, para 4.1.

354 Art. 1:2(1) GALA.

355 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 32.

356 Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3), p. 32.

party *belanghebbenden* are interested parties that are not the addressee of the decision. The criteria for determining whether a third party qualifies as a *belanghebbende*, are developed in Dutch case law.

The question is whether and to what extent others than the addressee of a DNB decision that implements an ECB instruction qualify as *belanghebbende*. The addressee of a DNB decision will in most instances be a credit institution. ECB instructions that are adopted on the basis of Article 9(1), third subparagraph, SSM Regulation necessarily concern significant credit institutions as this power of instruction only encompasses significant entities. ECB instructions on the basis of Article 18(5) SSM Regulation, concerning administrative penalties, may not only cover credit institutions, but also ‘members of the management board’ and ‘any other individuals who under national law are responsible for a breach’. Thus, addressees of a DNB decision imposing a fine could also encompass natural persons, including directors and (other) natural persons that are considered to be personally responsible for the breach (so-called *feitelijk leidinggevers*). This paragraph will thus include the legal standing of ‘non-addressee’ credit institutions. It will also discuss legal standing of shareholders and directors.

5.4.5.2 Type of interests

Article 1:2(1) GALA codifies the definition of a *belanghebbende*: a party who’s interests are directly involved in the *besluit*. Such interests may be referred to as legal interests (*rechtsbelangen*).³⁵⁷ For a legal interest to exist, Dutch law requires that there is a factual interest (*feitelijk belang*), for instance a financial or economic interest. It is not necessary that the interest must have been taken into account in the administrative authority’s decision-making. In addition, for the right of appeal, Dutch law does not require that a party is deprived from a subjective right,³⁵⁸ nor that the affected interest is an interest that the law seeks to protect.³⁵⁹ Yet, the relativity requirement that has been introduced as a general principle of Dutch administrative law in 2013, codifies that a decision cannot be rendered invalid for violation of a rule that is not intended to protect the interests of the appellant.³⁶⁰ The introduction of this *Schutznorm* therefore effectively requires that the affected interest is protected by the rules invoked, although the relativity requirement is not a question of legal standing. The relativity requirement will be discussed further below.

357 De Poorter 2003, p. 131, 133 et seq.

358 Although that was the intention of the State Committee Kappeyne van de Coppello in 1894 that was responsible for the first proposals for general rules on administrative procedure, see Van Buuren 1978, p. 35.

359 Van Male 1992, p. 88.

360 Art. 8:69a GALA.

5.4.5.3 Five criteria for legal standing

The Dutch legislature described the concept of *belanghebbende* as an ‘open concept’ (*open begrip*) that is inherently vague and must in each specific situation be interpreted and given substance by the administration and the judiciary.³⁶¹ The criteria for determining whether a third party qualifies as a *belanghebbende*, are developed in Dutch case law. There, however, is not much case law on the concept of *belanghebbende* in financial supervision.³⁶²

According to Dutch case law, the interests affected must be the person’s own, personal, objectively determinable, current and directly affected interests, in Dutch these are referred to as the OPERA criteria (the interest must be *objectief bepaalbaar, persoonlijk, eigen, rechtstreeks betrokken bij het besluit* and *actueel*). As will be shown hereinafter, of the OPERA criteria, the requirement that the interest is directly affected will constitute the most relevant one for both shareholders and directors.

5.4.5.4 Legal standing of shareholders

5.4.5.4.1 General

Shareholders in a credit institution may well have an interest in challenging a supervisory decision addressed at the credit institution they hold shares in. They may also have an interest in challenging the publication of a sanction imposed on the credit institution. As we are focusing on the situation where the ECB instructs DNB to take a decision, the situations that will be discussed below do not include the withdrawal of authorisation or any other decisions that follow SSM bottom-up procedures, such as the ECB decision to either grant or reject a request to obtain a qualifying holding in a credit institution. This paragraph concentrates on legal standing of shareholders when challenging a DNB decision addressed at a credit institution that implements an ECB instruction. For shareholders to be qualified as *belanghebbende*, they must meet the criteria for legal standing. The most relevant condition in this respect is that the shareholders’ interests must be directly affected by the decision, instead of indirectly via the credit institution. Before zooming in on that condition, the type of interests shareholders will have will be briefly touched upon.

5.4.5.4.2 Financial interests

In case of a DNB decision imposing a fine on a credit institution upon instruction of the ECB, shareholders’ interests may be affected. These interests will primarily be financial interests. A fine, and in particular its

361 See Memo regarding the Final Report to the Dutch General Administrative Law Act (*Kamerstukken II 1991/92, 21221, nr. 8*), p. 20-21.

362 See also Roth 2011, para 3.

mandatory publication pursuant to the Dutch financial supervision act (*Wet op het financieel toezicht*),³⁶³ may negatively affect the share price. In addition, a fine may have a negative impact on the distribution of dividends to the shareholders. Dutch legal standing requirements only require a factual interest. Therefore, shareholders' financial interests may give rise to legal standing.

Whereas the Dutch legal standing rules accept parties whose factual interests are affected, EU law takes a different approach. It is settled EU case law that under the legal standing requirements of direct and individual concern in Article 263 TFEU, an act must affect a person's *legal* situation, rather than its factual or economic situation. This case law has recently been confirmed in *Trasta Komercbanka* for a credit institution's shareholders in the situation where the credit institution's license is withdrawn.³⁶⁴ The Court in its judgment emphasised that 'non-legal, economic effects' of the withdrawal decision shall not be taken into account when assessing legal standing, more specifically direct effect.³⁶⁵ In the rights-centered view of the Court, the withdrawal of *Trasta Komercbanka*'s banking license does not affect the shareholders' *legal* situation, as it does not affect their right to receive dividends and to participate in the bank's management.³⁶⁶ The Court nevertheless acknowledges that the withdrawal could affect shareholders economically, as the credit institution's ability to distribute dividends is 'questionable'.³⁶⁷ Such economic effects, however, cannot lead to accepting direct concern. The analogy that was put forward by the shareholders with competitors of the addressees of a decision in state aid cases and mergers, that are considered to be directly affected, was dismissed by the Court. The Court held that competitors in those situations are directly affected not because they are affected economically, but because the decision affects the competitors' Treaty right not to be subject to distorted competition.³⁶⁸

5.4.5.4.3 *Directly affected interests*

Derivative interest doctrine

For shareholders to have legal standing under Dutch law, their interests must be directly affected by the decision that is addressed to the credit institution. This requires a sufficient causal link between the decision and the

363 Art. 1:97 Dutch financial supervision act.

364 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323, para 108-109.

365 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323, para 109.

366 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323, para 110-111.

367 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323, para 111.

368 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323, para 112.

affected interests.³⁶⁹ As already stated above, a decision negatively affecting a credit institution may well affect the interests of its shareholders. But for these shareholders to have legal standing, there must be a direct causal link between the decision and their interests. Therefore, and according to the ‘derivative interest’ (*afgeleid belang*) doctrine developed in Dutch case law, a ‘derivative interest’ in principle cannot lead to a party being qualified as *belanghebbende*. The derivative interest doctrine entails that a party will not be qualified as a *belanghebbende* if his interests are merely affected indirectly by a decision, i.e. via the interests of another party.³⁷⁰ This is primarily the case where a party’s interests are affected via a contractual relationship with the decision’s addressee.³⁷¹ But the relationship may also be another type of private law relationship, such as a proprietary, company law or family law relationship.³⁷² Where the derivative interest doctrine applies, the third party will not be qualified as a *belanghebbende* and thus cannot challenge the decision at the administrative court. The question is: to what extent does the derivative interest doctrine apply to shareholders in a credit institution?

In EU case law, as discussed above, and more specifically in the *Trasta Komerbanka* judgment, the Court held that Trasta Komerbanka’s shareholders were not directly concerned by the ECB decision withdrawing Trasta Komerbanka’s banking license.³⁷³ The Court considered that direct concern was absent, as it was only due to the liquidation of the bank following the banking license’s withdrawal that the shareholders’ rights were affected.³⁷⁴ As the bank’s liquidation after withdrawal did not follow from EU rules, but instead was ordered by a national court under national law, the liquidation decision did not constitute an implementation of the decision withdrawing the license that is ‘purely automatic and [results] from EU rules alone’, which would have been necessary for constituting direct concern.³⁷⁵ In Dutch legal terminology, Trasta Komerbanka’s shareholders had merely derivative interests.

Opinion AG Widdershoven: five rules of thumb

But to what extent would shareholders under Dutch law be considered to have only derivative interests and therefore be barred from a right of appeal at the administrative court against a decision addressed at a credit institu-

369 De Poorter 2003, p. 145-147.

370 Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474, para 4.4.

371 De Poorter 2003, p. 154.

372 Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474, para 5.2.

373 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka* ECLI:EU:C:2019:323.

374 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka* ECLI:EU:C:2019:323, para 113-114.

375 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka* ECLI:EU:C:2019:323, para 114.

tion? The Opinion of AG Widdershoven in a case before the Dutch Central Court of Appeal (*Centrale Raad van Beroep*),³⁷⁶ one of the four highest Dutch administrative courts,³⁷⁷ is of relevance here. The Opinion was followed by the Dutch Central Court of Appeal,³⁷⁸ has been implicitly applied by the district court of Rotterdam in four similar judgments concerning a DNB decision in the area of insurance supervision³⁷⁹ and explicitly by the Dutch Trade and Industry Appeals Tribunal in the further appeal case.³⁸⁰ These judgments will be discussed further below.

In his extensive Opinion, AG Widdershoven analysed case law of the Dutch Central Court of Appeal (*Centrale Raad van Beroep*), the Administrative Law Section of the Dutch Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) and the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*). Based on this analysis, he formulated two normative anchor points (*normatieve ankerpunten*) and five rules of thumb (*vuistregels*) for the application of the doctrine of derivative interests by administrative courts. These will be discussed hereinafter.

The two normative anchor points cumulatively constitute the minimum level that must be complied with in all situations.³⁸¹ The first anchor point is the requirement of congruence (*congruentievereiste*), entailing that a third party must be qualified as an interested party and thus may not be blocked from access due to the derivative interest doctrine where the decision may constitute an unlawful act vis-à-vis the third party and thus the civil law relativity requirement is complied with.³⁸² This requirement must prevent third parties from having to obtain judicial protection against a decision at the civil courts, rather than at the administrative courts that are specifically set up for judicial review of administrative acts. The second normative anchor point entails that a party must be qualified as an interested party where the decision affects a right or an interest that is protected by law.³⁸³

After having discussed the two normative anchor points, AG Widdershoven first and foremost emphasises that the doctrine of derivative interests does not apply if the third party has its own, independent interest

376 Opinion AG Widdershoven in *Centrale Raad van Beroep* 7 November 2018 ECLI:NL:CRVB:2018:3474.

377 The other highest administrative courts are: the Dutch Supreme Court (*Hoge Raad*), the Administrative Law Section of the Dutch Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) and the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*).

378 *Centrale Raad van Beroep* 5 March 2019 ECLI:NL:CRVB:2019:655; *Centrale Raad van Beroep* 5 March 2019 ECLI:NL:CRVB:2019:669.

379 *Rechtbank Rotterdam* 26 February 2021 ECLI:NL:RBROT:2021:1486, 1487, 1488 and 1489.

380 *College van Beroep voor het bedrijfsleven* 14 December 2021 ECLI:NL:CBB:2021:1063.

381 Opinion AG Widdershoven in *Centrale Raad van Beroep* 7 November 2018 ECLI:NL:CRVB:2018:3474, para 8.2.

382 Opinion AG Widdershoven in *Centrale Raad van Beroep* 7 November 2018 ECLI:NL:CRVB:2018:3474, para 8.4.

383 Opinion AG Widdershoven in *Centrale Raad van Beroep* 7 November 2018 ECLI:NL:CRVB:2018:3474, para 8.5.

that is directly affected by the decision, in addition to a derivative interest. In relation to this starting point, the first rule of thumb is that that other interest may exist in another capacity, or because there is a real possibility that the third party will be affected in an interest that derives from a property right (*zakelijk recht*) or fundamental right. The second and third rule of thumb read that a derivative interest should not be invoked against a third party if the interest in material terms does not run in parallel to the interest of the addressee (second), nor if its legal position or 'interest position' (*belangpositie*) legitimises an independent entitlement to judicial protection (third). The fourth rule of thumb is that a derivative interest may be invoked against a third party if its interests run in parallel to those of the addressee and its interest is only involved in the *besluit* due to a contractual relationship with the addressee. The fifth and last rule of thumb entails the need to discard the so-called 'intertwinement correction' (*verwevenheidscorrectie*) to the derivative interest. The intertwinement correction has been applied in Dutch administrative case law to provide for legal standing of directors/sole shareholders where only the company's interests were affected by a decision yet the latter did not challenge the decision.³⁸⁴ Whereas in such instances the director/sole shareholder would in principle only have a derivative interest, the intertwinement correction would qualify them as an interested party as their interests are 'so intertwined and parallel to' (*'zodanig verweven is met en parallel loopt aan'*) the company's interests.³⁸⁵ AG Widdershoven proposes to provide for legal standing of the director/sole shareholder via a different route than the intertwinement correction, as, among other reasons, the existence of intertwined and parallel interests outside of the context of directors/sole shareholders leads to the exact opposite result, namely no legal standing due to a derivative interest.³⁸⁶

Derivative interest doctrine in financial supervision: pre Opinion AG Widdershoven

The Dutch Trade and Industry Appeals Tribunal is the highest administrative appeals court competent to review national supervisory decisions adopted under the Dutch financial supervision act.³⁸⁷ AG Widdershoven also analyses case law of this court. He finds that the Dutch Trade and Industry Appeals Tribunal's ground rule is that if a third party's interests

384 For an overview of the application of the intertwinement exception by the Dutch Council of State, see Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474, para 6.24.

385 Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474, para 6.24.

386 Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474, para 8.14.

387 Art. 11 Specification of Jurisdiction of Administrative Courts (*Bevoegdheidsregeling bestuursrechtspraak*) (appendix 2 of GALA). This provision also lists a couple of exceptions.

are affected via a contractual relationship with the addressee of the decision, this will lead to *afgeleid belang*.³⁸⁸

One of the cases AG Widdershoven discusses is *GSFS Pensionfund*³⁸⁹ and concerns a DNB supervisory enforcement decision addressed to a pension fund.³⁹⁰ AG Widdershoven concludes that the Dutch Trade and Industry Appeals Tribunal applies its ground rule in respect of supervisory enforcement decisions. DNB addressed an instruction (a so-called *aanwijzing*³⁹¹) to GSFS Pensionfund, requiring it to, *inter alia*, change its investment strategies in order to act in accordance with the law. Alongside GSFS Pensionfund, several (former) individual pension fund participants challenged the DNB decision. A participant (*deelnemer*) in a pension fund is an employee (or former employee (*gewezen werknemer*)) that on the basis of a pension agreement (*pensioenovereenkomst*) between him in the capacity as employee and his employer acquires claims vis-à-vis the pension provider (*pensioenuitvoerder*),³⁹² in this case GSFS Pensionfund. A former participant (*gewezen deelnemer*) in a pension fund is an employee (or former employee) that does not acquire pension on the basis of a pension agreement anymore and retained a pension claim (*pensioenaanspraak*) vis-à-vis the pension provider.³⁹³

The Dutch Trade and Industry Appeals Tribunal assessed whether the participants qualified as interested parties with regard to the DNB enforcement decision addressed to GSFS Pensionfund and thus whether they had legal standing in the procedure. The court acknowledged that the DNB instruction may affect the returns of GSFS Pensionfund on the pension assets deposited by the participants.³⁹⁴ Yet, it immediately adds that a potential lower return is only a derivative interest, deriving from the contractual relationship between the participants and the pension fund and GSFS.³⁹⁵ The court refers in this regard to its judgment in the *SNS* case, in which shareholders of SNS Bank and SNS Reaal (hereinafter together: SNS) challenged a so-called Supervisory Review and Evaluation Process (SREP) decision that DNB addressed to SNS Bank and required SNS Bank to enhance its capital position.³⁹⁶ In its judgment, the court held that the

388 Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474, para 6.26 et seq.

389 College van Beroep voor het bedrijfsleven 15 November 2016 ECLI:NL:CBB:2016:323 (*GSFS Pensionfund*).

390 Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474, para 6.28.

391 Art. 1:75 Dutch financial supervision act.

392 Definitions in Art. 1 Dutch Pensions Act (*Pensioenwet*).

393 Definitions in Art. 1 Dutch Pensions Act (*Pensioenwet*).

394 College van Beroep voor het bedrijfsleven 15 November 2016 ECLI:NL:CBB:2016:323 (*GSFS Pensionfund*), para 3.3

395 College van Beroep voor het bedrijfsleven 15 November 2016 ECLI:NL:CBB:2016:323 (*GSFS Pensionfund*), para 3.3. Van Praag agrees with the court, see Van Praag 2017, para 3.

396 College van Beroep voor het bedrijfsleven 10 mei 2016 ECLI:NL:CBB:2016:105 (*SNS*).

holders of SNS securities only have a derivative interest, as the potential decrease in value of their securities follows from their contractual relationship with SNS.³⁹⁷

The Dutch Trade and Industry Appeals Tribunal, after it decides that the participants in the pension fund only have a derivative interest, additionally holds that the so-called ‘intertwinement exception’ as formulated by the Administrative Law Section of the Dutch Council of State in a case concerning a director/sole shareholder does not apply.³⁹⁸ In this case, the Administrative Law Section of the Dutch Council of State held that the director/sole shareholder of the company that was the addressee of a decision qualified as an interested party, because in that capacity his interest is ‘so intertwined and runs in parallel to the interest of the company’ (‘is het belang van [belanghebbende B] zo verweven en loopt dit parallel met dat van [appellant]’).³⁹⁹ This ‘intertwinement exception’ is only applied by the Administrative Law Section of the Dutch Council of State in such specific situations.⁴⁰⁰

Derivative interest doctrine in financial supervision: post Opinion AG Widdershoven
On 26 February 2021, an interesting judgment was given by the district court of Rotterdam, concerning policy holders of an insurance company challenging the DNB decision consenting to the legal merger between Optas Pensioenen N.V. (Optas), as the disappearing legal entity, and Aegon Levensverzekering N.V. (Aegon), as the acquiring legal entity.⁴⁰¹ With this merger, all rights and obligations resulting from life insurances of Optas were transferred to Aegon. This judgment sheds some light on the application of the derivative interest doctrine in financial supervisory cases after the Opinion of AG Widdershoven.

A number of policy holders challenged DNB’s consent decision at DNB and requested an administrative review. The policy holders argued that the transfer of the life insurance’s rights and obligations to Aegon would have negative financial effects for them. However, DNB was of the opinion that their challenge was inadmissible, as the policy holders did not qualify as interested parties. DNB argued that the policy holders merely have a derivative interest, because their interests are affected via the contractual relationship with Optas. DNB added that the policy holders did not have a personal interest, by not sufficiently distinguishing themselves from the

397 College van Beroep voor het bedrijfsleven 10 mei 2016 ECLI:NL:CBB:2016:105 (SNS), para 5.4. Cf. Roth 2011, para 3.

398 See Afdeling bestuursrechtspraak van de Raad van State 27 August 2014 ECLI:NL:RVS:2014:3200.

399 Afdeling bestuursrechtspraak van de Raad van State 27 August 2014 ECLI:NL:RVS:2014:3200, para 1.3.

400 Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474, para 6.28.

401 Rechtbank Rotterdam 26 February 2021 ECLI:NL:RBROT:2021:1486, 1487, 1488 and 1489.

(thousands of) other policy holders. In the case before the district court of Rotterdam, DNB brought to fore several additional arguments. It also took the position that the actual transfer of the insurance portfolio did not follow directly from the consent decision, but from Optas' merger decision,⁴⁰² and that the rights and obligations were transferred one-on-one and unchanged to Aegon. Both arguments would lead to the absence of a directly affected interest.

The district court of Rotterdam in part followed DNB's argumentation. It confirmed that the policy holders had a derivative interest via the contractual relationship with Optas. However, the court held that the policy holders' interests, i.e. no (uncompensated) transfer, were opposite to Optas' interest, i.e. effectuating the transfer.⁴⁰³ The court therefore concluded that the derivative interest could not be invoked against the policy holders.⁴⁰⁴ The court's line of reasoning undoubtedly qualifies as an application of AG Widderhoven's second rule of thumb: a derivative interest should not be invoked against a third party if the interest in material terms does not run in parallel to the interest of the addressee. The other DNB arguments were all dismissed by the court and it subsequently held that the policy holders were to be qualified as interested parties. Therefore, their challenge of the DNB decision should be deemed admissible by DNB.

While the district court of Rotterdam is implicit in the application of AG Widderhoven's Opinion, the Dutch Trade and Industry Appeals Tribunal explicitly refers to it in its judgment in the further appeal case that was brought by DNB.⁴⁰⁵ It follows the finding of the district court of Rotterdam that the policy holders have a derivative interest via the contractual relationship with Optas yet that that circumstance shall not be invoked against them. Whereas the district court of Rotterdam seems to reach this conclusion via the application of the second rule of thumb, i.e. a derivative interest shall not be invoked against a third party if the interest in material terms does not run in parallel to the interest of the addressee, the Dutch Trade and Industry Appeals Tribunal explicitly refers to the third rule of thumb, i.e. a derivative interest shall not be invoked against a third party if its legal position or 'interest position' (*belangpositie*) legitimises an independent entitlement to judicial protection.⁴⁰⁶

402 This resembles the EU Court's position to conclude that the shareholder were not directly affected by the withdrawal of the banking license in *Trasta Komercbanka*, see Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323, para 113-114.

403 Rechtbank Rotterdam 26 February 2021 ECLI:NL:RBROT:2021:1486, 1487, 1488 and 1489, para 3.3.

404 Rechtbank Rotterdam 26 February 2021 ECLI:NL:RBROT:2021:1486, 1487, 1488 and 1489, para 3.3.

405 College van Beroep voor het bedrijfsleven 14 December 2021 ECLI:NL:CBB:2021:1063, para 6.4.1-6.4.2.

406 College van Beroep voor het bedrijfsleven 14 December 2021 ECLI:NL:CBB:2021:1063, para 6.4.1-6.4.2.

These judgments show the substantial potential influence of AG Widdershoven's rules of thumb on the application of the derivative interest doctrine in financial supervision.

Applying the rules of thumb to shareholders

From AG Widdershoven's rules of thumb on the concept of derivative interests, it firstly follows that shareholders, although their interests generally run in parallel to that of the credit institution, may be qualified as interested parties with regard to a decision addressed to the credit institution, provided that they have an opposing interest from that of the credit institution (second rule of thumb) or that their legal position or interest position legitimises an independent entitlement to judicial protection (third rule of thumb). Secondly, the first rule of thumb acknowledges that a person may have his own, independent interest that is directly affected by a decision, in addition to a derivative interest, because there is a real possibility that he will be affected in an interest that derives from a property right. This may be of particular relevance for shareholders, that essentially are the owners of the credit institution in which they hold shares. In the hypothetical situation that DNB would be competent to withdraw a banking license and not the ECB, it could be argued that the shareholders not only have a derivative interest, but that the withdrawal also directly affects the shareholders' interests that derive from their property rights. This would then lead to the shareholders' qualification as interested parties and would give them the right to challenge the license withdrawal.

5.4.5.5 Legal standing of directors

Under Dutch case law, directors do not have a right of appeal to challenge a fine that has been imposed on the financial institution.⁴⁰⁷ The Dutch Trade and Industry Appeals Tribunal denied access, dismissing the director's argument that the fine constitutes a so-called 'supervisory antecedent' (*toezichtsantecedent*) for him that will be taken into account in any future fit and proper assessment.⁴⁰⁸ Taking into account the supervisory antecedent, as reiterated by the Appeals Tribunal, could lead to the supervisory authority rejecting authorisation. The Appeals Tribunal held that the causal link between the fine and rejection of an authorisation is too remote. The director's interests will only be affected once the authorisation has been rejected. It thus necessarily takes another decision before the director's interests are affected, the Appeals Panel continued, the outcome of which is not dictated by the fine. The Appeals Panel added that judicial review of that decision will be open to the director.

⁴⁰⁷ Roth 2011, para 3 with reference to College van Beroep voor het bedrijfsleven 29 April 2004 ECLI:NL:CBB:2004:AO9910.

⁴⁰⁸ College van Beroep voor het bedrijfsleven 29 April 2004 ECLI:NL:CBB:2004:AO9910, para 6.1.

The approach of the Trade and Industry Appeals Tribunal to legal standing of the director has been criticised by De Groot for being strict.⁴⁰⁹ He argues that, even though the fine leaves open the question whether the supervisory antecedent will be invoked against the director in a fit and proper assessment, fact is that the fine constitutes a supervisory antecedent and may negatively affect the fit and proper assessment. He reiterates that the Appeal Tribunal's approach leads to the situation where the director cannot challenge the actual establishment of his supervisory antecedent. Although he does not state it explicitly, I derive from his arguments that he considers the establishment of the supervisory antecedent enough reason to grant a director the right of appeal against a decision imposing a fine on a financial institution.

I agree with De Groot's criticism. Also in light of AG Widdershoven's rules of thumb for the application of the derivative interest doctrine, I believe that the case could be made that directors' position, due to the immediate link between the fine and the supervisory antecedent, legitimises an independent entitlement to judicial protection (third rule of thumb). I believe that the automatic emergence of a supervisory antecedent for a director suffices to acknowledge that a director is directly affected by a fine imposed on the credit institution.

5.4.6 Relativity requirement (relativiteitsvereiste)

In 2010, the Dutch legislator introduced a relativity requirement for administrative and judicial review in Article 8:69a GALA.⁴¹⁰ The relativity rule in Dutch law does not operate as an admissibility requirement,⁴¹¹ such as the requirement that an applicant must qualify as an interested party. Pursuant to this relativity requirement, an administrative court may not annul a decision on the ground that it is contrary to a written or unwritten rule of law or general principle of law, where that rule or principle obviously (*kennelijk*) does not intend to protect the interests of the applicant. It thus requires a link between the grounds of appeal and the interests of the applicant. One of the legislator's examples where this link does not exist, is where inhabitants of a residential neighbourhood challenge the decision to establish a trailer park close to that neighbourhood by arguing that the inhabitants of

409 De Groot 2004, para 5.

410 Art. 8:69a GALA reads: 'De bestuursrechter vernietigt een besluit niet op de grond dat het in strijd is met een geschreven of ongeschreven rechtsregel of een algemeen rechtsbeginsel, indien deze regel of dit beginsel kennelijk niet strekt tot bescherming van de belangen van degene die zich daarop beroept.'

411 Explanatory Memorandum to the Act amending administrative procedure law (*Kamerstukken II* 2009/10, 32450, nr. 3), p. 20.

the trailer park would be exposed to noise pollution from the nearby swimming pool or railway.⁴¹²

Dutch tort law already had a relativity rule, codified in Article 6:163 Dutch Civil Code. On the basis of that provision, no duty to pay damages will arise, if the rule of law that is violated does not intend to protect against the damage as incurred by the aggrieved party. The restrictive scope of the civil law relativity rule has been mitigated through what is known as the *correctie Langemeijer* (correction Langemeijer).⁴¹³ On the basis of the *correctie Langemeijer*, the relativity requirement may also be met where the written rule of law infringed does not intend to protect the interests of the applicant, but where an unwritten standard of care does. A similar correction to the potentially strict consequences of the relativity requirement was accepted by the Administrative Law Section of the Dutch Council of State, what became known as the *correctie Widdershoven* (correction Widdershoven), named after Advocate General Widdershoven of the Administrative Law Section of the Dutch Council of State who introduced the correction.⁴¹⁴ The *correctie Widdershoven* is limited to the principles of legitimate expectation (*vertrouwensbeginsel*) and equality (*gelijkheidsbeginsel*).

5.5 INTERIM CONCLUSIONS

This chapter sought to set out the legal framework for the division of jurisdiction between EU courts and national courts, more specifically Dutch courts, in actions for annulment concerning SSM composite procedures. A distinction was made between bottom-up composite procedures and top-down composite procedures and to each type a different doctrine for the division of jurisdiction applies.

For SSM bottom-up procedures, the recent milestone case *Berlusconi* introduced a single judicial review for the entire decision-making procedure. The Court assumed exclusive jurisdiction over both national non-binding preparatory acts and the final ECB act. National courts are explicitly precluded from reviewing any such national preparatory acts. Although *Berlusconi* brought the long-awaited clarity on the division of jurisdiction in composite procedures, it raises new, fundamental questions on the EU Courts' role as *juges de droit national*. More specifically, it was concluded that the EU Courts are embedded in a system that did not anticipate such a role, due to, *inter alia*, the EU Courts' jurisdictional limits to apply and interpret

412 Explanatory Memorandum to the Act amending administrative procedure law (*Kamerstukken II* 2009/10, 32450, nr. 3), p. 18.

413 The *correctie Langemeijer* was coined by AG Langemeijer in his Opinion in Hoge Raad 17 January 1958 ECLI:NL:PHR:1958:AG2051 (*Beukers/Dorenbos*).

414 Opinion AG Widdershoven in Afdeling bestuursrechtspraak van de Raad van State 2 December 2015 ECLI:NL:RVS:2015:3680.

national law and to provide for derivative illegality of the EU final decision in case of errors originating at the national level.

For SSM top-down procedures, more specifically the construction ECB instruction-NCA implementing decision, the situation is different. In those types of procedures, no single judicial review exists. Rather parallel jurisdiction of both national courts and the EU Courts may arise. The national part of the construction can only be reviewed by national courts, the EU part exclusively by the EU Court. This raises the first problem for judicial protection: a full review of the complete construction, necessarily involves both judicial levels. The second problem arises where an ECB instruction leaves considerable discretion to the NCA. The legal standing requirement of direct concern will block an action for annulment at EU level against the ECB instruction. This situation causes additional complexities, as it makes the applicant for a full review entirely dependent on the willingness of the national courts to refer a preliminary question on validity of the ECB instruction to the Court.

From the comparison between the EU framework for an action for annulment and the Dutch framework for an action for annulment, it follows that the approaches to legal standing are divergent. Shareholders of a credit institution for instance are on the basis of *Trasta Komercbanka* not considered to be directly affected by a decision to withdraw the banking license. The Court's case law shows a very strict application of the legal standing requirements. Dutch law, especially with the introduction of AG Widdershoven's approach to the derivative interest doctrine, leaves substantially more room for third parties to be qualified as interested parties. These divergences between EU law and Dutch law, but probably also between Dutch law and other Member States' law, may lead to differences in judicial protection between for instance a credit institution on the one hand and its shareholders on the other. A credit institution could, provided that the requirement of direct concern is met, challenge an EU instruction at the EU Courts, as it will probably be individually concerned. For shareholders, however, the route necessarily starts at the national level, where it is dependent on the national court whether a legality review of the ECB instruction may take place via the preliminary reference procedure.

5.6 APPLYING THE NORMATIVE FRAMEWORK: ASSESSMENT

5.6.1 General

The normative framework underlying this dissertation is the 'composite' principle of effective judicial protection. The elements of the principle of effective judicial protection that are most relevant to this dissertation were selected and discussed in Chapter 2 and comprise: (1) clear system of judicial protection; (2) adequate access to court; (3) full jurisdiction of a court; (4) the right to judicial proceedings within reasonable time; and, (5) the

right to damages for violations of EU law. This normative framework will now be applied to the interim findings in the assessment with which this chapter concludes. The recommendations that follow from the assessments are formulated in Chapter 7.

5.6.2 Assessment

5.6.2.1 *A clear system of judicial protection?*

It must be concluded from this chapter that a comprehensive legal framework for the division of jurisdiction in judicial review of EU composite procedures between the EU Courts and the national courts is currently in place, has been developed further by the Court in *Berlusconi* and will continue to be shaped in the future. Notwithstanding the comprehensiveness of the legal framework for the division of jurisdiction in judicial review of composite procedures, several problems arise with regard to the element of a clear system of judicial protection.

A first problem is that two different doctrines govern the division of jurisdiction in bottom-up composite procedures and in top-down composite procedures. Regarding bottom-up composite procedures, the doctrinal framework entails that the EU Courts are exclusively competent to review the entire decision-making procedure where it concerns a bottom-up composite procedure in which the relevant EU authority has the exclusive decision-making power. Their exclusive competence prohibits national courts from assuming jurisdiction over national acts in such composite procedures. Instead, judicial review of the national phase of the procedure is centralised at the EU Courts. Yet, if the national preparatory act is binding on the relevant EU authority, which was the case in *Borelli*, the national courts are competent, and as follows from *Borelli* in certain cases even obliged, to review the national phase of the composite procedure. The Court's doctrine regarding bottom-up composite procedures entails a mutually exclusive two-track: either the national judicial level or the EU judicial level has jurisdiction.

The same doctrine does not apply to the division of jurisdiction in top-down composite procedures, and more specifically to the construction ECB instruction-NCA implementing decision. The concepts that are decisive for the distribution of jurisdiction are, alongside addressee, direct and individual concern and legal interest. Of specific significance for the division of jurisdiction in top-down composite procedures is the notion of 'discretion', a key element of direct concern. While the concepts of discretion and exclusive decision-making power show similarities and are sometimes used interchangeably, their legal implications diverge when applied in bottom-up procedures on the one hand and top-down procedures on the other. Where exclusive decision-making power is established in a bottom-up procedure, judicial review is centralised at the EU level, encompassing the entire pro-

cedure. In contrast, the concept of discretion in top-down composite procedures allocates jurisdiction solely in connection to the part of the procedure that falls within the jurisdiction of the relevant judicial level, viz. national courts are competent to review the national implementing decision and the EU Courts to review the EU act preceding the national implementation.

A second problem are the factual and legal complexities clouding an applicant's ability to allocate the various legal responsibilities between the ECB and the relevant NCA and to subsequently select the correct competent court, the applicant must allocate the various legal responsibilities between the ECB and the relevant NCA, requiring expert knowledge of the exact content and form of the cooperation between both supervisory authorities. These qualify as factual complexities. Secondly, several complexities relating to the legal framework exist as the legal concepts that are decisive for the division of jurisdiction are clouded by uncertainties. These concepts include the concept of legal effects, discretion, exclusive decision-making power and direct and individual concern. Specifically the concept of exclusive decision-making power requires parties to allocate legal responsibilities in an inherently complex composite procedure. The concept is substantive in nature in the sense that the exclusive decision-making power not necessarily lies with the authority adopting the final decision. And even though the application of the concept has some objectifying characteristics, as it focuses on the formal rather than the actual division of decision-making powers, the inherent uncertainty surrounding which authority involved, the ECB or the relevant NCA, stands in the way of creating a clear system of judicial protection. Furthermore, *Trasta Komerbanka* illustrates that even the General Court and the Court of Justice are applying the long-standing test of direct concern to shareholders differently, leading to outcomes that are diametrically opposed.

The immediate result of the complexity of the system of judicial protection is the existence of procedural disadvantages for parties affected by decisions adopted via a composite procedure. As illustrated by *Berlusconi*, applicants may have to institute proceedings at both national courts and EU Courts due to uncertainties in which judicial level is competent. This will lead to an increase in costs, as well as in substantial delays in obtaining redress.

5.6.2.2 Adequate access to court?

The findings in this chapter did not uncover unforeseen gaps in access to a court in judicial review of SSM composite procedures. In the selected SSM bottom-up composite procedures, addressees of the ECB decision, particularly credit institutions and (in the procedure for qualifying holding assessments) the shareholder-applicant, and parties to whom the ECB decision is of direct and individual concern may challenge that decision at EU level. The EU judicial review also encompasses any national preparatory acts. In SSM top-down composite procedures, i.e. the construction ECB

instruction-NCA implementing decision, access to judicial review may exist at both the national level and the EU level. Parties wishing to challenge the ECB instruction at the EU level must meet the legal standing requirements of direct and individual concern. ECB instructions adopted on the basis of Article 9(1), third subparagraph, SSM Regulation that require an NCA to exercise a specific national power vis-à-vis a significant credit institution are likely to be of direct concern to that credit institution as the instruction leaves no room for discretion to the NCA. It was also concluded that the requirement of individual concern is not likely to pose problems for a credit institution that is the subject of the ECB instruction.

However, the right to access to court is a whole different story for parties that are not the addressee of a supervisory decision, but may have a legitimate interest in challenging it, for instance because the decision affects their economic position. Such parties particularly include the credit institution's management, its shareholders and creditors. As was concluded above, these parties are unlikely to satisfy the *Plaumann* test of individual concern. As a result, the credit institution's management, its shareholders and creditors cannot institute an action for annulment under Article 263 TFEU against an ECB act addressed to the relevant credit institution. Furthermore, specifically with regard to a shareholder applicant, the legal interest requirement proves to be an insurmountable challenge. A shareholder applicant is generally not considered to have 'an interest of his own in bringing proceedings separate from the interest in which the company to which the EU act is addressed has in the annulment of that act'.

The credit institution's management, its shareholders and creditors, although potentially affected by a supervisory decision addressed at the relevant credit institution, thus do not have access to judicial review at the EU level. The strict application of the legal standing requirements to parties other than the addressee of a decision, credit institution, furthermore leaves remedies to the Member States. As was shown above, in Dutch administrative law, pursuant to the doctrine of *afgeleid belang* these parties will probably not be able to challenge a decision addressed to the credit institution. However, a new interpretation of the concept of *afgeleid belang* and its first application in the context of financial supervision have shown the potential to widen the scope of parties that must be qualified as interested parties.

Not providing for access to the EU Courts in an action for annulment to in particular shareholders is problematic from the perspective of the right to access to court, that requires a course of action before a court where an EU right is infringed. Considering that the EU right to property of shareholders will be affected in case of the withdrawal of a banking license, shareholders must be provided an opportunity to protect their interests pursuant to the right to access to a court which is currently lacking. The lack of access to court for shareholders is not a problem specifically relating to an integrated administration or composite procedures. The composite procedures in the SSM, however, make this problem particularly acute since the strict EU legal standing requirements will lead to a dependency on national law and

national courts for judicial protection of shareholders. This dependency will magnify the differences in the degree of judicial protection offered by the various Member States of the SSM, emphasising the need for providing access at the EU level.

Another problem for adequate access in SSM top-down composite procedures specifically is the Deggendorf doctrine, which closes off the route of indirect review via the preliminary reference procedure for parties that would ‘without any doubt’ meet the legal standing requirements in an action for annulment against the ECB instruction and were ‘fully aware’ of it, yet did not bring proceedings within the two-month time limit. Addressees of an NCA implementing decision will not necessarily be aware of the existence of a preceding ECB instruction. However, the EU judicial level may pursuant to the Deggendorf doctrine bar an applicant from indirect review, if it considers the applicant to have been ‘fully aware’ of the instruction.

5.6.2.3 Full jurisdiction?

The requirement of full jurisdiction entails that a court must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. As was set out above, in composite procedures both national courts and EU Courts have limited jurisdiction with regard to the phase of the procedure beyond their jurisdiction. As was held in *Foto-Frost*, whilst national courts can examine an EU act and declare it valid, they may not declare an EU act invalid as the latter is an exclusive competence of the Court.⁴¹⁵ National courts thus do not have full jurisdiction in judicial review of composite procedures. Neither do EU Courts.

The limited jurisdiction of EU Courts in reviewing composite procedures relates to the application and interpretation of national law. When SSM composite procedures are partly governed by national law, both as the relevant NCA will apply national law and as the ECB may apply national law pursuant to Article 4(3) SSM Regulation, the EU Courts’ competence to assess composite procedures in light of national law is doubtful. Although both the General Court and the Court of Justice seem to have adopted a pragmatic approach to reviewing ECB decisions adopted on the basis of national law, the competence to apply national law that is beyond the scope of Article 4(3) SSM Regulation is absent. As a result, the EU Courts do not have jurisdiction ‘to examine all questions of law relevant to the dispute before it’ and errors originating at national level risk remaining unjusticiable.

While both national courts and EU Courts do not have full jurisdiction in composite procedures, national courts’ limitations are partially compensated by the possibility of referring a preliminary question on validity to the Court concerning the EU act involved. The preliminary reference procedure

415 Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452, in particular para 15.

constitutes an ‘indirect review’ and may together with the national action for annulment provide for a full review of the entire composite procedure. As was already discussed above, a reverse preliminary reference procedure to make up for the jurisdictional limitations of the EU Courts is however missing, resulting in a gap in judicial review concerning any errors under national law made by the relevant NCA.

5.6.2.4 *The right to judicial proceedings within reasonable time?*

As was discussed above, the strict test for direct and individual concern of parties other than the credit institution in top-down SSM composite procedures decentralises judicial protection for these parties at the national courts. Because in top-down composite procedures the legal basis for the NCA implementing decision is an ECB instruction, parties may wish to challenge this instruction. Their only option available for judicial review of the ECB instruction is the indirect action via the preliminary reference procedure. This two-staged judicial review may lead to substantial delays. As emphasised by AG Jacobs in his Opinion in *Unión de Pequeños Agricultores v Council* ‘[p]roceedings in the national courts, with the additional stage of a reference under Article 234 EC, are likely to involve substantial extra delays and costs’.⁴¹⁶ Yet, despite the average length of a preliminary request is 18 months, the ECHR does not take a stay on national proceedings due to a request for a preliminary ruling into account when assessing the reasonableness of the length of the national proceedings.⁴¹⁷ It may nevertheless be argued that the judicial proceedings as a whole must be considered when assessing whether the length of the proceedings constitutes an infringement of the right to judicial proceedings within reasonable time. When taking into account both the national and EU proceedings necessary to obtain a full review of an SSM top-down composite procedure, it must in my view be concluded that the necessity of a preliminary reference procedure for obtaining a full review will lead to a substantial delay, infringing the right to judicial proceedings within reasonable time.

416 Opinion AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197, para 44.

417 European Court of Human Rights, ‘Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)’, *Case-law Guide Series* 2020, p. 89 with reference to case law; Hofmann 2021, p. 1371 with reference to ECtHR 26 February 1998, 20323/92, ECLI:CE:ECHR:1998:0226JUD002032392 (*Pafitis v Greece*).

6.1 INTRODUCTION

This chapter will cover the non-contractual liability of the ECB and the NCAs, in particular of the Dutch Central Bank (*De Nederlandsche Bank*, hereinafter: DNB), for damage caused by an SSM composite procedure.¹ An action for damages constitutes the final puzzle piece in judicial protection against supervisory action and may serve two functions. First, it provides judicial protection in the form of judicial control and compensation where an action for annulment is not available to a party. The findings in Chapter 5, particularly those concerning the difficulties of legal standing in judicial review for parties other than the addressee of a decision and the limits to judicial review by the EU Courts of NCA preparatory acts, highlight the relevance of an action for damages for judicial protection. Where an action for annulment is unavailable, an action for damages serves as a safety net for judicial protection. Second, an action for damages functions as an additional remedy, offering monetary compensation for any damage resulting from an annulled administrative act.

Examples of possible actions for damages in the SSM are damage incurred by a person or credit institution due to a wrongful rejection of an application for authorisation to obtain a qualifying holding in a credit institution and damage incurred by a credit institution due to a wrongful sanctioning decision imposed by an NCA following an instruction of the ECB.

The division of jurisdiction in actions for annulment concerning SSM composite procedures has been discussed at length in the previous chapter. Although the actions for annulment and damages are closely connected and complementary, they are distinct remedies. They fulfil distinct functions, produce different legal effects and may operate independently from each other. Therefore, the findings in Chapter 5 may not *mutatis mutandis* be applied to the action for damages. It is settled EU case law that an action for damages must be considered an ‘independent remedy’, i.e. existing irre-

1 This chapter is exclusively concerned with non-contractual liability, not contractual liability, as both the relationship between the ECB and supervised credit institutions, as well as that between DNB and supervised credit institutions is not considered to be of a contractual nature under EU law and Dutch law, respectively. For ECB supervision, see Almhofer 2018, p. 120-121 with reference to Gurlit 2013, p. 887-889. In general on the qualification of the relationship between a supervisory authority and supervised entities under Dutch law, see Giesen 2005, p. 100-101.

spective of whether an action for annulment is available to or utilised by the applicant. The concepts guiding the EU Courts in jurisdictional matters in actions for annulment, most notably reviewable act, legal effects, exclusive decision-making power and legal standing, are not necessarily relevant to the division of jurisdiction in non-contractual liability cases, nor to the division of liability between the ECB and the NCAs. As a result of the differences between the two remedies, the Court's Berlusconi doctrine on the division of jurisdiction in an action for annulment concerning bottom-up composite procedures in which an EU authority has the exclusive decision-making power, and the principle of a single judicial review at EU level, does not necessarily imply that the EU Courts are exclusively competent to decide on non-contractual liability within such a composite procedure. Thus, the legal and judicial framework for non-contractual liability for damage resulting from SSM composite procedures requires a separate analysis.

This chapter is structured as follows. As SSM composite procedures involve reviewable acts that may be challenged via an action for annulment, the relationship and interaction between an action for annulment and an action for damages will be elaborated upon firstly, both for EU law and Dutch law. Secondly, the division of jurisdiction between the EU Courts and the national courts in non-contractual liability cases in SSM composite procedures is discussed. In short: the EU Courts have jurisdiction over actions for damages against the ECB and national courts over actions for damages against their NCAs. Thirdly, the legal framework for the division of liability between the ECB and the NCAs is examined. This paragraph revolves around the liability requirements of illegality and causal link, which are particularly relevant to the division of liability in composite procedures. One of the conclusions is that situations may arise in which both the ECB and DNB may be held liable. The Court developed an approach to such situations of joint (or: concurrent) liability, which includes a duty to exhaust national remedies, which will be examined. This chapter concludes with assessing the interim findings by applying the normative framework.

6.2 ANNULMENT, FAILURE TO ACT AND ACTION FOR DAMAGES: INTERACTION BETWEEN REMEDIES

6.2.1 EU law

6.2.1.1 *Action for damages: an independent remedy*

6.2.1.1.1 *From accessory to independent*

An action for damages may be considered a means for reviewing EU acts, comparable to an action for annulment.² Yet, despite the similarity, the two

2 Chalmers, Davies & Monti 2019, p. 400.

remedies differ on core aspects. An EU action for annulment will often precede a non-contractual liability claim. Both actions then are adjudicated consecutively by the EU Courts. As is clear from Article 263 TFEU, the main purpose of an action for annulment is a legality review. If an action for annulment is considered to be well-founded, the act is declared void, with *erga omnes* effect. The main purpose of an action for damages is compensation for those who suffered damage and primarily offers individual legal protection. An action for damages does not result in the act being declared void with *erga omnes* effect. The action for damages thus is of a more subjective nature, focusing on individual justice.

Another way of conceptualising and comparing an action for annulment and an action for damages is by drawing a distinction between primary and secondary remedies. A primary remedy aims at safeguarding and enforcing a right.³ From this perspective, a secondary remedy constitutes a new claim arising from the infringement of the primary right.⁴ An action for annulment constitutes a primary remedy and an action for damages a secondary remedy.⁵

The relation and interaction between the action for damages and the actions for annulment and failure to act have been shaped by the Court's case law, changed over time and are an often-debated subject.⁶ In 1963, with *Plaumann*, the Court was confronted with the issue of how the action for annulment related to the action for damages.⁷ It had to decide whether a successful action for annulment was a necessary prerequisite for an action for damages. The Court answered in the affirmative. It held that '[a]n administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects.'⁸ The Court substantiated its position by stating that by awarding damages it would in essence 'nullify the legal effects of a decision which [...] has not been annulled'.⁹ The *Plaumann* judgment applied to both the situation where an action for annulment was available to the applicant but remained unused, as well as to the situation where the remedy of annulment was not available to the applicant.¹⁰ Pursuant to the *Plaumann* judgment, the definitive nature of an administrative measure thus was absolute and could be invoked against everyone, including parties not meeting the legal standing requirements and thus unable to challenge the administrative measure.

3 For this definition, see Eilmansberger 2004, p. 1199, fn. 2.

4 For this definition, see Eilmansberger 2004, p. 1199, fn. 2.

5 For this distinction, see Eilmansberger 2004, p. 1199-1246, more specifically p. 1199, fn. 2.

6 See, for instance, Mead 1997, p. 243-258; Türk 2009a, p. 244-246; Gutman 2011, p. 703-708.

7 Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

8 Case 25/62 *Plaumann* ECLI:EU:C:1963:17, p. 108.

9 Case 25/62 *Plaumann* ECLI:EU:C:1963:17, p. 108.

10 See Opinion AG Roemer in Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* ECLI:EU:C:1971:96, p. 990.

The Court's position in *Plaumann* met strong criticism.¹¹ The judgment's implications were profound, as it meant that the (restrictive) legal standing requirements of an action for annulment would *de facto* apply to an action for damages as well. Importantly, precisely the absence of these requirements would make an action for damages an attractive remedy.¹² It would enable persons unable to institute an action for annulment to obtain judicial protection via an action for damages. The action for damages thus could not serve as a safety net for judicial protection in case of unavailability of judicial review. In addition, *Plaumann* would render meaningless the much broader limitation period for bringing an action for damages, which is five years¹³ in contrast to the two months applicable to an action for annulment.¹⁴

Plaumann was overhauled by later case law. As EU case law currently stands, the action for damages is considered an independent remedy, existing independently from an action for annulment. This overhaul took place less than a decade after *Plaumann*, in *Lütticke*¹⁵ and *Schöppenstedt*.¹⁶ The Court held that an action for damages is 'an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose.'¹⁷ Since then, annulment is not a prerequisite for an action for damages. Inadmissibility of an action for annulment does not lead to inadmissibility of an action for damages.¹⁸ Currently, any person who claims to have been injured by an EU act can bring an action for damages.¹⁹ Fines gives two justifications for an action for damages' independence: giving full effect to the differences between the two remedies and the necessity of guaranteeing the effectiveness of the general system of actions.²⁰

6.2.1.1.2 Limits to the action for damages' independence: abuse of process

The action for damages' independence is not absolute as it is settled case law that there are situations where not having instituted an action for annulment or failure to act leads to inadmissibility of an action for damages. These exceptions to the action's independence aim to prevent 'abuse of pro-

11 For criticism, see in particular Opinion AG Roemer in Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* ECLI:EU:C:1971:96, p. 901 and Opinion AG Roemer in Joined Cases 106 and 107/63 *Alfred Toepfer and Getreide-Import Gesellschaft v Commission* ECLI:EU:C:1964:46, p. 440.

12 Türk 2009a, p. 244.

13 Art. 46 Statute of the CJEU.

14 Art. 263, sixth subpara, TFEU.

15 Case 4/69 *Lütticke GmbH v Commission* ECLI:EU:C:1971:40, see particularly para 6.

16 Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* ECLI:EU:C:1971:116, see particularly para 3.

17 Case 4/69 *Lütticke GmbH v Commission* ECLI:EU:C:1971:40, para 6.

18 Case T-514/93 *Cobrecap and Others v Commission* ECLI:EU:T:1995:49, para 58.

19 Case T-185/94 *Geotronics v Commission* ECLI:EU:T:1995:184, para 39.

20 Fines 1997, p. 18.

cess', in the sense that an applicant institutes an action for damages with the purpose of reaching the same results as an action for annulment or failure to act.²¹ As the limitation period for an action for damages is much wider than that applicable to an action for annulment the abuse of process would consist of circumventing the time-barring of the action for annulment by instituting an action for damages.

The 'abuse of process' exception is interpreted strictly in EU case law and an action for damages will only under specific circumstances be inadmissible on that basis. In *Krohn v Commission*, the Court specified that inadmissibility of an action for annulment leads to inadmissibility of an action for damages, in 'the exceptional case where an application for compensation is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the application seeks in fact the withdrawal of that individual decision'.²² In *Holcim France*, the General Court stressed that the exception only applies 'where the alleged damage flows exclusively from an individual administrative measure which has become definitive, which the party concerned could have challenged by means of an annulment'.²³ In *Holistic Innovation Institute v Commission* the General Court formulated two conditions of an action for damages that will lead to its inadmissibility: the action for damages concerns the same instance of illegality as the (inadmissible) action for annulment and has the same financial end in view.²⁴ If these two conditions apply, the action for damages 'is actually aimed at securing withdrawal of an individual decision which has become definitive and would, if upheld, have the effect of nullifying the legal effects of that decision'.²⁵ A similar formulation may also be found in the *Plaumann* judgment that was discussed above. A claim for damages exceeding and including the amount that would have been repaid in case of a successful annulment will be inadmissible where 'a close connection' exists between the action for damages and the action for annulment.²⁶

A Banking Union example where the General Court dismissed an action for damages as (manifestly) inadmissible is *Iccrea Banca v Commission and SRB*, concerning the determination by the Single Resolution Board (SRB) of the *ex ante* contributions of Iccrea Banca to the Single Resolution Fund (SRF).²⁷ Iccrea Banca's action for annulment was dismissed as manifestly inadmissible as it was brought more than one year after it became aware of

21 Gutman 2011, p. 704 with reference to Lenaerts, Arts & Maselis 2006, para 11-004, p. 372 and citations therein.

22 Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85, para 33.

23 Case T-86/03 *Holcim France* ECLI:EU:T:2006:90, para 50.

24 Case T-468/14 *Holistic Innovation Institute v Commission* ECLI:EU:T:2016:296, para 46. These conditions were formulated earlier in 1966 in *Schreckenberg v Commission*, see Case 59/65 *Schreckenberg v Commission* ECLI:EU:C:1966:60, ECR 543, p. 550.

25 Case T-468/14 *Holistic Innovation Institute v Commission* ECLI:EU:T:2016:296, para 47.

26 Case T-468/14 *Holistic Innovation Institute v Commission* ECLI:EU:T:2016:296, para 48.

27 Case T-494/17 *Iccrea Banca v Commission and SRB* ECLI:EU:T:2018:804.

the existence of the SRB decision, thus grossly transgressing the two-month time limit.²⁸ Iccrea Banca additionally sought to obtain compensation consisting of the higher sums contributed to the SRF. The General Court held that the claim for compensation was tantamount to seeking repayment via an action for annulment as it has the same financial purpose and therefore would circumvent the inadmissibility of the action for annulment instituted against the SRB decision.²⁹ Insofar as the damages claimed were exceeding the higher sums paid, comprising damage in form of not being able to make certain investments and to seek assistance of external consultants, the General Court considered that between that claim and the action for annulment existed a close connection as the claim essentially aimed to restore Iccrea Banca's financial position to the situation in which the SRB decision was not adopted.³⁰ Therefore, the (manifest) inadmissibility of the action for annulment led the General Court to dismiss as (manifestly) inadmissible the application for damages.

The 'abuse of process' rationale of the exceptions to the independent nature of an action for damages leads to the conclusion that the definitive character of an unchallenged act is relative and may only be invoked against persons that could have instituted an action for annulment. Yet, what criterium should be used where it is not absolutely clear that a person could have started an action for annulment? It would be logical to apply the criterium as formulated in *TWD Textilwerke Deggendorf*.³¹ This judgment concerns the availability of an indirect action via a preliminary reference procedure for challenging an act, where the act could have been challenged in a direct action.³² Although this judgment does not regard the interaction between an action for annulment and an action for damages, the Court's rationale for the exceptions to the availability of an action for annulment on the one hand and to the availability of an indirect action on the other is preventing an evasion of the time limits applicable to an action for annulment.³³ In *TWD Textilwerke Deggendorf*, the Court held that an indirect action is not available to persons who were 'fully aware' of the relevant EU decision and 'without any doubt' would have had legal standing in a direct action, but let the time limits expire.³⁴ Where doubt exists, an indirect action is allowed.³⁵ It would be logical to apply the same criterium to the exception to the independence of an action for damages. Only where the applicant was 'fully aware' of the EU decision and an action for annulment has 'without any doubt' been available to the applicant, not instituting an action for annulment may be invoked against him in an action for damages.

28 Case T-494/17 *Iccrea Banca v Commission and SRB* ECLI:EU:T:2018:804, para 47.

29 Case T-494/17 *Iccrea Banca v Commission and SRB* ECLI:EU:T:2018:804, para 51.

30 Case T-494/17 *Iccrea Banca v Commission and SRB* ECLI:EU:T:2018:804, para 62.

31 Case C-188/92 *TWD Textilwerke Deggendorf* ECLI:EU:C:1994:90.

32 As also discussed in Ch. 5, para 5.3.5.2.2.

33 Gutman 2011, p. 705.

34 Case C-188/92 *TWD Textilwerke Deggendorf* ECLI:EU:C:1994:90, para 24-26.

35 Case C-207/17 *Rotho Blaas Srl v Agenzia delle Dogane e dei Monopoli* ECLI:EU:C:2018:840.

Obviously, also where these two conditions are met, not having instituted an action for annulment within the time limit may only lead to inadmissibility of an action for damages in the exceptional circumstance that the damages claimed in essence seek to nullify the legal effects of the act.

6.2.1.2 *An independent remedy in the SSM*

The exception to the independent nature of an action for damages as developed in EU case law is not likely to apply in the context of SSM composite procedures, neither to an SSM composite procedure that results in imposing a fine. Where a fine is imposed on a credit institution by an NCA on instruction of the ECB pursuant to Article 18(5) SSM Regulation, an action for damages will likely be dismissed due to the absence of a direct causal link between the ECB instruction and the damage incurred.³⁶ Other SSM composite procedures do not involve the payment, granting or rejection of any monetary sums, and therefore any damage is not likely to flow exclusively from the ECB decision in dispute. One could think of the rejection of an application for authorisation as a credit institution or of an application for obtaining a qualifying holding by the ECB. In these situations, a possible damage category is that of lost profits.³⁷ Although it is hard to imagine an applicant will not institute an action for annulment against such rejections, if the applicant does not, an action for damages is unlikely to be considered inadmissible due to not having contested the rejection decision. Even though such an action for damages relates to the same issue of illegality as the (inadmissible) action for annulment, an action for damages not relating to any monetary sums paid will pursuant to the EU case law discussed above probably not be considered as having the same financial end in view.

Yet beyond the context of SSM composite procedures, where the ECB imposes a fine directly on a credit institution, an action for damages may be said to be designed to indirectly secure annulment of the individual decision and on that ground would be inadmissible. Would the credit institution claim another type of damage, for instance reputational damage incurred as a result of the fine and its publication, that claim would on the basis of the case law discussed above be inadmissible where it has a close connection with the action for annulment aiming to annul the decision imposing the fine. In the example of claiming reputational damage, such a close connection is likely to exist, as the objective of the action for damages would, similarly to *Iccrea Banca v Commission and SRB*, be to restore the applicant's position to the situation in which the ECB decision was not adopted. Claiming monetary compensation for reputational damage would *de facto* seek annulment of the ECB fine.

³⁶ See further para 6.4.2.4.3.

³⁷ According to the Court's case law, lost profits are in principle recoverable, but shows reluctance in awarding it, see *Craig & De Búrca* 2020, p. 633.

6.2.2 Dutch law – Action for damages: additional judicial protection

6.2.2.1 General

Similar to EU law, the functions fulfilled by an action for annulment and an action for damages differ under Dutch law. An action for annulment seeks to annul the act, with *erga omnes* effect, whereas an action for damages aims to compensate the applicant for the damage incurred.

Judicial protection provided by the Dutch civil courts in an action for damages against administrative authorities is regarded as a form of ‘additional’ judicial protection.³⁸ Where Dutch administrative law does not provide for judicial protection via administrative or judicial review, judicial protection may thus be obtained at the Dutch civil court. Judicial review for instance is not available if the alleged wrongful act does not qualify as a reviewable act (*besluit*), or if the applicant does not qualify as an interested party (*belanghebbende*). In those situations the civil court essentially functions as a ‘safety net’ for judicial protection against the relevant authority. The civil court acts as the *restrechter*, i.e. the court with residual jurisdiction.³⁹

Yet, the civil court also offers judicial protection in form of an action for damages where judicial review is available, thus truly offering ‘additional’ judicial protection. Judicial protection may then be obtained via both the administrative court and the civil court. The administrative court will review the act and may annul it. The administrative court in certain circumstances also has the competence to award damages. Alternatively, an action for damages on the basis of Article 6:162 Dutch Civil Code (*Burgerlijk Wetboek* (BW)) may be instituted before the civil court.

6.2.2.2 The principle of formele rechtskracht

Differently from EU law, where the EU Courts adjudicate both actions for annulment and actions for damages, in Dutch law the interaction between the two remedies has been shaped by the objective of creating an effective division of jurisdiction between the administrative courts and the civil courts and of their respective functions. Illustrative is the Dutch Supreme Court (*Hoge Raad*) judgment in *Heesch/Van de Akker*, in which it introduced the principle of *formele rechtskracht* (finality of administrative decisions) and held that the underlying rationale of this principle is the need for an effective division of jurisdiction between the administrative court and the civil court.⁴⁰ The Supreme Court held that where an administrative legal procedure with sufficient guarantees has been available to challenge a decision, but has not been used, the civil court must assume the validity of that

38 Marseille & Tolsma 2022, p. 391.

39 See also Ch. 5, para 5.4.1.

40 Hoge Raad 16 May 1986 ECLI:NL:HR:1986:AC9347 (*Heesch/Van de Akker*).

decision and its formation.⁴¹ In the landmark case *Van Gog/Nederweert* the Dutch Supreme Court held that the civil court must in principle respect the administrative court's findings concerning illegality and attribution.⁴² The Supreme Court listed three reasons for this judgment, two of which directly relate to the division of jurisdiction between the administrative court and the civil court: i) preventing that parties need to litigate again on an issue that has already been decided on in a judicial process with sufficient guarantees; ii) preventing divergent judgments of the civil court in areas that are within the competence of the administrative court; and, iii) preventing that the civil court must adjudicate issues that are typically within the competence of the administrative court.⁴³ In legal literature these reasons are summarised as: legal certainty, the idea of concordance (*concordatiegedachte*), and the idea of specialisation (*specialisatiegedachte*).⁴⁴

The principles advocated by the Supreme Court in *Heesch/Van de Akker* and *Van Gog/Nederweert* are referred to as the 'proper application' of the principle of *formele rechtskracht* (*eigenlijke werking van de formele rechtskracht*) and the 'improper application' of the principle of *formele rechtskracht* (*oneigenlijke werking van de formele rechtskracht*), respectively. These principles, together hereinafter referred to as the principle of *formele rechtskracht*, are central to the interaction between an action for annulment and an action for damages. The proper application of the principle entails that where an administrative judicial process with sufficient guarantees has been available to challenge a reviewable act which has not been used or has been used unsuccessfully, the civil court must assume the reviewable act's lawfulness, both with respect to its content and its formation.⁴⁵ The improper application of the principle of *formele rechtskracht* is the mirror image of the former: where a reviewable act has been considered unlawful and therefore has been annulled in an action for annulment, the civil court must assume the act's unlawfulness.⁴⁶

The principle of *formele rechtskracht* thus seeks to preclude 'reopening' litigation via an action for damages over an act and its formation that has become definitive. Where the principle applies,⁴⁷ an action for damages will be

41 Hoge Raad 16 May 1986 ECLI:NL:HR:1986:AC9347 (*Heesch/Van de Akker*), para 3.3.2: 'Voorop moet worden gesteld dat wanneer tegen een beschikking een met voldoende waarborgen omklede administratiefrechtelijke rechtsgang heeft opengestaan (zoals die ingevolge de Wet Arob), de burgerlijke rechter, zo deze beroepsgang niet is gebruikt, in geval de geldigheid van de beschikking in het voor hem gevoerde geding in geschil is, ervan dient uit te gaan dat die beschikking zowel wat haar wijze van tot stand komen als wat haar inhoud betreft in overeenstemming is met de desbetreffende wettelijke voorschriften en algemene rechtsbeginselen.'

42 Hoge Raad 31 May 1991 ECLI:NL:HR:1991:ZC0261 (*Van Gog/Nederweert*).

43 Hoge Raad 31 May 1991 ECLI:NL:HR:1991:ZC0261 (*Van Gog/Nederweert*), para 3.4.

44 Marseille & Tolsma 2022, p. 407 with reference to Mok & Tjittes 1995, p. 385.

45 Hoge Raad 16 May 1986 ECLI:NL:HR:1986:AC9347 (*Heesch/Van de Akker*), para 3.3.2. See Sluysmans 2015, III.b.33.2 (online).

46 Polak 2019, p. 14 with reference to Mok & Tjittes 1995, p. 383 et seq.

47 In Dutch case law, a number of exceptions to the principle of *formele rechtskracht* was developed, see Marseille & Tolsma 2022, p. 410 et seq.

dismissed, either due to inadmissibility or on substantive grounds.⁴⁸ One may distinguish between the situation where an administrative judicial process has not been used and where an administrative judicial process has been used unsuccessfully. In the first situation, the principle of *formele rechtskracht* applies. *Formele rechtskracht* relates to the act. In the latter situation, the principle of *gezag van gewijsde* applies, in other jurisdictions commonly known as the principle of *res judicata*. The principle of *gezag van gewijsde* will not relate to the act, but to the decision by an administrative court. I will refer to both principles together as the principle of *formele rechtskracht*.

The principle of *formele rechtskracht* constitutes a relative concept.⁴⁹ The Dutch Supreme Court held in *Montenegro c.s./Staat* that it may not be invoked against parties that did not have the opportunity to challenge the act.⁵⁰ Yet, the principle may be invoked against other interested parties that had the possibility to challenge the act.⁵¹ An exception to the principle of *formele rechtskracht* arises where the applicant may have assumed that he did not qualify as an interested party.⁵² This exception arose in *X/DNB*, in which a candidate-director of a bank did not challenge the DNB decision addressed to the bank rejecting the application for obtaining a statement of no rejection.⁵³ The candidate-director inferred from the case law as well as from DNB communications that he would not qualify as an interested party, as he would merely have a 'derivative interest'. Yet, somewhat later, the Dutch Trade and Industry Appeals Tribunal took a different path, qualifying candidate-directors as interested parties. The Supreme Court held that in these circumstances, an exception applies to the principle of *formele rechtskracht*.⁵⁴ The action for damages instituted by the candidate-director therefore could not be dismissed on the basis of the principle of *formele rechtskracht*.

Due to the relative nature of the concept of *formele rechtskracht*, changes in case law regarding which parties qualify as interested parties under Dutch administrative law have a direct effect on the availability of an action for damages. This interaction between case law on legal standing and the availability of an action for damages is of particular relevance in light of recent developments concerning the 'derivative interest' (*afgeleid belang*)

48 The case law is not consistent on the consequences of the principle of *formele rechtskracht*, see Marseille & Tolsma 2022, p. 399-404. AG Keus argues in his Opinion in *Euroase hotel Bergen* that an action for damages should be dismissed on substantive grounds in case of *formele rechtskracht*, and not lead to inadmissibility, see Opinion AG Keus in Hoge Raad 9 November 2007 ECLI:NL:PHR:2007:BB3776 (*Euroase hotel Bergen*), para 2.3.

49 Polak 2022, para 8.8.

50 Hoge Raad 20 November 1987 ECLI:NL:HR:1987:AD6026 (*Montenegro c.s./Staat*), para 3.1.

51 Hoge Raad 8 September 1995 ECLI:NL:HR:1995:ZC1799 (*Utrecht/Budinovski*), para 3.3.1.

52 Further on this exception to the principle, see Marseille & Tolsma 2022, p. 410 et seq.

53 Hoge Raad 23 February 2007 ECLI:NL:HR:2007:AX3070 (*X/DNB*).

54 Hoge Raad 23 February 2007 ECLI:NL:HR:2007:AX3070 (*X/DNB*), para 3.3-3.4.

doctrine.⁵⁵ It was submitted in Chapter 5 that AG Widdershoven's interpretation of the derivative interest doctrine, which is currently applied by the Dutch Trade and Industry Appeals Tribunal,⁵⁶ could potentially lead to an expansion of the group of interested parties in financial supervision, by encompassing shareholders and directors of a credit institution that is the addressee of a supervisory decision.⁵⁷ The 2007 Supreme Court judgment *X/DNB* confirms the importance of developments in administrative law concerning the concept of interested parties for non-contractual liability cases in the area of financial supervision.⁵⁸

6.2.3 EU law and Dutch law: different degrees of independence

What may be inferred from a comparison between the approaches regarding the interaction between an action for annulment and an action for damages taken in EU law and Dutch law, is that due to the division of jurisdiction between the administrative courts and the civil courts under Dutch law, the interaction between the two remedies in the Netherlands has been shaped by this division and its effectiveness. Starting point in Dutch case law is that adjudicating the lawfulness of a reviewable act and its formation is an administrative court competence *par excellence*. In an action for damages, therefore, application of the principle of *formele rechtskracht* leads to dismissing an action for damages instituted against a reviewable act that has become definitive. EU case law leaves more room for instituting an action for damages against an EU act that has become definitive by choosing a criterium of 'abuse of process' for assessing whether an action for damages is available to an applicant. The action for damages is thus accorded a higher degree of independence under EU law, than under Dutch law. Furthermore, provided, as was argued above, that the *TWD Textilwerke Deggendorf* criteria govern the availability of an action for damages to a certain applicant, EU law seems to be more lenient in allowing for an action for damages where an applicant could have challenged the relevant act via an action for annulment. An action for damages under EU law is open to applicants for whom access to an action for annulment was not crystal clear, whereas under Dutch law applicants may utilise an action for damages where they may have assumed that they did not qualify as an interested party, for example because at the time of the adoption of the administrative act they did not yet qualify as an interested party.

55 More extensively on this doctrine, see Ch. 5, para 5.4.5.4.3.

56 The Dutch Trade and Industry Appeals Tribunal is the highest administrative court that is competent in actions for annulment brought against DNB supervisory decisions.

57 See Ch. 5, para 5.4.5.4.3-5.4.5.5.

58 Hoge Raad 23 February 2007 ECLI:NL:HR:2007:AX3070 (*X/DNB*).

6.3 DIVISION OF JURISDICTION IN SUPERVISORY LIABILITY DISPUTES CONCERNING SSM COMPOSITE PROCEDURES

6.3.1 General

Article 268 in conjunction with Article 340 TFEU codifies the EU Courts' jurisdiction over the non-contractual liability of the EU and the ECB. From Article 286 TFEU read in conjunction with Article 274 TFEU, it follows that the jurisdiction is exclusive.⁵⁹ This exclusivity also follows from Article 35.1 ESCB Statute. It precludes the possibility of bringing an action for non-contractual liability of the ECB before the national courts.⁶⁰ The EU Courts do not have the competence to adjudicate an action for damages against a Member State or Member State authority.⁶¹ Such an action for damages must thus be instituted before the competent national courts. As a result of the division of jurisdiction between the national courts and the EU Courts, an action for non-contractual liability against both an NCA and the ECB cannot be brought in a single action before a national court nor before the EU Courts.⁶²

6.3.2 Jurisdiction of EU Courts

6.3.2.1 *General*

Pursuant to Article 268 TFEU in conjunction with Article 340(3) TFEU, the EU Courts have jurisdiction over disputes involving the non-contractual liability of the ECB. A decisive element for the EU Courts' jurisdiction and thus for their approach to the division of jurisdiction between the national courts and the EU Courts, is that the damage is 'caused' by the ECB (or by its servants in the performance of their duties), meaning that the act causing the damage must be attributable to the ECB.⁶³ The first instance court for actions for damages instituted by natural or legal persons against the ECB is the General Court.⁶⁴ General Court decisions are subject to a right of appeal to the Court of Justice.⁶⁵

⁵⁹ Craig & De Búrca 2020, p. 634. See also Oliver 1997, p. 286.

⁶⁰ See also Oliver 1997, p. 286.

⁶¹ Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85, para 18; Craig & De Búrca 2020, p. 634; Oliver 1997, p. 287.

⁶² For this finding regarding an action against the Member State and the EU, see Oliver 1997, p. 286-287 and Wils 1992, p. 193.

⁶³ Cf. Fines 1997, p. 17.

⁶⁴ Art. 256(1), first subpara, TFEU in conjunction with Art. 51 Statute of the CJEU.

⁶⁵ Art. 256(1), second subpara, TFEU.

6.3.2.2 Jurisdiction where the ECB applies national law

The EU Courts' jurisdiction in an action for damages where the ECB applied national law may be disputed. In legal literature, two approaches may be discerned: an institutional approach and a substantive approach.⁶⁶ The institutional approach focuses on the institution responsible for the action, whereas the substantive approach focuses on the law applied in that action, EU or national.⁶⁷ Following the institutional approach, the EU Courts have jurisdiction, regardless of the law applied. The substantive approach leads to the EU Courts having jurisdiction when EU law is applied and to Member State courts' jurisdiction when national law is applied. An argument for adopting the substantive approach would be that where 'the ECB wades into national legal territory, it must also account nationally'.⁶⁸ I do not find this a convincing argument.⁶⁹ As the *Foto-Frost* judgment shows, the Court, for the assessment of the validity of Union acts attaches great importance to uniformity and centralisation.⁷⁰ Moreover, Article 268 in conjunction with Article 340(3) TFEU and Article 274 TFEU makes clear that the EU Courts has exclusive jurisdiction over disputes concerning the non-contractual liability of the ECB, regardless of the law applied by the ECB. These provisions exclude national jurisdiction. Although, arguably at the time of drafting these provisions it was not foreseen that an EU institution would apply national law, this development in my view cannot lead to the conclusion that the EU Courts would not have jurisdiction where the ECB in the application of national law caused any damage.⁷¹

In Chapter 5, it was already argued that the law the ECB applies is not decisive for whether or not the EU Courts have jurisdiction. This follows from the formulation of Article 263 TFEU. This may also be inferred from the *Berlusconi* case in which the Court, at least with regard to an action for annulment, adopts an institutional approach.⁷² Even though substantive national law was applied in the SSM composite procedure, the Court assumed exclusive jurisdiction over the entire decision-making procedure. The same must be concluded from the judgments in *Caisse régionale de crédit agricole mutuel Alpes Provence*⁷³ and *Crédit mutuel Arkéa*.⁷⁴ However, the application of substantive national law by the ECB does not imply that

66 Extensively on these approaches, see Almhofer 2018, p. 135-141.

67 Almhofer 2018, p. 135.

68 See Ter Kuile, Wissink & Bovenschen 2015, p. 181.

69 Neither do Ter Kuile et al, see Ter Kuile, Wissink & Bovenschen 2015, p. 183.

70 Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452, para 15.

71 For this analysis for judicial review of ECB acts in the application for national law, see Ch. 5, para 5.3.2.2.2.

72 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

73 Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* ECLI:EU:T:2018:219.

74 Case T-712/15 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:900; Joined Cases C-152/18 P and C-153/18 P *Crédit mutuel Arkéa v ECB* ECLI:EU:C:2019:810.

the ECB's act will be assessed against the complete scope of national law, including national general administrative law and national general principles of administrative procedure, because the ECB is not required under Article 4(3) SSM Regulation to apply national procedural law and national principles of good governance.⁷⁵ Rather, also in situations where substantive national law is applied, the conduct of an EU institution will be assessed on the basis of EU procedural law and general principles, of course in addition to assessing the ECB's compliance with the substantive national law it was required to apply.

Similar conclusions may be inferred from *Ledra Advertising*, a case concerning the non-contractual liability of the ECB and the Commission in the context of the European Stability Mechanism (ESM).⁷⁶ The ESM does not form part of the EU, but the ESM Treaty does assign tasks to the ECB and the Commission. The Court in *Ledra Advertising* 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 the FEU Treaties'.⁷⁷ Transposing this judgment to the ECB's application of national law: the ECB, regardless of its application of national law, remains to be bound to the tasks, powers and responsibilities that are laid down in EU law and are to be assessed by the EU Courts.

6.3.3 Jurisdiction of Dutch courts

6.3.3.1 General

Pursuant to the EU principle of national procedural autonomy, it is for the Member States to determine which national court is competent to adjudicate an action for damages against the Member State or a Member State authority. In the Netherlands, an action for damages against DNB may in principle be instituted at either the competent administrative court or the competent civil court. The competent administrative court is the district court of Rotterdam.⁷⁸ The competent civil court is the district court of

⁷⁵ Lackhoff 2017, p. 108.

⁷⁶ Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701.

⁷⁷ Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701, para 56.

⁷⁸ Art. 8:90(1) GALA in conjunction with Art. 7 Specification of Jurisdiction of Administrative Courts (*Bevoegdheidsregeling bestuursrechtspraak*) (appendix 2 of GALA). The district court of Rotterdam (*Rechtbank Rotterdam*) is competent in actions for annulment instituted against decisions adopted on the basis of the Dutch Financial Supervision Act. A small number of exceptions however apply, see Art. 7 Specification of Jurisdiction of Administrative Courts (*Bevoegdheidsregeling bestuursrechtspraak*) (appendix 2 of GALA) under 'Wet op het financieel toezicht'.

Amsterdam (*rechtbank Amsterdam*).⁷⁹ For the civil court to assume jurisdiction, it suffices that the applicant institutes an action for damages on the basis of Article 6:162 BW.⁸⁰

The division of jurisdiction between the administrative courts and the civil courts is governed by Article 8:88 and 8:89 GALA and is highly complex. Pursuant to Article 8:88 GALA, an interested party may request the administrative court to award damages for damage that is incurred or will be incurred as a result of, *inter alia*, a wrongful reviewable act (that is either annulled by the administrative court or withdrawn by the administrative authority due to grounds of lawfulness⁸¹) and a wrongful act that is preparatory to a wrongful reviewable act. The administrative court has jurisdiction in an action for damages if the damages claimed do not exceed the amount of EUR 25.000,-.⁸² In situations where the damages claimed amount to EUR 25.000,- or less, the civil court has parallel jurisdiction. If the amount claimed is higher than EUR 25.000,-, the administrative court does not have jurisdiction. The civil court has jurisdiction instead. It has been held by the Administrative Law Section of the Dutch Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) that an applicant may limit its claim to EUR 25.000,- to gain access to the administrative court.⁸³ In as far as the damage incurred exceeds this amount, the applicant may institute a separate action for annulment at the civil court. The Administrative Law Section of the Dutch Council of State held that the civil court is not bound by the administrative court's judgment in adjudicating the claim exceeding the claim that is adjudicated by the administrative court.⁸⁴

As in the context of the SSM it is unlikely that the damages claimed will be lower or equal to EUR 25.000,-, in this chapter I will focus on the civil court adjudicating an action for damages.

6.3.3.2 Implications of Berlusconi for national jurisdiction in cases where damage results from a DNB preparatory act

In *Berlusconi*, the Court created a single judicial review under Article 263 TFEU for bottom-up composite procedures in which an EU authority has

79 Art. 99(1) Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) in conjunction with Art. 1:10(2) Dutch Civil Code (*Burgerlijk Wetboek*).

80 Marseille & Tolsma 2022, p. 397-398.

81 Scheltema, *GS Onrechtmatige daad*, V.1.2.3.2 (online, updated 23 December 2022).

82 Article 8:89(2) GALA.

83 Afdeling bestuursrechtspraak van de Raad van State 2 August 2017 ECLI:NL:RVS:2017:2081, para 9.3 et seq.

84 Afdeling bestuursrechtspraak van de Raad van State 2 August 2017 ECLI:NL:RVS:2017:2081, para 9.12. Kortmann criticises this consideration for being an empty consideration, as he argues that the issue is not within the competence of the Administrative Law Section of the Dutch Council of State and because he considers it unlikely that the civil court will deviate from the administrative court's judgment, see Kortmann 2017, para 10-13.

exclusive decision-making power.⁸⁵ National courts are precluded from ‘reviewing the legality’ of national preparatory decisions.⁸⁶ To what extent does this principle of a single judicial review in bottom-up composite procedures apply to non-contractual liability in these procedures?

The *Berlusconi* judgment could be interpreted strictly or broadly. A strict interpretation would preclude a national action for annulment but would in principle allow for an action for damages under national law, as the latter does not constitute ‘reviewing the legality’. Moreover, due to the nature of an action for damages, in a successful action the national preparatory act will not be annulled, which would prevent that the ECB final decision turns out to be based on a void and thus ‘non-existent’ national draft decision. Therefore, an action for damages does not pose similar risks to the EU principle of autonomy of EU law as an action for annulment would.

A broad interpretation would take into account the considerations of the Court to introduce a single judicial review for such composite procedures. More specifically, it held that a single judicial review seeks to mitigate ‘the risk of divergent assessments in one and the same procedure’.⁸⁷ The Court in that regard also speaks in the more general terms ‘national remedies against preparatory acts or proposals’,⁸⁸ which could encompass actions for damages in relation to DNB preparatory acts. Furthermore, one could argue that separating between the action for annulment, to be brought at the EU level, and the action for damages, to be brought at the national level, in relation to NCA preparatory acts would hamper the ‘effectiveness’ and ‘coherence’ of the EU system of remedies.⁸⁹

Nevertheless, such a broad interpretation would stretch the Court’s judgment well beyond its scope, which is exclusively concerned with Article 263 TFEU and not with an action for damages. Furthermore, the Court’s perception of a damages action as an independent remedy reinforces a strict interpretation. Additionally, where the EU Courts lack jurisdiction in an action for damages against an NCA preparatory act, this will not result in a gap in judicial protection, as such an action can be brought before the national courts. Given the preceding analysis, I would advocate a strict interpretation. It is important to note, however, that this stance does not preclude the possibility of the Court subsequently expanding its *Berlusconi* doctrine by introducing a centralised action for damages, encompassing both the ECB final act and any NCA preparatory acts.⁹⁰

85 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

86 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 59.

87 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 50.

88 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 50.

89 Cf., in relation to both actions in matters of common foreign and security policy, see Opinion AG Hogan in Case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:396, para 63, 67–68.

90 Such an expansion of the *Berlusconi* doctrine constitutes one of the recommendations outlined in Ch. 7, see para 7.3.3.3.3.

As explained above, the prohibition introduced with *Berlusconi* for national courts to carry out a legality review of national preparatory acts does in my view not prohibit national courts from adjudicating an action for damages involving such acts. However, even though *Berlusconi* does not directly affect national jurisdiction in actions for damages, I believe that it may affect national jurisdiction indirectly, via the principle of *formele rechtskracht*. I believe the argument could be made that an EU Court judgment upholding an ECB final decision or not using an action for annulment against an ECB final decision may lead to *formele rechtskracht* of the NCA proposal or draft decision vis-à-vis parties that qualify as interested parties under Article 263 TFEU. The *formele rechtskracht* of an ECB final decision can however not be invoked against parties not qualifying as interested parties in an EU action for annulment. I will substantiate my view directly below.

As follows from *Berlusconi*, the EU Courts' exclusive jurisdiction under Article 263 TFEU encompasses both the ECB final act and any national preparatory acts, most notably the NCA draft decision. The principle of *formele rechtskracht* has been developed within a purely national context, taking into account the division of jurisdiction between the Dutch administrative courts on one hand and the Dutch civil courts on the other. But even though issues concerning the principle of *formele rechtskracht* in principle lie within the national procedural autonomy of the Member States, the EU principles of sincere cooperation,⁹¹ equivalence and effectiveness in my view require an EU Court judgment be accorded at least similar status to that of a national administrative court decision. Categorically not according *formele rechtskracht* to a national act where EU Courts adjudicate the case, whereas that would be the case where a national administrative court upheld the decision, would lead to the unequal treatment of EU Courts and national courts. Moreover, not according *formele rechtskracht* would hamper the effectiveness of EU law. Thus, I believe EU law requires the principle of *formele rechtskracht* to be applied in situations where jurisdiction over national preparatory acts lies with the EU Courts equally to how it would be applied if jurisdiction would have lied with the national courts.

Following this argument, DNB draft decisions may be 'covered' by the *formele rechtskracht* of the ECB final decision. Where a DNB preparatory act is covered by the *formele rechtskracht* of the ECB final decision, it in principle will not be possible for the addressee of the decision and other parties that qualify as interested parties under Article 263 TFEU to institute an action for damages at the national level against that DNB preparatory act.

To what extent DNB preparatory acts may be covered by the *formele rechtskracht* of the ECB final decision will depend on whether a specific DNB preparatory act is so closely related to ECB final decision, that it must be considered to be of a dependent nature. This criterium is commonly referred to in legal literature as the 'connection criterium' (*samenhangcriterium*).⁹²

91 Art. 4(3) TEU.

92 See, e.g., Van der Grinten 2008.

Below, the connection criterium will be discussed in relation to an NCA draft decision preceding an ECB final decision.

6.3.3.3 *Scope of the principle of formele rechtskracht in relation to DNB draft decisions: 'connection criterium'*

As argued above, the principle of *formele rechtskracht* may be applied in SSM composite procedures that are within the exclusive jurisdiction of the EU Courts and, more specifically, in a national action for damages under Dutch law instituted by parties qualifying as interested parties in an EU action for annulment against the final ECB decision. But to what extent may the *formele rechtskracht* of an ECB final decision extend to the DNB draft decision preceding it?

The scope of the principle of *formele rechtskracht* extends to both the final decision and its formation (*wijze van totstandkoming*).⁹³ Yet the principle of *formele rechtskracht* in principle only extends to the final decision itself, and not to any preparatory acts (*voorbereidingshandelingen*) preceding that final act.⁹⁴ These preparatory acts may involve all kinds of acts and factual conduct by an administrative authority preceding the final decision, including for example the provision of (incorrect) information (*inlichtingen*) and commitments (*toezeggingen*).⁹⁵

An exception to the rule that the *formele rechtskracht* of a final decision does not cover preparatory acts was formulated by the Dutch Supreme Court in *Kuijpers/Valkenswaard*.⁹⁶ It held that the principle of *formele rechtskracht* in principle extends to preparatory acts that are so closely related to the final decision, that they are considered to be of a dependent nature.⁹⁷ The criterium to assess whether a specific preparatory act is covered by the *formele rechtskracht* of the final decision is the 'connection criterium'. A key element of the connection criterium is whether the preparatory act is unlawful independently from the final decision.⁹⁸ However, that a preparatory act is unlawful independently from the final decision not necessarily means that it does not meet the connection criterium,⁹⁹ and on that basis may be covered by the *formele rechtskracht* of the final decision. A preparatory act

93 Hoge Raad 16 May 1986 ECLI:NL:HR:1986:AC9347 (*Heesch/Van de Akker*), para 3.3.2.

94 Hoge Raad 26 November 1999 ECLI:NL:HR:1999:AA3382 (*Noord-Brabant/Janse*), para 3.4. See also Van Triet 2023, p. 105

95 See Opinion AG Keus in Hoge Raad 9 November 2007 ECLI:NL:PHR:2007:BB3776 (*Euroase hotel Bergen*), para 2.22. See also Van der Grinten 2008, para 5.1.

96 Hoge Raad 9 September 2005 ECLI:NL:HR:2005:AT7774 (*Kuijpers/Valkenswaard*).

97 Hoge Raad 9 September 2005 ECLI:NL:HR:2005:AT7774 (*Kuijpers/Valkenswaard*), para 3.4: 'Inlichtingen die zozeer samenhangen met het beoogde besluit, dat zij ten opzichte daarvan een onzelfstandig karakter dragen'. See also Opinion AG Keus in Hoge Raad 9 November 2007 ECLI:NL:PHR:2007:BB3776 (*Euroase hotel Bergen*), para 2.22.

98 Hoge Raad 9 September 2005 ECLI:NL:HR:2005:AT7774 (*Kuijpers/Valkenswaard*), para 3.4. See Van der Grinten 2008, para 5.3.

99 Van der Grinten 2008, para 6.

is unlawful independently from the final decision where awaiting the final decision is not necessary for assessing the preparatory act's (un)lawfulness.¹⁰⁰ An example of such a situation is the provision of incorrect information by an administrative authority on the interpretation of legislation.¹⁰¹

To answer the question whether DNB draft decisions will be covered by the *formele rechtskracht* of an ECB final decision, it must be assessed whether the DNB draft decision is so closely related to the ECB final decision, that it must be considered to be of a dependent nature. In my view, this question must be answered in the affirmative.

Firstly, in short, the rationale of the principle of *formele rechtskracht* is that issues for which the administrative courts provide judicial protection, must be litigated at the administrative courts and not at the civil courts. As stated above, the ideas underlying this objective are legal certainty, concordance and specialisation. As was held in *Berlusconi*, the jurisdiction of the EU Courts in an action for annulment extends to NCA preparatory acts, and most notably the NCA draft decision. Thus, judicial protection against a DNB draft decision is available at the EU judicial level in an action for annulment instituted against the ECB final decision. In my view, the argument could thus be made that with the availability of judicial review of the DNB draft decision via an action for annulment against the ECB final decision, an administrative legal procedure with sufficient guarantees has been available to challenge the national draft decision and that, therefore, the civil court must in principle assume the validity of the DNB draft decision where an ECB final decision has become definitive. It must be added that although, considering the EU Courts' jurisdictional limits, not all national errors may lead to illegality of the ECB final decision, that circumstance may not lead to the principle of *formele rechtskracht* not extending to a DNB preparatory act.¹⁰² Thus, even though certain errors committed by DNB may remain without consequences for the validity of the ECB final decision in an action for annulment, these errors may not purely on that basis be challenged at the national level in an action for damages. This may in my view be argued by an analogous application of AG Keus' reasoning in *Euroase hotel Bergen*: The circumstance that commitments that are not unlawful independently from the final decision may not have consequences for the validity of the final decision in an action for annulment, will not prevent the *formele rechtskracht* from extending to these commitments.¹⁰³

Secondly, applying the connection criterium to a DNB draft decision in my view leads to the conclusion that it is so closely related to the ECB final decision, that it must be considered to be of a dependent nature. First of all,

100 Van der Grinten 2008, para 5.3.

101 Van der Grinten 2008, para 5.3.

102 See further para 6.7.7.2, where this situation is assessed in light of the right to adequate access to court.

103 AG Keus in Hoge Raad 9 November 2007 ECLI:NL:PHR:2007:BB3776 (*Euroase hotel Bergen*), para 2.23. See also Van der Grinten 2008, para 5.4.1.

the circumstance that the draft decision is adopted by a different authority than the final decision-maker does not automatically lead to a draft decision not qualifying as dependent. This may be inferred from the Supreme Court case *Chipshol/Luchtverkeersleiding Nederland*, that concerned communications by Air Traffic Control the Netherlands (*Luchtverkeersleiding Nederland*, LVNL), an administrative authority responsible for air traffic safety, and a final decision by the municipality of Haarlemmermeer.¹⁰⁴ The circumstance that certain conduct is demonstrated by a different administrative authority than the authority taking the final decision may be relevant for the question whether that conduct (or: preparatory act) must be considered dependent from the final decision, but is not decisive in itself.¹⁰⁵ Moreover, in the selected SSM bottom-up composite procedures, the NCA draft decision and the ECB final decision are inextricably linked and the SSM Regulation codifies the NCA draft decision as a fixed element of the decision-making procedure. Furthermore, an NCA draft decision constitutes an explicit element of the formation of the ECB final decision as the ECB takes the draft decision into account in its final decision-making and may be said to incorporate the draft decision into its final decision.¹⁰⁶

Therefore, in sum, I believe that the *formele rechtskracht* of the ECB final decision is very likely to extend to the NCA draft decision adopted in preparation of the ECB decision. The NCA's draft decision or proposal must in my view be considered so closely related to the ECB final decision, that it is of a dependent nature. Furthermore, as was held in *Berlusconi*, judicial protection against a DNB draft decision is available at the EU Courts via an action for annulment against the ECB final decision, emphasising that national civil courts must in principle assume the validity of the DNB draft decision where an ECB final decision has become definitive.

6.3.3.4 Interim conclusion

In my view, EU law, more specifically the principles of sincere cooperation, equivalence and effectiveness, requires the principle of *formele rechtskracht* to be applied in the '*Berlusconi* situation', i.e. where the judicial review of DNB preparatory acts is an exclusive EU Court competence. Because the DNB draft decision must in my view on the basis of the 'connection criterium' developed in Dutch case law be considered so closely related to the ECB

104 Hoge Raad 25 May 2012 ECLI:NL:HR:2012:BU9920 (*Chipshol/Luchtverkeersleiding Nederland*).

105 The circumstance is one of the factors taken into account by the Court of Appeal, see Gerechtshof Amsterdam 15 December 2009 ECLI:NL:GHAMS:2009:BK6541 (*Chipshol/Luchtverkeersleiding Nederland*), para 4.38.

106 See Ch. 4, para 4.3.5.3.3. See also Mok, who in his case note on *Chipshol/Luchtverkeersleiding Nederland* argues that where an administrative authority prior to adopting a decision is advised by an expert, that advice is 'incorporated' into the final decision, regardless of whether the advice is followed by the final decision-making authority, and therefore is covered by the *formele rechtskracht* of that final decision, see Mok 2012, para 2.

final decision that it is of a dependent nature, the *formele rechtskracht* of the ECB final decision in principle extends to DNB draft decisions. As a result, DNB draft decisions in principle cannot be challenged via a national action for damages by parties that would have qualified as an interested party in an action for annulment against the ECB final decision where the latter decision has become definitive. As a rule, an ECB final decision becomes definitive if the decision is upheld in an action for annulment or because the time limit is exceeded.

As the principle of *formele rechtskracht* applies to bottom-up SSM composite procedures that are within the exclusive competence of the EU Courts, a national action for damages against DNB draft decisions may not offer an independent, alternative route to an action for annulment at EU level against the ECB decision and any DNB draft decisions where it concerns parties that qualify as interested parties under EU law. These conclusions are applicable to, *inter alia*, applicants in a credit institution authorisation procedure, provided that the ECB adopted the final decision, applicants in a procedure for the authorisation of qualifying holdings and to credit institutions the banking license of which was withdrawn, as to these decision-making procedures the principle of a single judicial review applies. A national action for damages instituted by these parties will under Dutch law be dismissed i) where the EU annulment route is still available, ii) where an action for annulment has been unsuccessful, and iii) where an action for annulment has not been instituted within the time limit. To such parties, a national action for damages thus may only provide additional judicial protection conditional upon annulment of the ECB final decision or withdrawal by the ECB. Consequently, in SSM bottom-up composite procedures, obtaining monetary compensation from DNB probably requires litigating the case twice, at the EU level and at the national level. However, such a national action for damages may not be necessary, if full compensation may be obtained in an action for damages against the ECB.

It is conceivable that not all Member States have a principle similar to the Dutch principle of *formele rechtskracht*. Therefore, it may well be possible that in other Member States, an action for damages can be instituted against the relevant NCA, independently of the availability of an action for annulment at the EU level. This situation may lead to substantial differences in judicial protection of individuals against SSM composite procedures in the various Member States. Furthermore, due to the relative nature of the principle of *formele rechtskracht*, the situation will arise that parties that are not the addressee of the final ECB decision in question, for instance the bank's management, its shareholders and bondholders where a credit institution's license is withdrawn, will have access to a national action for damages. This situation may lead to diverging judgments, for instance, if the national court finds that DNB acted unlawfully by infringing certain procedural requirements, whereas the EU Courts in an action for annulment after examining the national phase of the decision-making procedure does not establish any procedural errors.

6.4 LEGAL FRAMEWORK FOR THE DIVISION OF LIABILITY BETWEEN THE ECB AND NCAs IN NON-CONTRACTUAL LIABILITY CASES CONCERNING SSM COMPOSITE PROCEDURES

6.4.1 General

For the division of jurisdiction in practice between the EU Courts and national courts in non-contractual liability cases, the division of liability between the ECB and the NCAs that follows from the legal framework for non-contractual liability must be analysed. This division of liability mainly revolves around the requirements of an illegal act and a causal link, which are particularly relevant to the division of liability in composite procedures. As situations may arise where both the ECB and DNB may be held liable, the EU concept of joint liability will be discussed, which is relevant to the division of jurisdiction between national courts and EU Courts in SSM composite procedures.

6.4.2 ECB liability

6.4.2.1 Legal basis and liability requirements

The legal basis for non-contractual liability of the European Union is codified in Article 340(2) TFEU, which states that in case of non-contractual liability, the EU shall in accordance with the general principles common to the laws of the Member States make good any damage caused by its institutions or by its servants in the performance of their duties. Article 340 TFEU must be distinguished from the principle of Member State liability or *Francovich* liability, although both actions have been synchronised with *Brasserie du Pêcheur*.¹⁰⁷ Non-contractual liability of the ECB is codified separately in Article 340(3) TFEU. That provision is considered a *lex specialis* of Article 340(2) TFEU.¹⁰⁸ That the ECB's non-contractual liability is regulated in a separate paragraph may be explained by the fact that the ECB has its own budget. Any compensation is at the expense of the ECB's budget, whereas the European Union budget will be used when any of the other EU institutions is ordered to pay compensation. Furthermore, the ECB does not represent the EU, but rather the eurozone Member States, whereas the other EU institutions represent the whole European Union.¹⁰⁹ In addition, the ECB is the only EU institution listed in Article 13(1) TEU that has legal personality. The ECB's legal personality has been established by Article 282(3) TFEU and Article 9.1 ESCB Statute.

¹⁰⁷ Joined Cases C-46 and 48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79.

¹⁰⁸ Almhofer 2018, p. 118, 146.

¹⁰⁹ Almhofer 2018, p. 147.

Article 340(2) and 340(3) TFEU read as follows:

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The provisions cited above do not further elaborate on the requirements for liability of the EU and the ECB. Therefore, it is left for the EU Courts to develop a liability regime that is ‘in accordance with the general principles common to the laws of the Member States’. Türk refers to the provision’s reference to general principles common to the Member States as ‘a creative mandate to develop such principles on the basis of a comparative approach’.¹¹⁰

The substantive liability requirements for non-contractual liability of the EU and the ECB have been developed in case law. Case law on non-contractual liability has been shaped mainly in cases where other EU institutions than the ECB were involved. Yet, this case law may *mutatis mutandis* be applied to non-contractual liability of the ECB.¹¹¹

In *Lütticke*, the Court formulated three conditions for non-contractual liability of the EU: an illegal act (which requires an act that is attributable to the EU or ECB and illegality), actual damage and a causal link between the damage and the illegal act.¹¹² These three conditions have been further elaborated in EU case law and together form an extensive set of rules for establishing EU liability.¹¹³

6.4.2.2 Attributable act

6.4.2.2.1 Attribution

For establishing non-contractual liability of the EU and the ECB and for the EU Courts’ jurisdiction over non-contractual liability cases under Article 268 TFEU, the damage claimed must in accordance with Article 340 TFEU be ‘caused’ by it or by its servants in the performance of their duties. This requirement is to be understood as such that an act allegedly causing the damage is attributable to the EU or the ECB. The requirement of attribution is an essential element of the EU Courts’ jurisdiction in non-contractual liability cases. Where both a Member State and the EU are involved, attribu-

¹¹⁰ Türk 2009a, p. 240.

¹¹¹ See Case T-79/13 *Accorinti v ECB* ECLI:EU:T:2015:756, para 65.

¹¹² Case 4/69 *Lütticke GmbH v Commission* ECLI:EU:C:1971:40, para 10.

¹¹³ Türk 2009a, p. 241.

tion has proven to be a central element of the EU Courts' approach to the division of jurisdiction between them and the national courts.¹¹⁴ Attribution becomes particularly relevant for EU jurisdiction where an EU act is implemented by a Member State authority. For the EU Courts to assume jurisdiction, the alleged unlawful conduct must be the responsibility of the relevant EU institution and not be attributable to the Member State authority involved.¹¹⁵ Consequently, EU jurisdiction cannot be established for errors made by the relevant Member State authority in the implementation of the EU act where no responsibility of the EU exists. Where the EU Courts find that the damage is not attributable to the EU but to the Member State, it denies jurisdiction.¹¹⁶

Non-contractual liability for acts of servants of an EU institution only arises when these acts have occurred in performance of their duties.¹¹⁷ The Court held in *Sayag v Leduc* that the EU is only liable 'for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions'.¹¹⁸ These situations are to be interpreted strictly.¹¹⁹

6.4.2.2.2 Acts

EU acts against which an action for non-contractual liability can be instituted on the basis of Article 340 TFEU are to be defined broadly and are 'measures or conduct attributable to a Community institution or body'.¹²⁰ The range of acts that can be challenged via an action for damages therefore is significantly wider than those reviewable under Article 263 TFEU, the action for annulment, Article 277, the plea of illegality, and Article 267, the preliminary reference procedure.¹²¹ Core element of a reviewable act within the meaning of Article 263 TFEU is that it is intended to produce legal effects vis-à-vis third parties. That requirement generally excludes from judicial review, *inter alia*, recommendations, opinions, preparatory acts and factual conduct. Yet, these and other acts that do not produce legal effects, including omissions, can be challenged via Article 340 TFEU.

It follows from *Ledra Advertising* that acts or omissions of an EU institution that relate to an act that is not formally attributable to the relevant EU

114 Fines 1997, p. 17.

115 See, e.g., Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85, para 19.

116 Whether an act is attributable to the EU is an issue of jurisdiction, see Art. 268 TFEU: 'The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.' See, for instance, Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 20-21.

117 Türk 2009a, p. 243.

118 Case 9/69 *Sayag v Leduc* ECLI:EU:C:1969:37, para 7.

119 Türk 2009a, p. 243.

120 Türk 2009a, p. 241.

121 Türk 2009a, p. 241.

institution may still be attributable to that EU institution.¹²² *Ledra Advertising* concerned an action for damages instituted by a number of depositors, including Ledra Advertising Ltd, of two large Cypriot banks against the Commission and the ECB in relation to a Memorandum of Understanding (MoU) that was formally adopted by the European Stability Mechanism (ESM), which does not belong to the EU legal order. Both the Commission and the ECB were involved in the MoU negotiations but did not have formal decision-making powers. As the Commission nor the ECB adopted the MoU, the General Court held that the action for damages was inadmissible. The Court of Justice did not follow the General Court's judgment and considered that 'whilst such a finding [that the Commission and the ECB duties within the ESM do not entail any power to make decisions of their own and that the role of EU institutions in the ESM does not alter the nature of the acts of the ESM, that fall outside the legal order, JT] is liable to have an effect in relation to the conditions governing the admissibility of an action for annulment that may be brought on the basis of Article 263 TFEU, it cannot prevent unlawful conduct linked, as the case may be, to the adoption of a memorandum of understanding on behalf of the ESM from being raised against the Commission and the ECB in an action for compensation under Article 268 TFEU and the second and third paragraphs of Article 340 TFEU.'¹²³

6.4.2.2.3 Omissions

Omissions can also be challenged via an action for damages.¹²⁴ For an omission to qualify as a wrongful act for the purpose of Article 340 TFEU, the relevant institution must, according to settled case law, have 'infringed a legal obligation to act under a provision of Community law'.¹²⁵ Thus, it must be established that the EU institution was legally obliged to act. The existence of such a legal obligation is also required in an action for a wrongful failure to act as provided in Article 265 TFEU.¹²⁶ Yet, there is an important difference: An action for failure to act under Article 265 TFEU instituted by a natural or legal person requires that the EU institution omitted to adopt a reviewable act, i.e. an act that is intended to produce legal effects,¹²⁷ whereas this is not required for an action for damages under Article 340 TFEU.

122 Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701, para 55-61.

123 Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701, para 55.

124 Türk 2009a, p. 241.

125 Case C-146/91 *KYDEP v Council and Commission* ECLI:EU:C:1994:329, para 58. See also Case T-195/00 *Travellex and Other v Commission* ECLI:EU:T:2003:111, para 143. See Türk 2009a, p. 241.

126 Craig & De Búrca 2020, p. 569.

127 Craig & De Búrca 2020, p. 569.

In several cases concerning composite procedures, the Court had to assess whether the relevant EU institution, most often the Commission, had a legal obligation to act. An example of a case where the Court did not find a duty and, as a result, dismissed an action for damages is *Borelli*.¹²⁸ The *Borelli* case was discussed extensively in Chapter 5, focussing on the action for annulment and the doctrinal framework governing the division of jurisdiction between the national courts and the EU Court in composite procedures. The Court held that it did not have jurisdiction to review the Commission decision rejecting funding, as the Commission was bound by the negative opinion that was issued by the Italian authorities and was precluded from examining the application or undertaking an assessment of the lawfulness. The Commission did not have the power, nor a duty to act, for instance to check the lawfulness of the national opinion. Following the denial of jurisdiction in the action for annulment, the Court denied jurisdiction in the action for damages because the alleged damage had arisen as a result of the negative national opinion.¹²⁹ The damage incurred therefore was not attributable to the Commission.

Suppose the Court had found a duty for the Commission to check the lawfulness of a national opinion. In that case, the *Borelli* case could have been the basis for a situation where the Commission did not take adequate steps to prevent an infringement of EU law by a Member State, in this case Italy. This situation is commonly mentioned as one of the situations where joint liability of both the Member State and the EU may arise.¹³⁰ It could then be argued that the Commission, by rejecting the funding application, in fact, authorised a national opinion that constituted an infringement of EU law.¹³¹

Also, in *Emerald Meats*, the Court did not find a duty for the Commission.¹³² *Emerald Meats* concerned tariff quotas for frozen meat. The Commission was assigned to determine which applications for import licenses under the Community tariff quota for frozen meat should be accepted by the Member States. This determination took place on the basis of the quantities that a trader imported over the three previous years. The Member States were responsible for providing the Commission with these quantities. *Emerald Meats* instituted both an action for annulment and an action for damages against the Commission, claiming they had been granted a too small quota share due to the Irish authorities providing the Commission with erroneous data. *Emerald Meats* argued that the Commission was under a duty to check that the data provided by the national authorities was

128 Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

129 Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 20-21.

130 Oliver 1997, p. 299-303; Craig & De Búrca 2020, p. 634-636.

131 *Borelli* claimed that the national opinion was adopted in breach of Art. 9 Regulation No 355/77, see Case C-97/91 *Borelli* ECLI:EU:C:1992:491, para 7.

132 Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats v Commission* ECLI:EU:C:1993:19.

correct, where the Commission knows or should reasonably know the data is incorrect or based on an unlawful interpretation of Community legislation and could in no event constitute a valid basis for the Commission's decision. The Court, however, strictly divided the tasks and responsibilities of the Member States and the Commission. The Member States were responsible for drawing up the lists with reference quantities. The Commission's task was confined to checking whether an applicant was included in more than one list and determining which applications should be accepted by the Member States.¹³³ Thus, the Court held that the Commission did not have a duty nor a power to check the correctness of the reference quantities as provided by the national authorities.¹³⁴ In the absence of a duty, an omission could not be established, according to the Court.

Where an EU institution has been conferred wide discretionary powers, a legal obligation to act generally cannot be established.¹³⁵ In *Star Fruit Company v Commission*, for instance, the Court held that the Commission's power to commence infringement proceedings against a Member State constituted a discretionary power, not a duty.¹³⁶ Such wide discretionary powers are inherent to financial supervision, also within the SSM, especially where intervention powers are concerned. Therefore, an omission may not easily be established.

6.4.2.2.4 ECB omissions in the SSM

The ECB has been assigned various monitoring and overseeing functions and has the overall responsibility for the functioning of the SSM. Omissions in carrying out these functions vis-à-vis NCAs may give rise to ECB liability.¹³⁷ Yet, the question is whether any ECB omissions in relation to NCAs are eligible to give rise to a wrongful omission and thus could potentially give rise to the non-contractual liability of the ECB. As we have seen, it is settled case law that omissions can only give rise to EU non-contractual liability where an EU institution infringed a legal obligation to act under a provision of EU law. Thus, a legal duty to act is a prerequisite for the non-contractual liability of the ECB. More particularly, in relation to the NCAs, the ECB must have been conferred intervening powers. Where no such intervening powers exist, the EU principle of conferral precludes the ECB from exercising such powers.

133 Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats v Commission* ECLI:EU:C:1993:19, para 36.

134 Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats v Commission* ECLI:EU:C:1993:19, para 38.

135 Craig & De Búrca 2020, p. 569 and references to case law.

136 Case 247/87 *Star Fruit Company v Commission* ECLI:EU:C:1989:58, para 10-12. Also on this case, see Oliver 1997, p. 299-300. See also Case T-571/93 *Lefebvre v Commission* ECLI:EU:T:1995:163, para 60.

137 Extensively on non-contractual liability of the ECB for breach of a duty to prevent damage (*Schadensabwendungspflicht*), see Almhofer 2018, p. 186-194.

Several ECB oversight and intervention powers may be found in the SSM Regulation.¹³⁸ First of all, the ECB has been assigned the overall responsibility for the SSM's effective and consistent functioning, as laid down in Article 6(1) SSM Regulation. Yet, this overall responsibility does not confer upon the ECB a power to intervene, neither a general one, nor a specific one. Yet, Article 6(5)(b) SSM Regulation provides an intervention power to the ECB. The ECB may take over the complete supervision of an NCA at any time, 'when necessary to ensure consistent application of high supervisory standards'. This intervention power is considered a last resort, which may only be applied as an *ultimum remedium*.¹³⁹ Therefore, only under highly exceptional circumstances, Article 6(5)(b) SSM Regulation will lead to a duty to act for the ECB. In relation to significant institutions, the ECB is the direct supervisory authority and has an instruction power vis-à-vis the NCAs pursuant to Article 6(3) and Article 9(1), third subparagraph, SSM Regulation. May a duty to intervene be inferred from this instruction power? Also in this case, the general wording of the provisions in which the ECB's power of instruction has been laid down, make it unlikely that the EU Courts would infer a duty to intervene from it.

6.4.2.2.5 Attribution and legal effects

Türk posed the question of the relationship between attributability and legal effects in relation to ECB liability.¹⁴⁰ Can the ECB be held liable under Article 340 TFEU if the legal effects are attributable to another authority? He refers to the cases *Ledra Advertising*¹⁴¹ and *Accorinti v ECB*.¹⁴² These judgments answer the question posed in the affirmative: an act can be attributable to an authority, regardless of whether the legal effects are attributable to it. In *Ledra Advertising*, the relevant act concerned a Memorandum of Understanding adopted by the ESM and the Republic of Cyprus. Whilst the ECB and the Commission were involved in the memorandum negotiations, they did not have any decision-making powers in relation to it. Yet, the Court held that although these findings could have consequences for the admissibility of an action for annulment under Article 263 TFEU, it did not prevent invoking the memorandum in an action for damages against the ECB and the Commission.¹⁴³ From *Accorinti v ECB*,¹⁴⁴ Türk infers that, although that argument in that case was rejected, statements by the ECB President or an

138 See Ch. 4.

139 Almhofer 2018, p. 192.

140 Türk 2017, p. 56.

141 Joined Cases C-8/15 to C-10/15 P *Ledra Advertising and Others v Commission and ECB* ECLI:EU:T:2016:701.

142 Case T-79/13 *Accorinti v ECB* ECLI:EU:T:2015:756.

143 Joined Cases C-8/15 to C-10/15 P *Ledra Advertising and Others v Commission and ECB* ECLI:EU:T:2016:701, para 55.

144 Case T-79/13 *Accorinti v ECB* ECLI:EU:T:2015:756.

Executive Board member could give rise to legitimate expectations and therefore to non-contractual liability.¹⁴⁵ It is however doubtful whether a statement by the ECB President and especially an Executive Board member can be regarded as a statement constituting ‘precise, unconditional and consistent assurances originating from authorised and reliable sources that could have given rise to legitimate expectations’.¹⁴⁶ Yet, where these conditions for giving rise to the EU legitimate expectations doctrine are met, such statements may lead to non-contractual liability of the EU or the ECB, even though these statements do not produce legal effects.

6.4.2.3 Illegality

Only in exceptional cases a ‘simple’ illegality leads to non-contractual liability.¹⁴⁷ In EU case law, a distinction is made between discretionary and non-discretionary acts for establishing illegality.¹⁴⁸ The degree of discretion is decisive for the legal test to be applied. The conditions that apply in situations where the EU acted with a certain element of discretion, the test as formulated in *Bergaderm* applies.¹⁴⁹ Three conditions were formulated in *Bergaderm*: 1) the rule of law infringed must be intended to confer rights on individuals, 2) the breach must be sufficiently serious, and 3) there must be a direct causal link between the breach and the damage. These requirements mirror the liability requirements for Member State liability as developed in *Brasserie du Pêcheur*.¹⁵⁰ Where an EU institution only has a limited or no discretion, a mere infringement of EU law may constitute a sufficiently serious breach.¹⁵¹ Thus depending on the degree of discretion of an EU institution, the legal test is whether a sufficiently serious breach or a mere infringement of EU law has been committed. Thus, once a duty of an EU institution to exercise its powers is established, an attributable act or omission, the Court will consecutively assess whether the EU institution respected the limits of its discretionary powers.¹⁵²

Supervisory authorities, including the ECB, generally act with a large discretion, especially in the day-to-day supervision of financial institutions. Yet, in SSM composite procedures, generally detailed requirements apply, misapplication of which are not likely to qualify as acts taken within the margin of discretion of the ECB or the relevant NCA. Therefore, any ‘mere’ misapplication of law in an SSM composite procedure, is likely to already

145 Türk 2017, p. 56.

146 Case T-79/13 *Accorinti v ECB* ECLI:EU:T:2015:756, para 77.

147 Van der Woude 1997, p. 110.

148 Craig & De Búrca 2020, p. 624.

149 Case C-352/98 P *Bergaderm* ECLI:EU:C:2000:361.

150 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79.

151 Case C-352/98 P *Bergaderm* ECLI:EU:C:2000:361, para 44.

152 Van der Woude 1997, p. 109-128, in particular p. 118.

constitute a sufficiently serious breach. And thus, annulment of a final ECB decision concluding any of the bottom-up composite procedures, will probably be sufficient to establish an illegal act in an action for damages.

6.4.2.4 Causation

6.4.2.4.1 General

For non-contractual liability to arise, there must be a direct causal link between the wrongful conduct and the damage.¹⁵³ Similarly to Dutch law, the EU Courts take a two-step approach to establishing causation. The EU Courts will first assess whether the damage would have arisen without the illegal act, or in case of an omission, whether the omitted act would have prevented the damage. This assessment is comparable to the *condicio sine qua non* requirement in Dutch law. This first-step assessment is primarily a factual issue. The second-step assessment is concerned with whether the damage is a ‘sufficiently direct consequence’ of the act.¹⁵⁴ More specifically, this requirement encompasses that not a general obligation exists ‘to make good every harmful consequence, even a remote one’.¹⁵⁵ The second step constitutes a normative, rather than a factual assessment. Objective predictability of the damage sustained thus is the focus of the EU Courts’ assessment.¹⁵⁶ Where the damage caused by the act is too remote, the requirement of causation will not be fulfilled.

Of particular relevance for SSM composite procedures, is that for non-contractual liability of the EU, the applicant must not only show that the EU action caused the loss, but also that the ‘chain of causation’ has not been broken by the Member State involved in the composite procedure.¹⁵⁷ The causal link between the wrongful conduct and the damages must be ‘direct, immediate and exclusive’ meaning that the damage must arise ‘directly from the conduct of the institutions and does not depend on the intervention of other causes, whether positive or negative’.¹⁵⁸ Such an intervention of a contributory cause can arise as a result of an act or omission by a Member State or by the party that suffered the damage.¹⁵⁹ In this paragraph, the focus will be on the former.

153 Case C-352/98 P *Bergaderm* ECLI:EU:C:2000:361, para 42.

154 Joined Cases 64, 113/76, 167, 239/78, 27, 28 & 45/79 *Dumortier frères SA and Others v Council* ECLI:EU:C:1979:223, para 21.

155 Joined Cases 64, 113/76, 167, 239/78, 27, 28 & 45/79 *Dumortier frères SA and Others v Council* ECLI:EU:C:1979:223, para 21.

156 Almhofer 2021, p. 228.

157 On this ‘chain of causation’, see Craig & De Búrca 2020, p. 632 and Toth 1997, p. 193 et seq.

158 Toth 1997, p. 192.

159 Craig & De Búrca 2020, p. 632; Toth 1997, p. 193.

6.4.2.4.2 *National independent and autonomous act*

It is settled case law that an independent or autonomous act of a Member State authority between the damage and the EU act will break the chain of causation between the latter and the damage.¹⁶⁰ This for instance was found in *Société pour l'Exportation des Sucres SA v Commission*.¹⁶¹ This case concerned a telex message sent by the Commission to a national authority on the basis of which the national authority adopted an act in relation to certain contracts that were not discussed in the telex message. As the telex did not mention anything in relation to the contracts and therefore did not bind the national authorities, the national authorities' rejection of the application could 'only be the result of an appraisal' by the national authorities themselves.¹⁶² Thus, the national authorities' decision was an act adopted independently of the Commission's telex. The Commission therefore could not be held liable.

6.4.2.4.3 *SSM top-down composite procedures: NCA independent and autonomous act?*

EU case law on the chain of causation is also relevant for non-contractual liability of the ECB in top-down composite procedures. I will discuss both the granting of authorisation as a credit institution (a bottom-up composite procedure, yet with an NCA duty to notify), and the procedure of an ECB instruction that an NCA needs to implement.

Firstly, with regard to the NCA's task to notify the applicant of an ECB decision granting authorisation as a credit institution and of an ECB decision objecting to the NCA draft decision that proposes granting authorisation,¹⁶³ it could be asked whether this national notification could qualify as an independent or autonomous act that would break the chain of causation between the ECB decision and any damage incurred. This will probably not be the case, as the NCA will merely notify the applicant of the decision the ECB has taken and does not have any decision-making competence.¹⁶⁴ Nor does the NCA have a duty to check the correctness of the ECB decision. Therefore, for instance, when the ECB objects to a national draft authorisation and rejects an application, even though the applicant fulfils all criteria necessary for obtaining authorisation, causation will not hamper a non-contractual liability claim against the ECB.

160 Case 132/77 *Société pour l'Exportation des Sucres SA v Commission* ECLI:EU:C:1978:99, para 27. See Craig & De Búrca 2020, p. 632 and Toth 1997, p. 193.

161 Case 132/77 *Société pour l'Exportation des Sucres SA v Commission* ECLI:EU:C:1978:99.

162 Case 132/77 *Société pour l'Exportation des Sucres SA v Commission* ECLI:EU:C:1978:99, para 24.

163 Art. 14(4) SSM Regulation; Art. 88(3)(c) (objection to draft authorisation) and Art. 88(3)(d) (decision of authorisation) SSM Framework Regulation.

164 In the same sense, see Almhofer 2018, p. 291-292.

Secondly, the more complex question arises whether and to what extent the implementation by an NCA of an ECB instruction may break the causal link between the damage and the ECB instruction. The answer will depend on the margin of discretion that the ECB instruction leaves for the NCA. Therefore, a distinction must be made between a specific instruction, prescribing in detail the action an NCA must take under national law (Art. 9(1), third subpara, SSM Regulation), and an instruction requiring an NCA to open national sanctioning proceedings (Art. 18(5) SSM Regulation). Regarding the first category, the specific instruction, as was already discussed in Chapter 5, is likely to leave very little room for the NCA. The ECB will prescribe what action to take vis-à-vis an individual credit institution. Therefore, if the NCA decision that implements the ECB instruction causes damage to the credit institution to which the decision is addressed, there will be a direct causal link between the ECB instruction and the damage. In the second category, i.e. the ECB instruction requiring the NCA to open penalty proceedings against a credit institution, the NCA involvement is much more likely to break the causal link between the ECB instruction and any damage incurred by the credit institution that is ultimately confronted with an administrative penalty imposed on it by the NCA. Although the NCA is under the obligation to give effect to the ECB instruction by opening penalty proceedings, the NCA is not prescribed what the outcome of the proceedings should be and whether or not ultimately a penalty will be imposed. Therefore, the NCA's actions that implement the ECB instruction must be regarded as a national independent or autonomous act, breaking the causal link between the ECB act and any damage.

6.4.2.4.4 *Commission's failure to exercise supervisory powers over a Member State*

Even where an independent or autonomous national act is established, which would result in breaking the causal link between the damage and any EU conduct, the Court in *Vloeberghs v High Authority* established the principle that the Commission is liable if the national act has been made possible by a consecutive illegal failure of the Commission to exercise its supervisory powers.¹⁶⁵ The Commission's failure will then be considered the direct cause of the damage.¹⁶⁶ *Vloeberghs v High Authority* concerned the High Authority's, the Commission's predecessor, duty laid down in the European Coal and Steel Community (ECSC) Treaty to oversee and enforce that the ECSC Member States respect the principle of free movement of goods. AG Roemer in his Opinion, that was followed by the Court, stated the following: 'The fact that conduct contrary to the Treaty on the part of a Member State is at the commencement of a chain of cause and effect does

165 Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:18. See Craig & De Búrca 2020, p. 632 and Toth 1997, p. 193-194.

166 See Opinion AG Roemer in Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:6, ECR 197, p. 240.

not prevent the subsequent omission of the High Authority from being regarded as the direct cause of the damage. If the High Authority has failed to exercise its functions of supervision with regard to a Member State it is liable for the damage which follows from the original behaviour of a Member State contrary to the Treaty.¹⁶⁷ The Court held: 'if the High Authority, which is required to have Article 4 (a) respected by the Member States and Community undertakings, does not carry out that duty, those who are subject to it are entitled to consider themselves to have suffered damage to their legitimate expectations or to their rights and to ask for reparation of the damage which has thus been done to them.'¹⁶⁸

In cases with similar situations, the Court generally did not go into the details of the chain of causality.¹⁶⁹ In *Lütticke*, for instance, the Court's focus was on whether the Commission failed to exercise its supervisory function concerning the national tax systems and their conformity with the requirements of free movement and non-discrimination.¹⁷⁰

6.4.3 DNB liability

6.4.3.1 Legal basis and liability requirements

The legal basis for non-contractual liability of DNB is the general legal basis for tort as laid down in Article 6:162 BW. Within the context of non-contractual liability for inadequate financial oversight this legal basis has been further elaborated in Dutch Supreme Court judgments *DNB/Vie d'Or*¹⁷¹ and *Band/AFM*.¹⁷² The standard as developed in this case law requires supervision to meet 'the requirements of proper and careful supervision' (*de eisen die aan een behoorlijk en zorgvuldig toezicht moeten worden gesteld*).

Another doctrine applies to non-contractual liability for unlawful administrative acts (*besluitenaansprakelijkheid*). Most notably, both the requirements of illegality and attribution are in principle considered to be met where an administrative act is annulled. The doctrine governing non-contractual liability for unlawful administrative acts, as already mentioned earlier, is commonly known as the 'improper application' of the principle of *formele rechtskracht* (*oneigenlijke werking van de formele rechtskracht*).¹⁷³

167 Opinion AG Roemer in Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:6, ECR 197, p. 240.

168 Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:18, ECR 197, p. 216.

169 Toth 1997, p. 194.

170 Case 4/69 *Lütticke GmbH v Commission* ECLI:EU:C:1971:40, para 11 et seq.

171 Hoge Raad 13 October 2006 ECLI:NL:HR:2006:AW2077 (*Vie d'Or*). This line of case law has been further confirmed in a judgment concerning oversight by the Dutch Labour Authority, see Hoge Raad 2 June 2017 ECLI:NL:HR:2017:987 (*X/Staat*).

172 Hoge Raad 21 November 2014 ECLI:NL:HR:2014:3349 (*Band/AFM*).

173 See para 6.2.2.2, as well as para 6.4.3.4. For an application of this doctrine, see Hoge Raad 23 December 2011 ECLI:NL:HR:2011:BT7193 (*Palthe/DNB and AFM*), para 3.3.

In *Vie d'Or*, the Dutch Supreme Court elaborated on the application of the general Dutch tort standard to inadequate financial supervision. The *Vie d'Or* standard that supervision must meet 'the requirements of proper and careful supervision' particularly takes into account the wide discretionary powers that financial supervisory authorities generally have as well as the 'supervisory dilemma' (*toezichthoudersdilemma*).¹⁷⁴ In short: it would be in the interest of clients of a financial institution to strictly enforce financial regulation vis-à-vis the financial institution, whereas such strict enforcement may also jeopardise the financial institution's continuity which would ultimately be to the detriment of its clients. Whilst this supervisory dilemma must be taken into account by the civil court in a dispute on the non-contractual liability of the Dutch financial supervisory authorities, it must not be taken into account by the administrative court when reviewing an administrative act.¹⁷⁵ Yet, the administrative court does take into account the financial supervisory authority's discretion when reviewing an administrative act.¹⁷⁶ But overall, the test for annulling an act by an administrative court is less strict than the test for supervisory liability, resulting in wrongful conduct being easier established in (administrative) judicial review than in a liability action.¹⁷⁷

In 2012, the Dutch legislator introduced a statutory limitation of liability of DNB and the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten* (AFM)), codified in Article 1:25d Dutch Financial Supervision Act (*Wet op het financieel toezicht* (Wft)).¹⁷⁸ It applies to both liability for inadequate oversight and liability for unlawful acts. The provision limits the liability of the two Dutch financial supervisory authorities to cases in which the damage to an important extent results from intentional wrongful conduct or gross negligence. It thus sets a high bar for non-contractual liability.

The application of the statutory limitation of liability is not limited to situations within the national sphere and therefore in principle also applies in situations falling within the scope of EU law, including the SSM. However, application of the statutory limitation finds its limits in the EU principles of equivalence, effectiveness and the principle of effective judicial protection. An element of the EU principle of effective judicial protection that is particularly relevant to the (limits to) application of Article 1:25d Dutch Financial Supervision Act is the principle of Member State liability.

174 Hoge Raad 13 October 2006 ECLI:NL:HR:2006:AW2077 (*Vie d'Or*), para 4.3.3.

175 Van Praag 2014, p. 229.

176 Van Praag 2014, p. 229.

177 Van Praag 2014, p. 229.

178 Art. 1:25d(1) Dutch Financial Supervision Act reads: 'De Nederlandsche Bank, de leden van haar directie en raad van commissarissen en haar werknemers zijn niet aansprakelijk voor schade veroorzaakt door een handelen of nalaten in de uitoefening van een op grond van een wettelijk voorschrift opgedragen taak of verleende bevoegdheid, tenzij deze schade in belangrijke mate het gevolg is van een opzettelijk onbehoorlijke taakuitoefening of een opzettelijk onbehoorlijke uitoefening van bevoegdheden of in belangrijke mate te wijten is aan grove schuld.'

6.4.3.2 EU influence: EU principle of Member State liability

6.4.3.2.1 EU influence in theory...

It may be questioned to what extent the Dutch statutory limitation is in accordance with EU law and more in particular with the EU principle of Member State liability (also known as *Francoovich* liability).¹⁷⁹ As the Court confirmed in 2018 in *Kantarev v Balgarska Narodna Bank*, national limitations to financial supervisory liability may not impose a higher standard of liability than Member State liability.¹⁸⁰ As a result, national liability requirements may not exceed the EU requirements. However, the EU principle of Member State liability will only pose limits to national liability regimes where the EU rule allegedly violated is intended to confer rights on individuals. This EU ‘relativity requirement’ entails that the rule infringed must be intended to protect the interests of the party that suffered damage.¹⁸¹

To assess the potential influence of the EU principle of Member State liability on national liability regimes, including statutory limitations, the protective scope is of prudential regulation and oversight thus is particularly relevant.¹⁸² Most notably, the question is whether prudential regulation and oversight aim to protect the financial interests of individuals, including depositors and investors, or whether they are exclusively concerned with protecting the general interest, viz. financial stability and well-functioning financial markets. If a certain provision of financial regulation is not considered to protect the financial interests of individuals, the ‘relativity requirement’ is not met and the EU regime for Member State liability will not be applicable. The national court may then rely upon the national liability regime, including any statutory limitations.

The *Peter Paul* judgment of 2004, concerning several first generation banking directives and alleged inadequate oversight by the German financial supervisory authority,¹⁸³ still seems to be considered authoritative today by the Member States for the protective scope of financial oversight. *Peter Paul* may be interpreted as leaving much room for introducing national statutory limitations. In a preliminary reference procedure, the Court held in *Peter Paul* that the German statutory immunity applicable to its financial supervisory authority did not constitute a violation of the EU principle of Member State liability, because the banking directives allegedly infringed by the supervisory authority were not intended to confer rights on depositors.¹⁸⁴ Although more recently the judgment in *Kantarev v Balgarska*

179 Case C-6/90 and C-9/90 *Francoovich* ECLI:EU:C:1991:428.

180 Case C-571/16 *Kantarev v Balgarska Narodna Bank* ECLI:EU:C:2018:807.

181 See Opinion AG Mischo in C-6/90 and C-9/90 *Francoovich* ECLI:EU:C:1991:221, para 77.

182 More extensively on the protective scope of both prudential and conduct-of-business supervision in relation to depositors and investors, see Tegelaar 2016, p. 708-709.

183 Case C-222/02 *Peter Paul and Others v Germany* ECLI:EU:C:2004:606.

184 Case C-222/02 *Peter Paul and Others v Germany* ECLI:EU:C:2004:606, para 40 et seq.

Narodna Bank clarifies that the EU regime of deposit guarantee schemes is intended to confer rights upon depositors,¹⁸⁵ this has not been established in EU case law for other areas of prudential supervision.

It has been argued that the Dutch statutory limitation in certain situations sets a higher standard for non-contractual liability than the EU requirements for Member State liability.¹⁸⁶ It has introduced a standard of fault, intentional wrongful conduct or gross negligence, that is likely to exceed the EU requirement of a sufficiently serious breach, especially where the supervisory authority does not have room for discretion.¹⁸⁷

As already stated, where national liability law imposes a higher standard for establishing liability than the EU standard, national courts are required to either interpret national law in accordance with EU law or, if that is not possible, to set aside national law. If in a specific case the principle of Member State liability applies, a national court would probably have to set aside Article 1:25d Dutch Financial Supervision Act. In such a situation, the national court may rely on its national liability regime, where necessary interpreted in accordance with the EU standard of liability, or directly apply the EU standard. It must apply the standard of liability that provides the highest level of protection for the injured party, as required by the EU principle of equivalence.¹⁸⁸ If the case involves inadequate oversight, it may apply the *Vie d'Or* standard or the EU standard. If it involves liability for an annulled administrative act, the court may rely on the doctrine governing liability for unlawful decisions or on the EU standard.

6.4.3.2.2 ...and practice

Case law on the liability of the Dutch financial supervisory authorities is quite scarce as such proceedings are rarely initiated. As a result, it is difficult to draw definitive conclusions on national courts respecting the EU principle of Member State liability in cases concerning non-contractual liability of DNB (and the AFM).

However, the Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) had to adjudicate an action for damages brought by a Belgian entity representing almost 700 investors against the AFM.¹⁸⁹ The essence of the matter pertained to, in short, alleged inadequate oversight by the AFM relating to investor and (financial) consumer protection. Notably, the statutory limitation of liability as codified in Article 1:25d Dutch Financial Supervision Act finds no explicit mention in the 5 July 2022 judgment. Instead, the

185 Case C-571/16 *Kantarev v Balgarska Narodna Bank* ECLI:EU:C:2018:807, para 88 et seq.

186 Tegelaar 2016, p. 713; Tegelaar 2017, p. 67.

187 Tegelaar 2016, p. 713; Tegelaar 2017, p. 67.

188 As follows from Joined Cases C-46 and 48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79, para 66. See Tegelaar 2017, p. 24 and references to literature. On the principle of equivalence, see Ch. 2, para 2.4.2.3.

189 *Gerechtshof Amsterdam* 22 July 2022 ECLI:NL:GHAMS:2022:1961.

legal framework governing AFM liability as set out by the appellate court comprises both the *Vie d'Or* standard and the EU standard of Member State liability. Before the court addressed the Dutch regulatory legal framework, it elaborately outlined the EU origin of the relevant national provisions of financial and consumer law, commencing with the Treaty principle of loyal cooperation.¹⁹⁰ The relevant EU legislation included the Unfair Commercial Practices Directive, the Unfair Contract Terms Directive and the Markets in Financial Instruments Directive. The court, prompted by the EU origin of the national rules purportedly violated, found itself compelled to apply the principle of Member State liability, in addition to the *Vie d'Or* standard.¹⁹¹ The Amsterdam Court of Appeal conducted a thorough analysis of the AFM's conduct and found that the AFM could not be held liable for the damage incurred by the investors, not on the basis of the *Vie d'Or* standard, nor on the EU ground. In a parallel vein, the district court of Amsterdam in first instance did not apply the statutory limitation of liability.¹⁹² It instead relied solely upon the *Vie d'Or* standard.¹⁹³

The judgments of the Amsterdam Appeal Court and the Amsterdam district court as discussed above show the courts' willingness to set aside the statutory limitation of liability where EU financial and consumer law is concerned. The national and EU rules involved are clearly of a protective nature and seek to protect the (financial) interests of investors and financial consumers. For financial consumers, depositors and investors the relativity rule generally is not an issue under Dutch law. It was held in *Vie d'Or* that financial supervision is exercised not only with a view of safeguarding financial stability, but also aims to protect the financial interests of individual clients of supervised entities.¹⁹⁴

Other case law seems to be lacking in which Article 1:25d Dutch Financial Supervision Act is not applied, yet instead is relied upon the *Vie d'Or* standard, the doctrine governing non-contractual liability for unlawful acts, or the EU standard for Member State liability. Instead, other judgments demonstrate that Article 1:25d Dutch Financial Supervision Act is still actively applied, also in cases where the relevant underlying legislation is of an EU nature. The Amsterdam Court of Appeal for example in 2016 applied the limitation of liability in a case concerning the alleged infringement of Article 210 Dutch Pensions Act (*Pensioenwet*).¹⁹⁵ This provision is an implementation of Article 9 of the EU Pensions Directive.¹⁹⁶ Another example: The administrative law section of the district court of Rotterdam

190 Gerechtshof Amsterdam 22 July 2022 ECLI:NL:GHAMS:2022:1961, para 3.7 et seq.

191 Gerechtshof Amsterdam 22 July 2022 ECLI:NL:GHAMS:2022:1961, para 3.26 et seq.

192 Rechtbank Amsterdam 22 August 2018 ECLI:NL:RBAMS:2018:6034.

193 Rechtbank Amsterdam 22 August 2018 ECLI:NL:RBAMS:2018:6034, para 4.10-4.11.

194 Hoge Raad 13 October 2006 ECLI:NL:HR:2006:AW2077 (*Vie d'Or*), para 4.2.2.

195 Gerechtshof Amsterdam 21 June 2016 ECLI:NL:GHAMS:2016:2389.

196 Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (recast).

(*Rechtbank Rotterdam*) considered in a 2022 judgment that DNB ‘enjoys immunity’ according to Article 1:25d Dutch Financial Supervision Act¹⁹⁷ and in a related judgment held that it is impossible or very difficult to obtain compensation from DNB as a result of the limitation of liability.¹⁹⁸ These judgments concerned the fit and proper (re)assessment by DNB of two directors of an investment firm. The provisions governing the fit and proper (re)assessment are laid down in national law, yet find their origin in EU financial legislation, including CRD IV (for credit institutions) and MiFID II (for investment firms).

As already stated above, for the principle of Member State liability to apply and thus to limit the application of national limitations of liability, the rule infringed must be intended to confer rights on individuals. It may be questioned whether Article 210 Dutch Pensions Act and its EU equivalent Article 9 EU Pensions Directive are intended to protect the financial interests of a pension fund when (unlawfully) removed from the register. In the same vein, it is unsure whether the provisions governing the fit and proper assessment seek to protect the directors that are assessed.

Nevertheless, in the decision-making process of the financial supervisory authority other legal rules and principles may have been violated that do have a corresponding rule or principle in European law and must be considered to protect the interests of supervised institutions or other stakeholders. The EU duty of care, for example, is considered to be of such protective nature,¹⁹⁹ especially in relation to supervised entities to whom a decision is addressed, as are the principle of legality and the principle of proportionality. For example, in the 2016 case the legal rule that was allegedly infringed by DNB was the principle of legality, as a corollary of the rule of law. DNB purportedly acted *ultra vires* by removing a pension fund from the register,²⁰⁰ thus potentially violating the principle of legality, a principle also known to EU law.

As is evident from the preceding discussion, the applicability of the EU principle of Member State liability will hinge upon the specifics of a case, and particularly on the type of party that sustained damage and the rule that is claimed to be infringed. Consequently, the application of Article 1:25d Dutch Financial Supervision Act will depend on the type of party, the violations presented by the injured party, the court’s acknowledgement of an EU equivalent rule corresponding to the national rule purportedly infringed, and ultimately, on whether that EU rule is intended to protect the interests of the injured party. Considering the foregoing, it becomes evident that determining whether the EU principle of Member State liability should supersede the national regime, including any statutory limitation, is

197 *Rechtbank Rotterdam* 16 September 2022 NL:RBROT:2022:11948, para 23.3.

198 *Rechtbank Rotterdam* 9 February 2021 ECLI:NL:RBROT:2021:13702, para 3.3.

199 Case T-167/94 *Detlef Nölle v Council and Commission* ECLI:EU:T:1995:169, para 75-76.

200 See Hoge Raad 9 March 2018 ECLI:NL:HR:2018:309 (*Stichting GSFS Pension Fund v DNB*), para 3.3.1-3.3.6.

a complex challenge for national courts. This scenario introduces potential risks for ensuring effective judicial protection, particularly for the right to damages for violations of EU law. It is conceivable that the complexities involved will lead to situations where the national limitation of liability is applied contrary to EU law.

6.4.3.3 *Attributable act*

Attribution (*toerekening*) of the illegal act to DNB is necessary for establishing supervisory liability. Article 6:163(3) BW elaborates on three grounds for attribution. Pursuant to this provision, an act may be attributed to a person where the act results from his fault, or from a cause for which he may be held accountable by virtue of the law or of generally accepted principles (*verkeersopvattingen*). For liability of the State or state authorities, it is settled case law that where the relevant act has been annulled, both the requirements of illegality and attribution have been fulfilled.²⁰¹ The rationale for what may be referred to as ‘strict attribution’ (*risicotoerekening*) of the State, is that it is considered to be more reasonable that any damage incurred by an individual resulting from a wrongful legislative or administrative act is to be borne by the society as a whole than by the individual.²⁰² Although Article 1:25d Dutch Financial Supervision Act raised the bar for establishing illegality by introducing the standards of intentional wrongful conduct and gross negligence, it does not seek to affect the requirement of attribution.

Yet, in many instances within the SSM, DNB will only be responsible for preparatory acts that are not reviewable by Dutch administrative courts. However, they can be reviewed in the annulment procedure instituted against the ECB final decision as was held in *Berlusconi*.²⁰³ Due to the unreviewability of DNB preparatory acts at national judicial level, the principle of strict attribution cannot be applied to such acts. That leads us to the question: how will Dutch courts assess the requirement of attribution in case of DNB preparatory measures that precede an ECB final decision? I would argue that a DNB preparatory act should always by virtue of *verkeersopvattingen* be attributable to DNB.

6.4.3.4 *Illegality and a statutory limitation*

Illegality may prove to be an element for the division of liability between the ECB and NCA’s in liability cases.²⁰⁴ It thus also plays a role in the division of jurisdiction in liability cases concerning composite procedures.

201 Jansen, *GS Onrechtmatige daad*, Art. 6:162 BW, note 11.4.5.1 (online, updated 1 December 2020).

202 Jansen, *GS Onrechtmatige daad*, Art. 6:162 BW, note 11.4.5.1 (online, updated 1 December 2020).

203 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

204 See also Almhofer 2018, p. 217.

For liability to arise under Dutch liability law, an illegal act must exist (*onrechtmatige daad*). Before the statutory limitation of liability was introduced for the AFM and DNB, where a decision was annulled, both attribution and illegality of the act were established on the basis of the so-called ‘improper application’ of the principle of *formele rechtskracht* (*oneigenlijke werking van de formele rechtskracht*).²⁰⁵ As already stated above, Article 1:25d Dutch Financial Supervision Act raised the bar for establishing illegality by introducing the standards of intentional wrongful conduct and gross negligence. These standards apply, regardless of the room for discretion of the supervisory authorities. Therefore, in contrast to the EU requirement of the sufficiently serious breach, which may lead to illegality where there is a mere infringement of EU law, a simple infringement of national law or EU law will not be qualified as an illegal act where intentionality or gross negligence are absent or not proven.

The liability requirements of intentional misconduct or gross negligence may also be applied to DNB when acting within the SSM context. Therefore, for instance, where DNB implements an ECB instruction, the statutory limitation may apply. If a court does apply the statutory limitation, DNB will not commit an unlawful act where it implements an ECB instruction that breaches EU law and does not leave any discretion to DNB. Yet even without the statutory limitation and instead relying on the doctrine governing non-contractual liability for unlawful administrative acts, the *Vie d’Or* standard or the EU liability regime, DNB would probably not have committed an unlawful act. As DNB is under the obligation to implement the ECB instruction, it has to do so even where DNB is convinced the ECB instruction is in breach of Union law. A Union act may be held to be invalid only after the act has been overhauled by the relevant Union institution or where the Court annulled the act.²⁰⁶

6.4.3.5 Causation

Even if Dutch courts assume jurisdiction to adjudicate an action for damages against DNB for preparatory acts in bottom-up composite procedures and declare such an action admissible, such an action is unlikely to be successful. This relates to the requirement of causation between the DNB act and the damage incurred. Because the ECB takes the final decision, the causal link between any preparatory DNB acts and the damage will be broken.

Causation is determined by a two-step assessment, comprising of the *condicio sine qua non* requirement and a possible limitation of damages on the basis of Article 6:98 BW that codifies that only damage that has such

205 That annulment must in principle result in having fulfilled both the liability requirement of illegality and attribution was decided in Hoge Raad 31 May 1991 ECLI:NL:HR:1991:ZC0261 (*Van Gog/Nederweert*), para 3.4.

206 This follows from Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452.

a connection to the event that leads to the liability of the relevant person, that, in light of the nature of the liability and the damage, can be attributed to him as a consequence of this event, is eligible for compensation.²⁰⁷ This two-step approach is also common in other civil law systems,²⁰⁸ as well as in EU law. Pursuant to the *condicio sine qua non* requirement, event a is the cause for event b, where without event a, even b would not have occurred.²⁰⁹ The *condicio sine qua non* requirement is not fulfilled where event b would still have occurred, even though event a would be left out of the equation.²¹⁰ This test assesses a factual causal link. Article 6:98 BW codifies the so-called doctrine of the reasonable attribution (*leer van de redelijke toerekening*).²¹¹ Whether the damage has such a connection to the event that leads to the liability of the relevant person that it can be attributed to him as a consequence of this event, is to be established taking into account all circumstances of the case (*alle omstandigheden van het geval*), including the nature of the liability and the damage.²¹²

A specific doctrine governing causation in cases concerning liability for unlawful acts was developed in case law. In short, no causal link exists if the damage would also have arisen in the situation that a lawful act was adopted.²¹³ If, for example, a decision has been annulled because it lacked sufficient reasons, the unlawfulness of the decision could be remedied by including sufficient reasons in the decision. If the outcome of the then lawful decision is similar to the annulled decision, according to the doctrine, a causal link is absent.

6.5 EU COURTS' APPROACH TO THE DIVISION OF JURISDICTION BETWEEN NATIONAL COURTS AND EU COURTS IN INSTANCES OF JOINT LIABILITY

6.5.1 General

As follows from the above, in an SSM composite procedure, the relevant NCA and the ECB may both potentially be liable for any damage resulting from the procedure. The division of jurisdiction between the EU Courts and the national courts in cases concerning non-contractual liability in principle leads to two parallel judicial levels – the EU and the national level – having jurisdiction. The EU judicial level is exclusively competent regarding non-contractual liability of the EU, including the ECB, and the national judicial level regarding non-contractual liability of the relevant national authority.

207 Asser/Sieburgh 6-II 2017/50 (online).

208 Asser/Sieburgh 6-II 2017/50 (online).

209 Asser/Sieburgh 6-II 2017/50 (online).

210 Asser/Sieburgh 6-II 2017/50 (online).

211 Asser/Sieburgh 6-II 2017/57 (online).

212 Asser/Sieburgh 6-II 2017/63 (online).

213 For an overview of relevant case law, see Boonekamp, *GS Schadevergoeding*, Art. 6:98 BW, note 1.5.4 (online, updated 15 November 2022).

It would therefore be logical to maintain that where a national act allegedly causes the damage, an action for damages must be instituted at the national level, and where the damage is allegedly caused by an EU act, an action for damages must be instituted at the EU level. However, in a composite procedure, the exact cause of the damage is not easily established. Not only does it require detailed insights into the communications between the various administrative authorities, it also requires an assessment of two sets, EU and national, of liability requirements. The approach developed in EU case law brings additional complexity to the division of jurisdiction between the EU Courts and the national courts and introduced a duty to exhaust national remedies.

6.5.2 EU concept of joint liability

6.5.2.1 *General*

The Court developed the EU concept that legal literature coined joint (or: concurrent) liability. Both names are somewhat misleading, as they imply that besides the EU level, the Member State involved is liable, instead of potentially liable. The EU Courts, however, as stated, does not have jurisdiction to decide on the non-contractual liability of a Member State. It depends on the facts of the case and on the applicable national law whether a national authority will be held liable for implementing a wrongful EU act. In addition, joint liability will only arise after a national court has adjudicated the case of non-contractual liability of the relevant national authority. It is likely that a national authority under the obligation to implement an EU act cannot be held liable for implementing what later turns out to be a wrongful EU act. The national authority simply has not acted wrongfully. It must be emphasised that in the case law discussed below the EU Courts respect their jurisdictional limits and do not adjudicate any national non-contractual liability. Thus, rather than establishing joint liability, the EU Courts are exclusively concerned with establishing whether the EU may be held liable.

Where the concept of joint liability applies, there may be procedural implications for persons that incurred damage as a result of a composite procedure, most notably the existence of a duty to exhaust national remedies. Joint liability gives rise to a multitude of complex problems²¹⁴ and is regarded by some as 'the most difficult problem in the field of European Union liability'.²¹⁵

214 Craig & De Búrca 2020, p. 634.

215 Kawczyńska 2014, p. 73. See also Craig & De Búrca 2020, p. 634.

Joint liability of the EU and a Member State can occur in various situations. The following situations have currently been recognised in EU case law as situations where joint liability may arise:²¹⁶

- The EU has not taken adequate steps to prevent an infringement of EU law by a Member State;
- Joint action by the EU and one or more Member States; and,
- A Member State's application of an unlawful EU act.

The existence of joint liability is by no means limited to these situations.²¹⁷ It may also occur in other situations. Especially with the constant development of the EU towards an ever more integrated administration, it is likely that other situations will arise, for instance, in the context of the SSM. This paragraph aims to examine the application of the concept of joint liability to the SSM. To what extent may joint liability of the ECB and an NCA arise within SSM composite procedures, and what are the procedural implications for the applicant?

6.5.2.2 *Categories of joint liability*

The first situation of joint liability to discuss concerns the situation where the EU has not taken adequate steps to prevent an infringement of EU law by a Member State. Within this category, it is helpful to distinguish between three subcategories: the Commission not initiating infringement proceedings against a Member State that has infringed EU law, the Commission not taking action under Article 108(2) TFEU in relation to state aid and the Commission authorising an unlawful national measure.²¹⁸ These three categories have in common that the Member State involved infringed EU law and thus acted wrongfully.

With regard to the first sub-category, i.e. the Commission not initiating infringement proceedings against a Member State, it is not likely that joint liability will arise for multiple reasons. First of all, because, as was discussed above, for an omission to qualify as an illegal act, there must be a legal obligation to act and no such obligation exists. At least the second paragraph of Article 258 TFEU is formulated as a discretionary power: the Commission 'may bring the matter before the Court of Justice of the European Union'. In addition, even if such a legal obligation would be believed to exist, the requirement of causation would likely prevent liability, because a judgment by the Court would be merely declaratory and not constitutive.²¹⁹ In addi-

216 See Oliver 1997, p. 299 et seq. See also Craig & De Búrca 2020, p. 634, Wils 1992, p. 194-198, and Kawczyńska 2014, p. 73.

217 Oliver 1997, p. 299.

218 For this distinction, see Oliver 1997, p. 299-303.

219 Oliver 1997, p. 300.

tion, the requirement that the rule infringed is intended to confer rights on individuals is unlikely to be met.²²⁰

As regards the second sub-category, i.e. the Commission not taking action under Article 108(2) TFEU in relation to state aid, it is more likely to lead to Commission liability and, therefore, joint liability.²²¹ Article 108(2) TFEU reads: 'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.' The Commission decision is constitutive in nature and binding on the Member State.²²² But the only case that concerned this situation, *Société Bretagne Angleterre Irlande v Commission*, does not give sufficient clarity on whether joint liability eventually may arise because of the factual particularities of the case.²²³ The Court held that the Commission was not liable, but in this case, the Commission's decision on the approval of state aid was sent with delay to the applicant. Therefore, the case was not about the failure of the Commission to take action against the state aid.

Concerning the third sub-category, the Commission authorising an unlawful national measure: this was the situation in *Kampffmeyer v Commission*.²²⁴ This case is a classic in case law on joint liability. In this judgment, the Court recognised the existence of joint liability of the EU and a Member State, Germany in this case.²²⁵ The Commission authorised German protective measures concerning the import of cereals that were notified to the Commission. The Commission's authorisation decision was later annulled and the applicants were seeking monetary compensation for the damages incurred as a result of the German protective measures. They instituted proceedings in Germany against the Federal Republic of Germany, before the national courts, as well as before the Court against the Commission. The Court found that '[t]he Commission's conduct constituted a wrongful act or omission capable of giving rise to liability on the part of the Community'.²²⁶ It therefore held that 'the liability of the Community has been recognized in principle'.²²⁷ However, despite the existence of a wrongful act of the Commission capable of giving rise to non-contractual liability, the Court

220 Oliver 1997, p. 300.

221 Oliver 1997, p. 300-301.

222 Oliver 1997, p. 300.

223 Case T-230/95 *Société Bretagne Angleterre Irlande v Commission* ECLI:EU:T:1999:11. See De Visser 2004, p. 55.

224 Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31.

225 Oliver 1997, p. 288.

226 Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31, ECR, p. 262.

227 Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31, ECR, p. 263.

required the applicants first to attempt to obtain compensation at the national level. It thus introduced a duty to exhaust national remedies. This duty will be further discussed in paragraph 6.5.2.3. It follows from *Kampffmeyer v Commission* that joint liability may arise where the Commission unlawfully authorises national safeguard measures.²²⁸

The second situation where joint liability could arise is a joint action by one or Member States and the EU. Oliver in 1997 states that a joint action is rare.²²⁹ He does not define joint action, nor does EU case law, but Oliver discusses three areas where such joint actions exist: agriculture, mixed agreements and customs law.²³⁰ In the context of the SSM, mixed agreements and customs law are not that relevant and will, therefore, not be discussed. In the area of agriculture, Oliver discusses the famous *Borelli*²³¹ and *Emerald Meats*²³² judgments. In both *Borelli* and *Emerald Meats*, according to the Court, the alleged unlawful conduct causing the damage had to be attributed to the national authorities, not to the Commission. Both cases concerned alleged errors originating at the national levels. And to make things easy, the Court did not find any duty of the Commission to review or correct the national input, which could have led to a form of 'subsidiary liability' and therefore joint liability.

The third situation of potential joint liability is a Member State's application of an unlawful EU act. The Court has largely developed this category in the field of agricultural policy. The starting point for the Court in joint liability cases in that field is that implementing the Common Agricultural Policy is a national, not a Commission, responsibility.²³³ An immediate result of this starting point is that generally, communications of the Commission in this area, mostly telexes, are not legally binding on the national authorities and therefore cannot lead to liability of the Commission.²³⁴ As these communications are not binding, it is, according to the Court, not the telex of the Commission causing the damage, but the national decision in which the Commission's 'opinion' is implemented.²³⁵ As the national authorities are not under the obligation to follow the Commission's opinion, their decision constitutes an independent or autonomous national act, breaking the causal link between the Commission's telex and the damage.²³⁶ Examples of cases are *Société pour l'Exportation des Sucres SA v Commission*,²³⁷ that was

228 Oliver 1997, p. 302-303.

229 Oliver 1997, p. 303.

230 Oliver 1997, p. 303-306.

231 Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

232 Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats v Commission* ECLI:EU:C:1993:19.

233 Oliver 1997, p. 306.

234 Oliver 1997, p. 306.

235 Case 133/79 *Sucrimex v Commission* ECLI:EU:C:1980:104, para 23.

236 See further para 6.4.2.4.2.

237 Case 132/77 *Société pour l'Exportation des Sucres SA v Commission* ECLI:EU:C:1978:99.

discussed above, and *Sucrimex v Commission*.²³⁸ In contrast to these cases, in the exceptional case *Krohn v Commission*, the Court did assume jurisdiction in an action for damages against the Commission, as it held that the alleged damage was caused by the Commission and not by the national authorities that implemented the Commission's telex because the telex was binding on the national authorities.²³⁹ Yet after the first admissibility-prong, the second was applied: the duty to exhaust national remedies. In *Krohn v Commission*, the Court held that an exception to this duty applied for Krohn. This duty will be discussed hereinafter.

6.5.2.3 *Duty to exhaust national remedies*

6.5.2.3.1 *The duty*

As a general rule, where both national authorities and EU authorities are involved, the EU Courts only consider an action for damages against the relevant EU act admissible where the following two admissibility requirements are met: the alleged unlawful conduct is attributable to the EU institution and the duty to exhaust national remedies has been complied with.²⁴⁰

As already stated above, the Court introduced the duty to exhaust national remedies in *Kampffmeyer v Commission*.²⁴¹ This duty has its origin in the duty to mitigate damages, which was acknowledged by the Court in *Mulder* as a principle common to the legal systems of the Member States: 'the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself'.²⁴² An element of this duty to mitigate damages is whether the injured party 'availed himself of all the legal remedies available to him'.²⁴³ In situations where the relevant Member State and the EU may be jointly liable, these legal remedies may consist of bringing an action for damages against the relevant Member State or Member State authority before the national courts.

In *Kampffmeyer v Commission*, the applicants were German importers that requested import licenses at the competent national authorities to import maize from France. The applicable EC legislation at that time required levies for importing cereals to coordinate prices in the Member States. On 27 September 1963, the Commission set the levy rate for maize originating in France at 0.00 Deutsche Mark (DM). The applicant companies requested on that basis important licenses, in which that levy rate of 0.00 DM would apply. Several importers already entered into contracts for the

238 Case 133/79 *Sucrimex v Commission* ECLI:EU:C:1980:104.

239 Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85, para 21-23. See Oliver 1997, p. 307.

240 For a clear example of this approach, see Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85, para 16 et seq.

241 Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31.

242 Joined Cases C-104/89 and C-37/90 *Mulder* ECLI:EU:C:1992:217, para 33.

243 Joined Cases C-46 and 48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79, para 84-85.

purchase of French maize. On 3 October, the German authorities refused to grant the import licenses, as the German government adopted in accordance with the applicable Community legislation protective measures on 1 October, which included a suspension of import licenses. The Commission authorised these protective measures on 3 October 1963. This authorisation decision was found to be illegal and was annulled by the Court on 1 July 1965. The applicants incurred damage, which included penalties paid for repudiating the contracts for the purchase of maize, loss resulting from paying levies and loss of profit.

As stated, the Court held that the Commission authorising decision constituted a wrongful act capable of giving rise to liability. Yet, the Court introduced a duty to first exhaust national remedies, which 'is necessary to avoid the applicant's [sic] being insufficiently or excessively compensated for the damage by the different assessment of two different courts applying different rules of law'.²⁴⁴ The Court stayed the proceedings until the German courts before which actions for damages had been brought against the Federal Republic of Germany had given judgment. It took the applicants in *Kampffmeyer v Commission* twenty years after the facts had happened to report to the Court that they had obtained damages at the national level.²⁴⁵

The *Kampffmeyer v Commission* judgment has met stark criticism. Some authors infer from the judgment that the Court deems the German authorities primarily liable, with the Community only bearing subsidiary liability.²⁴⁶ Such an implicit view of the Court is not unreasonable, in my opinion, as the German authorities, in their capacity as authors of the protective measure, could be regarded as the 'primary offender', whereas the Commission is the 'secondary offender'.²⁴⁷ This distinction could be translated into a primary liability of the German authorities and a subsidiary, or 'derivative', liability of the Commission. The judgment was also criticised for potentially requiring litigating a case twice, first at the national level and subsequently at the EU level, and, as *Kampffmeyer v Commission* shows, may result in extreme delays in judicial protection.²⁴⁸ Furthermore, these delays may ultimately lead to exceeding the five-year time-limit for bringing an action for damages at the EU level.²⁴⁹ Applicants thus are advised to lodge a claim at the EU level concurrently, as happened in *Kampffmeyer*, so as to avoid being barred from obtaining full compensation at the EU judicial level.²⁵⁰

244 Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31, ECR 245, p. 266.

245 De Visser 2004, p. 52.

246 Oliver 1997, p. 288 and references to literature therein. See also Hartley 1977, p. 251-252.

247 Harding disagrees, see Harding 1979, p. 405.

248 De Visser 2004, p. 52; Harding 1979, p. 403.

249 See also Harding 1979, p. 403.

250 See also Harding 1979, p. 403, fn. 50.

6.5.2.3.2 *The exception*

In *Unifrex v Commission and Council*, the Court formulated an important exception to the duty to exhaust national remedies.²⁵¹ The Court held that the duty to exhaust national remedies could only be maintained where national remedies offer effective protection, i.e. where such remedies can lead to compensation of the damage.²⁵² Logically, the absence of compensation at the national level eliminates the risk of applicants being compensated 'excessively'.

Unifrex v Commission and Council concerned so-called monetary compensatory amounts that sought to decrease the risks for exporters and importers that are confronted with currency devaluation. Unifrex was a French company that exported cereals to Italy and the prices were agreed in lire, taking into account the compensatory amounts granted upon importation. On 23 March 1981, the Italian lira was devalued by 6% against the other currencies in the European Monetary System. Yet, only as of 6 April the Commission's recalculated compensatory amounts were applied. Payment of the compensatory amounts was the responsibility of the national authorities. The Commission took the position that Unifrex' action was inadmissible, arguing that it should have obtained compensation in the national courts.²⁵³ It argued that Unifrex could have instituted an action for annulment at the national courts against the national implementing decision and that judicial review of the Commission regulations could have been obtained via a preliminary reference procedure.²⁵⁴ Unifrex, however, argued that an action for annulment could not lead to being granted larger compensatory amounts.²⁵⁵ Even if the national action for annulment was successful, in this case necessarily after the relevant provisions in the Commission regulations were annulled by the Court in a preliminary reference procedure as the validity of the national implementing act was depending on the validity of the Commission regulation,²⁵⁶ a national action could not lead to larger compensatory amounts, as that would need an EU basis. Moreover, with regard to other types of damages, it would be unlikely that a national action for damages following annulment could lead to compensation, as the national authorities' implementation of the Commission regulation probably would not constitute a wrongful act under national law. The national authorities simply implemented a valid Commission regulation and could not be expected to act otherwise, as they are under the obligation

251 Case C-281/82 *Unifrex v Commission and Council* ECLI:EU:C:1984:165.

252 Case C-281/82 *Unifrex v Commission and Council* ECLI:EU:C:1984:165, para 11. See also Case 20/88 *Roquette Frères v Commission* ECLI:EU:C:1989:221, para 15.

253 Case C-281/82 *Unifrex v Commission and Council* ECLI:EU:C:1984:165, para 9.

254 Case C-281/82 *Unifrex v Commission and Council* ECLI:EU:C:1984:165, para 9.

255 Case C-281/82 *Unifrex v Commission and Council* ECLI:EU:C:1984:165, para 10.

256 On the lack of jurisdiction of national courts to declare an EU act invalid, see Ch. 5, para 5.3.1.

to give effect to EU law. As effective judicial protection could not be offered at the national level, the duty to exhaust national remedies did not apply and therefore the applicant's claim at the EU level was held to be admissible.²⁵⁷ *Unifrex v Commission and Council* was later confirmed in *Krohn v Commission*²⁵⁸ and *Travelex v Commission*.²⁵⁹

The absence of a final ruling by the national courts in an action for damages will only in exceptional situations lead to the inadmissibility of the EU action for damages. In *Holcim Romania v Commission*, the General Court held that inadmissibility of an EU action for damages would only arise where the lack of a final national ruling leads to the EU Courts being unable to identify 'the nature and the quantum of the damage' alleged.²⁶⁰ However, although inadmissibility will only result in the situation just mentioned, the EU Courts must await the national judgment before assessing the existence and the quantum of any damage, the causal link between the EU conduct and the damage alleged and decide on the amount of the damage 'where (i) a person has brought two actions before the EU judiciary seeking compensation for the same damage, one against a national authority, before a national court, and the other against an EU institution or body, and (ii) there is a likelihood that, because of the different assessments of that damage by the two different courts, the person in question may be insufficiently or excessively compensated, the EU judiciary must, before deciding on the, wait until the national court has given final judgment on the action brought before it'.²⁶¹ Yet the EU Courts can already ascertain the lawfulness of the conduct alleged and whether it is capable of giving rise to EU liability,²⁶² i.e. whether the relevant EU authority is 'liable in principle', which it also did in *Kampffmeyer v Commission*.

6.5.2.3.3 Critical notes

In my view, the duty to exhaust national remedies should not have been applicable in *Unifrex v Commission and Council* in the first place. Whereas in *Kampffmeyer v Commission* one could argue that it was legitimate to refer to the national courts for judicial protection as the German authorities were primarily liable, this reasoning does not apply to *Unifrex v Commission and Council* and the other cases. In all these cases, the Commission should in my view be regarded as primarily liable. However, I do understand the Court's idea behind the duty to exhaust national remedies. They may have sought to mirror the division of jurisdiction in judicial review where a Member

257 Case C-281/82 *Unifrex v Commission and Council* ECLI:EU:C:1984:165, para 12-13.

258 Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85.

259 Case T-195/00 *Travelex and Other v Commission* ECLI:EU:T:2003:111, para 87.

260 Case T-317/12 *Holcim Romania v Commission* ECLI:EU:T:2014:782, para 75.

261 Case T-317/12 *Holcim Romania v Commission* ECLI:EU:T:2014:782, para 79-80.

262 Case T-317/12 *Holcim Romania v Commission* ECLI:EU:T:2014:782, para 80.

State implements an EU act.²⁶³ The primary jurisdiction then lies with the national courts. If the validity of the relevant national act is dependent on the validity of an EU act, they can refer a preliminary ruling on validity to the Court. From an administrative law perspective, the invalidity of the EU act may invalidate the national act implementing the invalid EU act. Therefore, national courts can – in theory – offer an all-round judicial review and provide full redress to the applicant. However, such all-round judicial protection cannot be provided in a national action for damages. Even where an EU act in a preliminary reference procedure is declared void by the Court, this will not necessarily lead to an obligation to compensate at the national level. Simply because the national authority implementing the EU act did not commit a wrongful act.

Furthermore, the duty to exhaust national remedies essentially raises the bar for judicial protection provided by EU Courts in an action for damages. Yet pursuant to Article 268 in conjunction with Article 340 TFEU, the first step already suffices for the Court's jurisdiction.²⁶⁴ In *Krohn v Commission* the applicant argued that according to the Treaty the non-contractual liability of the EU 'is in no way dependent on rights of action under national law'.²⁶⁵ It is, after all, 'an autonomous form of action'.²⁶⁶ The EU Courts have nevertheless repeatedly held that an EU action for damages must be examined in the context of the entire system of judicial protection and may be dependent on judicial protection offered at the national level.²⁶⁷ Hence, similar to the situation in actions for annulment, also in actions for damages concerning composite procedures national courts may be considered the courts providing primary redress.²⁶⁸

6.5.2.4 Guiding principle: judicial subsidiarity

From EU case law on the division of jurisdiction between the national courts and the EU Courts where a Member State implements a wrongful EU act, it may be inferred that the EU Courts take an approach based on (judicial) subsidiarity.²⁶⁹ Pursuant to this approach, the existence of a wrongful EU act not necessarily leads to the EU Courts assuming jurisdiction in an action for damages, as they in some instances for judicial redress refers to the national

263 Extensively on the EU doctrinal framework governing the division of jurisdiction in actions for annulment concerning top-down composite procedures, see Ch. 5, para 5.3.5.

264 See also Wils 1992, p. 204-205.

265 Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85, para 25.

266 Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85, para 26. See para 6.2.1.1.

267 Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85, para 27; Case C-281/82 *Unifrex v Commission and Council* ECLI:EU:C:1984:165, para 11; Case T-195/00 *Travelex and Other v Commission* ECLI:EU:T:2003:111, para 87.

268 More extensively on the primary role national courts may have in actions for annulment relating to composite procedures, see Ch. 5, para 5.3.4.4 and 5.3.5.3.

269 Fines 1997, p. 19-21.

courts. Fines views the principle of judicial subsidiarity as an illustration of the general EU subsidiarity principle, currently codified in Article 5(3) TEU.²⁷⁰ Both principles govern the distribution of competences between the Member States and the EU. Fines submits that the general principle of subsidiarity operates on the basis of efficiency, whereas the judicial subsidiarity principle is based on the remedies' effectiveness.²⁷¹ She criticises EU Courts for not providing applicants with a sufficient explanation where they deny jurisdiction under the guise of judicial subsidiarity and subsequently refer to the national courts for judicial protection.²⁷² She infers from EU case law that the arguments to refer the case to the national judicial level may lie in the division of jurisdiction between the national and the EU judicial level, admissibility requirements, or both.²⁷³

6.5.2.5 Joint liability in the SSM

To what extent may joint liability of both the ECB and an NCA arise in SSM composite procedures? And will the duty to exhaust national remedies be applied by the EU Courts, also in situations where judicial protection at the national level is not available due to a national statutory limitation of liability or immunity of the relevant NCA? For answering these questions the following categories of potential joint liability will be distinguished:

- a. The ECB has not taken adequate steps to prevent an infringement of EU law by DNB;
- b. Joint action by the ECB and DNB, for instance in a bottom-up composite procedure;
- c. DNB's application of an unlawful ECB act, which may include both a specific instruction and general instructions and guidelines.

For joint liability to arise in situation (a), it is necessary to establish a wrongful omission by the ECB. In such a situation, the NCA act constitutes the direct cause of the damage, but the ECB's omission could be considered 'quasi-causal'.²⁷⁴ As was discussed above, for the existence of a wrongful omission it is required that a legal obligation to act under EU law has been infringed, and thus that a duty to act or intervene exists. It was argued that the general power to take over the complete supervision from an NCA 'when necessary to ensure consistent application of high supervisory standards' may only be used as an *ultimum remedium* and therefore only under highly exceptional circumstances Article 6(5)(b) SSM Regulation will lead to a duty to act for the ECB. A similar conclusion applies to the ECB's powers

270 Fines 1997, p. 20-21.

271 Fines 1997, p. 20.

272 Fines 1997, p. 20.

273 Fines 1997, p. 20.

274 See Almhofer 2018, p. 187.

of instruction vis-à-vis NCAs pursuant to Article 6(3) and Article 9(1), third subparagraph, SSM Regulation. An ECB omission will thus not easily be established.

Once a wrongful omission is established, subsequently the EU requirement of causation could prove problematic for establishing ECB liability. On the basis of settled case law an independent or autonomous NCA act situated between the damage and the ECB act or omission will break the chain of causation between the latter and the damage. However, in light of the overall structure and hierarchy of the SSM, including the ECB's responsibilities, I believe that the principle as formulated in *Vloeberghs v High Authority* should be applied to this situation, establishing a causal link between the ECB omission and any damage.²⁷⁵

In *Vloeberghs v High Authority*, the Court held that 'if the High Authority, which is required to have Article 4 (a) [free movement of products, JT] respected by the Member States and Community undertakings, does not carry out that duty, those who are subject to it are entitled to consider themselves to have suffered damage to their legitimate expectations or to their rights and to ask for reparation of the damage which has thus been done to them.'²⁷⁶ Pursuant to the SSM Regulation, the ECB has been conferred the exclusive competences to carry out the SSM prudential supervisory tasks and is 'responsible for the effective and consistent functioning of the SSM'.²⁷⁷ Moreover, the ECB has been provided with several oversight powers over the NCAs.²⁷⁸ Therefore, in my view, where the ECB addresses an instruction to an NCA, the ECB has a duty to check whether the NCA correctly implements that instruction. If the NCA infringes EU law, and in my opinion even national law as the ECB is required also to apply national law, and the ECB breaches its duty to supervise the implementation and correct any errors, it must in principle be possible to hold the ECB liable for any damage. This line of reasoning applies to both instructions in accordance with Article 9(1), third subparagraph, SSM Regulation, and instructions directing an NCA to open national penalty proceedings.

The follow-up question is whether the duty to exhaust national remedies will apply, and thus whether a party that incurred damage must first institute an action for damage against the NCA. For the exception to the duty to apply, it is necessary to provide evidence that no compensation can be obtained at the national level. If an NCA incorrectly implements an ECB decision and infringes EU law or national law, the NCA act will probably constitute a wrongful act under national law. Therefore, if the Dutch courts apply the *Vie d'Or* standard, the doctrine governing non-contractual

²⁷⁵ Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:18.

²⁷⁶ Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:18, ECR 197, p. 216.

²⁷⁷ On the institutional set-up of the SSM and the division of supervisory competences and tasks between the ECB and the NCAs, see Ch. 4.

²⁷⁸ See Ch. 4, para 4.3.5.2.3.

liability for unlawful administrative acts or the regime for Member State liability, this wrongful act will likely lead to liability of DNB. If the national courts decide to apply the statutory limitation of liability, the wrongful act will generally not lead to liability. In that situation, the limitation would effectively preclude affected parties from obtaining compensation in an action for damages against DNB.

However, if a national court will apply the statutory limitation of liability, will the EU Courts indeed take on an action for damages against the ECB due to the fact that a Member State has in place a semi-immunity, that may constitute a breach of the principle of Member State liability, for its financial supervisory authorities which bars applicants from being awarded compensation at the national level? As follows from the case law regarding the duty to exhaust national remedies, these situations concern a correct implementation by national authorities of an incorrect EU act, or: the unlawful conduct alleged in support of the application for compensation is the responsibility of an EU institution and not of a national authority. I have not come across judgments in which the EU Courts accepted an exception to the duty to exhaust national remedies on the basis of national (semi-) immunities, let alone immunities that are contrary to EU law. I believe it is highly likely that the EU Courts in such situations for judicial protection will refer to the national courts, urging them to abide by the EU principle of Member State liability and, where necessary, set aside the national statutory limitation. All the more so, because situation (a) concerns an infringement of EU law or national law applied in the exercise of an EU supervisory function by DNB. It is particularly in these situations that the EU principle of Member State liability may limit the national procedural autonomy regarding any statutory limitations of liability, provided that an EU rule is infringed that is intended to confer rights upon individuals. Furthermore, where DNB infringed EU law, the EU Courts will consider DNB 'primarily liable' and thus, on the basis of the unwritten, doctrinal principle of 'judicial subsidiarity' refer to the national courts for judicial protection. Hence, the applicant must first exhaust the national remedies.

With regard to situation (b), a joint action by the ECB and DNB, it is conceivable that joint liability may arise, as, in contrast to *Borelli* and *Emerald Meats*, the ECB in SSM bottom-up composite procedures according to the Court has the exclusive decision-making power and therefore any national preparatory acts are not binding on the ECB. Where damage results from the ECB's final decision, the ECB may therefore be held liable. In addition to ECB liability, the NCA responsible for any preparatory acts may be held liable under national law for any damage caused by any of these preparatory acts. However, as was argued above, the Dutch legal principle of *formele rechtskracht* is likely to extend to DNB draft decisions, limiting the access to an action for damages against DNB under national law for those parties that qualify as interested parties under Article 263 TFEU in action for annulment against the ECB final decision. The exception to the duty to exhaust national remedies will thus apply. A national action for damages is

however open to other parties. Yet, even though a national action for damages against NCA preparatory acts may be available, it is unlikely the EU Courts will apply the duty to exhaust national remedies in an action for damages against an ECB final decision vis-à-vis any applicant, as it follows from *Berlusconi* that the Court considers the ECB to be the sole authority carrying the legal responsibility for the final act concluding an SSM bottom-up composite procedure. In situation (b), an action for damages may thus be brought directly against the ECB, irrespective of the type of party instituting it.

Joint liability may also arise in situation (c), DNB's application of an unlawful ECB act. Pursuant to the SSM Regulation, NCAs are under the obligation to implement specific ECB instructions addressed to them, i.e. ECB instructions are legally binding on the NCA addressed. As follows from *Krohn v Commission*, where an EU act is binding on a national authority, any unlawful conduct relating to this EU act that caused damage is to be attributed to the EU. An action for damages against an ECB instruction will thus in principle be admissible. The admissibility requirement comprising of the duty to exhaust national remedies will probably not be applied. The correct implementation by an NCA of an unlawful ECB instruction cannot lead to non-contractual liability at the national level. NCAs are under the obligation to implement an ECB instruction and do not have any discretion in that regard. Under Dutch law, a DNB act implementing a wrongful ECB instruction will not qualify as a wrongful act, neither under the statutory limitation of liability, nor pursuant to the doctrine governing non-contractual liability for unlawful administrative acts, the standard of *Vie d'Or* or the EU liability standard. Therefore, in such a situation an action for damages against DNB will be dismissed under Dutch law. A party that incurred damage may thus institute an action for damages at the Court against the unlawful ECB instruction, without the need to first initiate proceedings at the national level.

6.6 INTERIM CONCLUSIONS

The involvement of the ECB and NCAs in SSM composite procedures raises questions on the division of jurisdiction and the distribution of liability in non-contractual liability cases. It was found that due to the EU Courts' approach to the division of jurisdiction between them and the national courts in composite procedures, where both the relevant NCA's and the ECB's action constitute an illegal act, litigation may be initiated at two judicial levels. It was further argued that the principle of a single judicial review as introduced in *Berlusconi* does not apply to national actions for damages. EU law thus does in principle not preclude national courts from adjudicating actions for damages involving an NCA preparatory act. With regard to the EU concept of joint liability, it was concluded that in all three situations that were discussed, viz. the ECB has not taken adequate steps

to prevent an infringement of EU law by DNB; joint action by the ECB and DNB; and, DNB's application of an unlawful ECB act, joint liability of both the ECB and the relevant NCA may in principle arise, which could give rise to the duty to exhaust national remedies under EU law.

Yet, the general conclusions as set out above require nuance on the basis of an analysis of Dutch law and its interaction with the EU framework governing actions for damages. First of all, it was argued that the Dutch principle of *formele rechtskracht* applies where an ECB final decision in a bottom-up composite procedure has become definitive and that it extends to DNB draft decisions, vis-à-vis parties qualifying as interested parties at EU level. Therefore, where an ECB final decision has become definitive, DNB draft decisions cannot, as a rule, be challenged via a national action for damages by these parties. The conclusion that litigation may be initiated at two judicial levels thus may not apply in full if DNB is involved. Secondly, it was found that the duty to exhaust national remedies will most likely only apply in situation (a), where DNB infringed EU law and the ECB has not taken adequate steps to prevent the infringement. Furthermore, even though the Dutch statutory limitation of liability may, provided the national courts decide to apply it, effectively bar applicants from being awarded compensation at the national level, it is unlikely that the EU Courts will allow for such a limitation where it infringes upon the EU principle of Member State liability. Should an action for damages against the ECB be brought, the case will be referred to the national courts for judicial protection. In situations (b) and (c) the duty to exhaust national remedies will not be applied. Therefore, not exhausting national remedies will not affect the access to an action for damages against the ECB at the EU judicial level.

6.7 APPLYING THE NORMATIVE FRAMEWORK: ASSESSMENT

6.7.1 General

The normative framework applied in this dissertation builds on the 'composite' principle of effective judicial protection. The elements of the principle of effective judicial protection that are most relevant to this dissertation were selected and discussed in Chapter 2 and comprise: (1) clear system of judicial protection; (2) adequate access to court; (3) full jurisdiction of a court; (4) the right to judicial proceedings within reasonable time; and, (5) the right to damages for violations of EU law. The normative framework so operationalised will be applied to the findings in this chapter and the ensuing assessments will be discussed in the following paragraphs. In Chapter 7, the recommendations with a view to improving the current framework for actions for damages in the SSM will be formulated.

6.7.2 Assessment

6.7.2.1 *A clear system of judicial protection?*

At first sight, the division of jurisdiction between the national courts and the EU Courts in an action for damages against either an NCA or the ECB for damage resulting from an SSM composite procedure seems clear. Monetary compensation for damage caused by an NCA must be claimed at the national judicial level and compensation for damage caused by the ECB at the EU judicial level. However, several problems hamper the existence of a clear system of judicial protection.

Firstly, in a composite procedure, establishing which of the authorities involved, or both, committed an illegal act and whether a causal link exists between the illegal act and the damage incurred may be a challenging task for a party that incurred damage. Not only does selecting the competent judicial level require detailed insight into the authorities' cooperation (factual complexities), it also requires an assessment of both the national and EU liability requirements (legal complexities).

Secondly, additional complexity is created by the EU Courts in situations where both the NCA and the ECB may be held liable for the damage, i.e. where joint liability may exist. It was found that joint liability may potentially arise in various SSM composite procedures. For such situations, a duty to exhaust national remedies and an exception to it was developed in EU case law. An action for damages against the ECB cannot be adjudicated, or will even be inadmissible, where national remedies have not been exhausted. This also applies to situations where the ECB is liable 'in principle', i.e. where the ECB has committed an illegal act. An exception applies if no compensation can be obtained via national remedies. It will depend on the conduct of the relevant NCA and of the ECB, the type of damages claimed by the applicant and the applicable national law, whether compensation may be obtained at the national level and thus whether the exception to exhaust national remedies will apply. I argued that national statutory limitations of liability or immunities applicable to the relevant NCA, such as Article 1:25d Dutch Financial Supervision Act, are not likely to be considered by the EU Courts as a legitimate reason to apply the exception to the duty to exhaust national remedies. The EU Courts will refer to the national courts for judicial protection. The national courts must either interpret the national liability regime in accordance with EU law, or set aside national limitations and immunities. After these hurdles have been overcome, and the result is that the national courts are competent but do not grant full compensation, additional judicial redress must be sought at the EU level in an action for damages against the ECB. This consequence will be discussed further below, in relation to the right to judicial proceedings within reasonable time.

6.7.2.2 Adequate access to court?

The findings in this chapter at first sight did not uncover gaps in access to court in an action for damages. Any party that suffered damage as a result of an SSM composite procedure may institute an action for damages at one or two judicial levels. A party may in principle institute an action against DNB at the national level, at the ECB at the EU level, or against both at both levels concurrently. It was already argued above that, perhaps somewhat counterintuitively, this multitude of available judicial levels may hamper the existence of a clear system of judicial protection.

However, a first problem relating to adequate access to court concerns the potential consequences of the Dutch principle of *formele rechtskracht* for routes to obtain compensation for damage incurred as a result of a DNB draft decision. A prerequisite for potential compensation at the national level for parties qualifying as interested parties at the EU level in an action for annulment against the ECB final decision is annulment of the ECB decision. Without annulment, the principle of *formele rechtskracht* may prevent these parties from obtaining compensation via an action for damages at the national level against DNB. First, this consequence of the principle of *formele rechtskracht* is not (yet) commonly known nor discussed in Dutch legal literature, leading to parties not instituting an action for annulment against the ECB decision within two months and consequently forfeiting their access to a national action for damages. And second, the EU action for annulment against the ECB final decision will primarily be focused on the ECB's conduct and to a lesser extent on the relevant NCA. The NCA draft decision may be considered by the EU Courts, but the judicial review is concerned with the ECB final decision. A judgment upholding the ECB decision thus confirms the legality of that decision, yet may not necessarily confirm the legality of the NCA's draft decision. The limited jurisdiction of the EU Courts to review NCA acts adds to this concern. Whereas in purely national situations involving multiple authorities the consequences of the principle of *formele rechtskracht* for access to an action for damages are justified by the judicial protection offered by the administrative court that has full jurisdiction to review the actions by all authorities involved, this justification is absent in the single judicial review of EU composite procedures. As a result, affected parties risk to remain deprived of judicial protection in form of a national action for damages, whilst judicial protection provided by an action for annulment is not sufficiently offered at the EU judicial level.

A second problem is that the duty to exhaust national remedies infringes the right to adequate access to court. An EU action for damages must be instituted within five years 'from the occurrence of the event giving rise thereto', or the claim will be inadmissible. *Kampffmeyer v Commission* is illustrative of the possible length of national proceedings. If the applicant did not obtain full compensation at the national level after more than five years and wishes to obtain additional compensation at the EU level, the time limit of the EU action for damages will bar him from bringing an

EU action for damages. To not lose the opportunity to institute an action for damages at EU level, an applicant thus would be advised to institute an action for damages at the EU judicial level before the national courts have given final judgment, as was done by the applicants in *Kampffmeyer v Commission*.

6.7.2.3 Full jurisdiction?

The requirement of full jurisdiction entails that a court must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. In composite procedures, both the national courts and the EU Courts have limited jurisdiction with regard to the phase of the procedure beyond their jurisdiction. The respective judicial levels therefore cannot adjudicate an action for damages insofar as it concerns actions by the authority not within their jurisdiction. Furthermore, in situations of joint liability, pursuant to the duty to exhaust national remedies the EU Courts will refrain from assessing the existence and the quantum of any damage, the causal link between the ECB conduct and the damage alleged and from deciding on the amount of the damage. The EU Courts thus limit their jurisdiction over EU acts, only to prevent the applicant from 'being insufficiently or excessively compensated for the damage'. The 'limited jurisdiction' of the national courts pertaining to ECB acts, of the EU Courts pertaining to national acts and of the EU Courts pertaining to ECB acts where the duty of exhaust national remedies is applicable is to the detriment of effective judicial protection and is contrary to the requirement of full jurisdiction. Preventing the applicant from 'being insufficiently or excessively compensated for the damage' must not be achieved via a route that is to the detriment of full jurisdiction.

6.7.2.4 The right to judicial proceedings within reasonable time?

The duty to exhaust national remedies in an action for damages at the EU level entails a delay to the right to damages. Anecdotic proof are the applicants in *Kampffmeyer v Commission* who it took until 1974 to obtain a final judgment on compensation at the national courts. If they would not have been compensated fully, they would have had to institute proceedings once again, this time at the Court against the Commission. The delays involved are even harder to justify considering that the EU Courts can assess the lawfulness of the conduct alleged and whether it may give rise to liability, but will voluntarily refrain from deciding on the nature and quantum of the damage, the causal link and the amount of the damage, also where it is established that the EU authority committed an illegal act capable of giving rise to liability.

The right to judicial proceedings within reasonable time will particularly be violated by the duty to exhaust national remedies in situation (a) of joint liability, i.e. the ECB has not taken adequate steps to prevent an infringement of EU law by DNB. It was found that in situation (a) the

duty to exhaust national remedies will be applicable. The duty to exhaust national remedies will however not be applied by the EU Courts in situations (b), i.e. joint action by the ECB and an NCA, and (c), i.e. DNB's application of an unlawful ECB act.

6.7.2.5 *The right to damages for violations of EU law?*

The statutory limitation of liability of DNB limits its non-contractual liability to cases in which the damage to an important extent results from intentional wrongful conduct or gross negligence. This standard of fault is likely to exceed the EU requirement of a sufficient serious breach in certain situations. If DNB infringed an EU rule that aims to protect the interests of the injured party, the limitation of liability may not exceed the EU standard of Member State liability. If it does, applying the statutory limitation will constitute a breach of the right to damages for violations of EU law by a Member State.

Yet, as was shown by the Amsterdam Court of Appeal in its judgment of 5 July 2022 regarding liability of the AFM, national courts may be willing to set aside Article 1:25d Dutch Financial Supervision Act. They will in case of liability for inadequate supervision instead apply either the national standard of *Vie d'Or*, where necessary interpreted in accordance with the EU regime governing Member State liability, or the EU regime. In case of liability for an unlawful administrative act, national courts will either apply the national doctrine governing the liability for unlawful administrative acts, or the EU standard for Member State liability. The EU principle of equivalence requires that the standard providing the highest level of protection for the party that incurred damage is applied.

If the statutory limitation of liability is applied in SSM composite procedures, the lack of compensatory remedies at the national level may be 'compensated' by an action for damages against the ECB at the EU Courts. In all three situations of joint liability an action for damages against the ECB may be brought at the EU judicial level, albeit after exhausting the national remedies in situation (a). The ECB liability regime does not entail limitations of liability. Yet, the nature of the ECB's conduct in situations where DNB has violated EU law or national law, i.e. situations (a) and (b), will not easily lead to ECB liability. In these situations the ECB conduct will comprise of an omission, for instance in form of not taking adequate steps to prevent an infringement by DNB or not correcting an error in a DNB draft decision. An ECB omission will only be eligible to giving rise to a wrongful omission that could potentially give rise to non-contractual liability where the ECB was under a legal obligation to act. The general wording of its oversight and monitoring tasks make it unlikely that the EU Courts will infer a duty to intervene from it.

7.1 INTRODUCTORY REMARKS

The SSM constitutes an integrated administration for the exercise of prudential banking supervision with unique features, posing problems for effective judicial protection. The ECB is to be regarded as the central supervisory authority, responsible for the ‘effective and consistent functioning of the SSM’, yet is highly dependent on the assistance of the NCAs. Furthermore, ‘assistance’ in many instances would be an understatement for describing the close involvement and essential responsibilities of the NCAs. The NCAs are, *inter alia*, responsible for the direct supervision of less significant entities, for preparing draft decisions for the ECB and for implementing ECB instructions. The integrated nature of the SSM raises a host of legal issues, most notably in guaranteeing effective judicial protection. This dissertation is dedicated to effective judicial protection within the SSM and more specifically within SSM composite procedures, seeking to answer the main research question:

Is effective judicial protection currently guaranteed within the Single Supervisory Mechanism; and, if not, how should effective protection be achieved?

This final chapter summarises the findings of the previous chapters and presents concluding observations, syntheses and recommendations that aim to improve the current legal and doctrinal framework governing judicial protection in SSM composite procedures. The recommendations will be addressed to a variety of actors, including the EU legislature, EU and national courts, the ECB and NCAs. Furthermore, this chapter seeks to place the findings regarding the SSM in the broader context of the increasing Europeanisation and integration of EU administration.

Important to emphasise here is that various dissertations and other academic contributions have also analysed the topic of judicial protection within the SSM.¹ Some of the conclusions and recommendations in this chapter correspond to those addressed in other contributions, which in my view reinforces the necessity of critically evaluating the current system and introducing reforms to address the problems identified. Yet not all conclu-

1 For a more extensive overview, see Ch. 1, para 1.7.

sions and recommendations are shared with other contributions, and in some respects, this dissertation will propose more far-reaching reforms than proposed by other legal scholars.

7.2 THE NORMATIVE FRAMEWORK: A 'COMPOSITE' PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION

The normative framework for answering the research question was developed in Chapter 2. The EU principle of effective judicial protection is central to this framework. The elements of the principle of effective judicial protection most relevant to this dissertation were selected on the basis of a literature review concerning the most pressing threats an integrated administration may pose for effective judicial protection and comprise: (1) a clear system of judicial protection; (2) adequate access to a court; (3) full jurisdiction; (4) the right to judicial proceedings within reasonable time; and (5) the right to damages for violations of EU law.

I argued in Chapter 2 that the current interpretation and application of the principle of effective judicial protection in EU case law does not adequately address effective judicial protection in an integrated administration. It follows from EU case law that the principle in its current application reinforces the 'compartmentalisation' of composite procedures in judicial procedures, as it clearly distinguishes between a national phase and an EU phase, and refers jurisdiction to one of the judicial levels instead of treating composite procedures as 'unitary'.

The two judgments shaping the current doctrinal framework for judicial protection and the division of jurisdiction in composite procedures, *Borelli*² and *Berlusconi*,³ must be considered to reinforce compartmentalisation whilst strengthening effective judicial protection.⁴ Both judgments remedy a gap in access to court by introducing a national obligation to review binding national preparatory acts (*Borelli*) and a 'single judicial review' at the EU level (*Berlusconi*). These judgments nevertheless continue the tradition of a strict division of jurisdiction regarding both phases of the decision-making procedure. Although the gaps in the access to court may now be solved, this continuation causes a misalignment between the unitary nature of the composite procedure and the system of judicial protection. The misalignment ultimately comes at the expense of effective judicial protection.

To solve the 'weakness' of the current interpretation and application of the EU principle of effective judicial protection in order to guarantee effective judicial protection in composite procedures, including the element of an effective remedy, I argued that the principle must be further developed so as to facilitate alignment between the administrative structure of composite

2 Case C-97/91 *Borelli* ECLI:EU:C:1992:491.

3 Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.

4 See Ch. 2, para 2.4.4.1.

procedures and the judicial system. The principle of effective judicial protection must become a truly 'composite' principle. For this idea, inspiration was drawn from the EU duty of care, a central element of the EU principle of good administration. In EU case law on composite procedures, the duty of care has been used to facilitate the 'imputation' of national errors to the EU authority involved. The concept of imputation as developed in EU case law requires a form of culpable behaviour by the relevant EU authority, for example an infringement of its duty of care. The infringement may consist of not checking and correcting a national error of assessment or not remedying a national failure to respect the right to be heard. The terminology 'imputation' seems to imply that national errors may be imputable even in the absence of any EU law infringement by the relevant EU authority. Nevertheless, the concept of imputation as developed in EU case law is confined to situations where a self-standing breach by the relevant EU authority of an EU competence or duty can be established. The concept thus does not provide for 'strict' or 'qualitative' responsibility or liability of the relevant EU authority, including the ECB, for errors originating at the national level.

The rationale of the concept of imputation in composite procedures has been described by various scholars. Cassese, for example, asserts: 'The protection of the individual should not suffer as a result of the division of the proceeding between two different administrations'.⁵ However, such suffering persists where no infringement of a competence or duty by the relevant EU authority can be established. A national error in the preparatory phase of a composite procedure that could not and should not have been detected and corrected by an EU authority remains unjusticiable before the EU Courts. Adding to the challenge for judicial protection is that national preparatory acts generally are not reviewable in the national courts as they are not intended to produce legal effects, or the national courts are precluded from reviewing them pursuant to *Berlusconi*. If the national preparatory acts in which the error occurred do qualify as a binding national act within the meaning of *Borelli*, judicial review must be organised at the national level, and a full judicial review requires the involvement of the Court via a preliminary reference procedure.

I argued that the rationale of the EU concept of imputation must inform the interpretation and application of the principle of effective judicial protection. In my view, to fully guarantee effective judicial protection in composite procedures, the principle requires alignment between the system of judicial protection and the unity characteristic of composite procedures. How this alignment should exactly be achieved to guarantee effective judicial protection in SSM composite procedures will, *inter alia*, depend on the type of composite procedure, particularly whether it concerns 'bottom-up' or 'top-down' procedures, and which type of action it ensues, viz. an action for annulment or an action for damages.

5 Cassese 2004, p. 34.

7.3 APPLYING THE NORMATIVE FRAMEWORK: EFFECTIVE JUDICIAL PROTECTION IN SSM COMPOSITE PROCEDURES?

7.3.1 Selected SSM composite procedures

Chapters 5 and 6 mapped out and analysed the doctrinal framework for judicial protection in an action for annulment and an action for damages in SSM composite procedures, respectively. The selected SSM composite procedures that were analysed are:

- a. Procedure for authorising a credit institution;
- b. Procedure for withdrawing authorisation as a credit institution upon a proposal of the relevant NCA;
- c. Procedure for authorising the acquisition of a qualifying holding in a credit institution; and
- d. ECB instruction addressed to an NCA instructing it to take a specific action under national law vis-à-vis an individual credit institution (encompassing both an ECB instruction requiring an NCA to exercise a national power in case the SSM Regulation does not confer such a power upon the ECB (Art. 9(1), third subpara, SSM Regulation) and an ECB instruction requiring an NCA 'to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with' national law (Art. 18(5) SSM Regulation).

Composite procedures (a), (b) and (c) qualify as bottom-up composite procedures, i.e. initiated at the national level and culminating in an ECB final decision. Composite procedure (d) qualifies as a top-down composite procedure, i.e. initiated at the ECB level and culminating in a national final decision. The following paragraphs will discuss and assess these four procedures in the context of two actions, viz. the action for annulment and the action for damages.

7.3.2 Action for annulment in SSM composite procedures

7.3.2.1 *General*

Chapter 5 analysed the legal and doctrinal framework for the action for annulment in SSM composite procedures and particularly for the division of jurisdiction between the national courts, focusing on Dutch law and Dutch national courts, and the EU Courts. The EU Courts' doctrines governing the division of jurisdiction are different for bottom-up composite procedures and top-down composite procedures.

For the division of jurisdiction in bottom-up composite procedures, i.e. those that conclude with an EU final act, the decisive concept is 'exclusive decision-making power'. The EU judicial level has jurisdiction where the EU authority has the 'exclusive decision-making power' in the composite

procedure (composite procedures of the *Berlusconi* type) and the national judicial level where the national act is 'binding on' the EU authority (composite procedures of the *Borelli* type). The doctrine as developed in EU case law entails a mutually exclusive two-track approach and designates only one competent judicial level, i.e. either EU or national. Due to the traditionally strict separation of competences between the national courts and the EU Courts, the scope of jurisdiction of each of the judicial levels does in principle not encompass acts of authorities beyond their legal orders. National court jurisdiction is confined to reviewing national acts and EU Court jurisdiction to reviewing EU acts. Nevertheless, the landmark ruling of *Berlusconi* softened the dualism underlying the division of jurisdiction by introducing a 'single judicial review' for bottom-up composite procedures comprising an EU exclusive decision-making power. The Court thus assumed exclusive jurisdiction over both national non-binding preparatory acts or national proposals and the final EU act. National courts are explicitly precluded from reviewing any such national acts.

The *Berlusconi* judgment and the principle of a single judicial review must be understood to apply to all three selected bottom-up SSM composite procedures: the procedures for the authorisation, the withdrawal of authorisation and the authorisation of acquisitions of qualifying holdings. Judicial review of these procedures thus is centralised at the EU level and the national courts may not assert jurisdiction over actions for annulment pertaining to NCA preparatory acts within these procedures. However, it was concluded that regardless of this centralisation of jurisdiction, the EU Courts' competence in relation to national preparatory acts is limited in several respects. The EU Courts do not have jurisdiction to review the validity of national preparatory acts in light of national law that is beyond the scope of Article 4(3) SSM Regulation or without an EU equivalent, they cannot annul a national act, their jurisdiction is limited in relation to national AML/CFT assessments and it may be argued that they are insufficiently equipped to apply national law.

For SSM top-down procedures, more specifically the construction ECB instruction-NCA implementing decision, the situation is very different. The doctrine governing the distribution of jurisdiction between the EU and the national judicial level as developed in bottom-up composite procedures does not apply. Top-down composite procedures show some similarities with the traditional EU institutional model of 'executive federalism': The abstract general rule is adopted at the EU level, although the ECB instruction will likely be detailed and case-specific, and subsequently implemented by the Member States. The implementation in SSM top-down composite procedures culminates in an individualised NCA decision addressed to a credit institution.

The NCA decision implementing the ECB instruction may be challenged at the national level, for the legal effects of the composite procedure manifest themselves vis-à-vis the addressee (and other affected parties) with the NCA decision. Because the NCA decision will produce legal

effects vis-à-vis third parties, it will generally be considered a reviewable act under the applicable Member State law and therefore be challengeable at the national level. Therefore, and contrary to NCA preparatory acts that will generally not qualify as a reviewable act under national law, judicial protection in SSM top-down composite procedures is in principle provided for at the national level against the NCA implementing decision.

The prominence of national judicial protection in top-down composite procedures is furthermore reinforced by the strict requirements for legal standing at the EU level, i.e. direct and individual concern, setting a high bar for challenging any preceding EU act. Yet, it was argued that an ECB instruction directing an NCA to exercise a specific national competence vis-à-vis an individual credit institution (Art. 9(1), third subpara, SSM Regulation) is of direct concern to that credit institution as it leaves no room of discretion to the NCA. As such an instruction must be considered to also be of individual concern to the relevant credit institution, it may challenge the ECB instruction directly at the EU level. However, an ECB instruction requesting an NCA to open national sanctioning proceedings (Art. 18(5) SSM Regulation) does leave much room for discretion to the NCA. Hence, such an ECB instruction is not of direct concern to the addressee of the penalty and therefore cannot be challenged at the EU Courts.

Furthermore, the credit institution's management, its shareholders and creditors will not be allowed to challenge an ECB instruction requesting an NCA to exercise a specific national competence vis-à-vis an individual credit institution directly, as they are unlikely to satisfy the requirements of direct and individual concern. To obtain judicial protection, these parties must institute proceedings against the NCA implementing decision at the national level. Besides potential difficulties in establishing legal standing before the national courts, for a review of the preceding ECB instruction they are dependent on the willingness of the relevant national court to refer a preliminary question on validity of the underlying ECB instruction to the Court, the route of 'indirect review'. This route is accompanied by shortcomings for effective judicial protection, including the dependency on national courts, the absence of an exchange of pleadings similar to a direct action and the delays involved.

From the comparison between the EU and the Dutch doctrinal frameworks for an action for annulment, it follows that the approaches to legal standing differ. Under EU law, for instance, shareholders of a credit institution are on the basis of *Trasta Komercbanka* not considered to be directly affected by a decision to withdraw the banking license and EU case law shows a restrictive application of the legal standing requirements. Dutch law, especially with the introduction of AG Widdershoven's approach to the derivative interest doctrine that was adopted by the Dutch Trade and Industry Appeals Tribunal, leaves substantially more room for third parties to be qualified as interested parties. These differences between EU law and Dutch law, but probably also between Dutch law and other Member States' law, may lead to unjustifiable differences in judicial protection between for

instance a credit institution on the one hand and its shareholders on the other. A credit institution could, provided that the requirement of direct concern is met, challenge an EU instruction at the EU Courts, as it will be individually concerned. For shareholders, however, the route inevitably starts at the national level, where it is dependent on the willingness of the national court whether a legality review of the ECB instruction may be initiated via the preliminary reference procedure.

7.3.2.2 *Assessment*

7.3.2.2.1 *Clear system of judicial protection*

Shortcomings were detected regarding the element of a clear system of judicial protection, i.e. a system that enables an applicant to select with sufficient certainty the correct competent judicial level. Firstly, in the EU case law two different doctrines govern the division of jurisdiction in bottom-up composite procedures and top-down composite procedures. For SSM bottom-up composite procedures, the decisive element is the concept of exclusive decision-making power and *Berlusconi* introduced the principle of a ‘single judicial review’ at the EU judicial level, centralising judicial review of SSM bottom-up composite procedures at the EU level and simultaneously prohibiting parallel jurisdiction of the national judicial level. In contrast, the doctrine governing the division of jurisdiction in top-down composite procedures continues reinforcing the decentralised, i.e. national, exercise of judicial review of the national implementing decision involved, the strong compartmentalisation of the decision-making structure and allows for parallel jurisdiction of both judicial levels. These differences are unwarranted from the perspective of a clear system of judicial protection.

Secondly, both factual and legal complexities frustrate the existence of a clear system. These complexities reinforce each other. Complexities concerning the factual situation arise due to the difficulties applicants face in allocating the various legal responsibilities between the relevant NCA and the ECB. This allocation requires expert knowledge of the content and form of the cooperation and acts involved. The legal complexities hampering a clear system of judicial protection relate to the legal concepts decisive for the division of jurisdiction, including legal effects, discretion, exclusive decision-making power and direct and individual concern, because the interpretation of these concepts is far from clear. For example, the concept of exclusive decision-making power is of a substantive nature, i.e. the exclusive decision-making power not necessarily lies with the authority adopting the final decision. Thus, the competent judicial level not necessarily coincides with the final decision-making authority that addresses the decision to the addressee. Establishing which authority is responsible for the final decision may be an easy task for the addressee, but establishing which authority in the complex decision-making structure of a composite procedure has the exclusive decision-making may prove difficult, especially

in the current absence of a clear definition. With regard to the long-standing legal standing requirement of direct concern, *Trasta Komercbanka* is illustrative of the difficulties that the EU Courts themselves have when applying it. The General Court found the shareholders to be directly concerned by the ECB decision withdrawing Trasta Komercbanka's banking license,⁶ whereas in appeal the Court held that the General Court erred in considering the shareholders to be directly concerned.⁷

Yet nuance must be added, as *Berlusconi* brought clarity on the division of jurisdiction in SSM bottom-up composite procedures. It is clear from the judgment that the principle of a single judicial review will extend to other SSM bottom-up composite procedures, most specifically those selected in this dissertation. In these composite procedures the ECB must be considered to have the exclusive decision-making power. Therefore, with respect to the three selected SSM bottom-up composite procedures, it will not be necessary for an applicant to analyse in detail the legal framework governing the procedures, the factual cooperation between the relevant NCA and the ECB in order to select the competent judicial level. The EU Courts will be exclusively competent in the judicial review of the ECB final decision and any NCA preparatory acts.

7.3.2.2.2 Adequate access to court

With regard to the element of adequate access to court, several problems were detected. Yet in the selected SSM bottom-up composite procedures, the ECB final decision, including any national preparatory acts, may be challenged at the EU level by the addressees of the ECB decision, i.e. by the relevant credit institution in case of an authorisation or withdrawal decision and the relevant shareholder-applicant in the procedure for qualifying holding assessments, as well as by parties to whom the ECB decision is of direct and individual concern. In SSM top-down composite procedures where it concerns an ECB instruction requesting an NCA to exercise a specific national competence vis-à-vis an individual credit institution (Art. 9(1), third subpara, SSM Regulation), the national and the EU judicial level may be competent in parallel in actions brought by parties to which the ECB instruction is of direct and individual concern, most notably the credit institution that is the subject of the instruction and to which the NCA implementing decision will be addressed.

However, access to judicial review will generally not be available to parties that are not the addressee of a supervisory decision, most notably the credit institution's management, its shareholders and creditors, including

6 Case T-247/16 *Trasta Komercbanka AS v ECB* ECLI:EU:T:2017:623.

7 Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323.

bondholders and depositors. These parties will not satisfy the strict test for establishing individual concern as developed in *Plaumann*.⁸ Moreover, in case of an ECB withdrawal decision shareholders of the relevant credit institution will not qualify as directly concerned and therefore cannot challenge the decision, because according to EU case law their legal position is not affected by the withdrawal decision.⁹ In addition, a shareholder applicant is unlikely to secure access to judicial review at the EU level because it will not meet the legal interest requirement, which demands a shareholder to prove 'an interest of his own in bringing proceedings separate from the interest in which the company to which the EU act is addressed has in the annulment of that act'.¹⁰

The credit institution's management, its shareholders (sometimes including a national State) and creditors, although potentially (economically) affected by a supervisory decision addressed at the relevant credit institution, thus do not have access to judicial review at the EU level because they do not satisfy the EU legal standing requirements. This lack of access is problematic for effective judicial protection in situations where an EU right is infringed. Considering that several shareholder rights will be affected in case of a banking license withdrawal, including their right to receive dividends and to participate in the management of the credit institution, shareholders must be provided with an opportunity to protect their interests under the right to access to court, which is currently lacking.

Furthermore, the lack of access to judicial review at the EU level will make judicial protection a national matter. Whether access to judicial review is available will therefore depend on the applicable national law. In some Member States shareholders may have access to judicial review of any national implementing decisions following the withdrawal decision, in others they will not. Once access is provided at the national level, shareholders may via the preliminary reference procedure accomplish the review of the ECB withdrawal decision. It will thus depend on national law whether shareholders may be offered judicial protection at the EU level.

In addition, adequate access to court may be hampered in SSM top-down composite procedures as a result of the doctrine developed in *TWD Textilwerke Deggendorf*.¹¹ The Deggendorf doctrine blocks the route of indirect review via the preliminary reference procedure where an applicant would 'without any doubt' meet the legal standing requirements in an action for annulment against the ECB instruction and was 'fully aware' of

8 Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

9 See Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323, para 111.

10 Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323, para 105 with reference to case law cited in Case T-247/16 *Trasta Komercbanka AS v ECB* ECLI:EU:T:2017:623, para 53.

11 Case C-188/92 *TWD Textilwerke Deggendorf* ECLI:EU:C:1994:90.

it, yet did not bring proceedings within two months after publication of the instruction or of its notification to the applicant, or of the day on which it came to the knowledge of the latter. The addressee of an NCA decision implementing an ECB instruction is not necessarily aware of that instruction. Yet pursuant to the Deggendorf doctrine, access to the EU judicial level could be barred if the EU Courts would consider the addressee to have been 'fully aware' of the ECB instruction.

7.3.2.2.3 Full jurisdiction

Shortcomings were also detected regarding the requirement of full jurisdiction demanding a court 'must have jurisdiction to examine all questions of fact and law relevant to the dispute before it'.¹² Full jurisdiction in the judicial review of SSM composite procedures is lacking at both the national and the EU judicial level, although to a varying degree. As a rule, both levels are only competent with regard to 'their' phase of the procedure. For national courts, the *Foto-Frost* judgment established a prohibition to declare an EU act invalid.¹³ However, the limited national jurisdiction regarding EU acts may be considered partially compensated by the possibility of an 'indirect review' via a preliminary reference procedure on validity. This indeed may only be considered partial compensation, as the possibility of a preliminary reference procedure is not a right of the applicant. Applicants must rely on the national courts' willingness to refer. Furthermore, and as noted earlier, a preliminary reference procedure has several procedural disadvantages compared to a direct action for annulment.

The limited jurisdiction of the EU Courts in reviewing SSM bottom-up composite procedures relates to the application and interpretation of 'purely' national law as well as to reviewing national preparatory acts that constitute an exclusive NCA competence, most notably the AML/CFT assessments in, *inter alia*, the procedure for the assessment of acquisitions of qualifying holdings. The EU Courts' competence to assess composite procedures in light of national law is doubtful, which is problematic as national law will be applied by both the relevant NCA and the ECB pursuant to Article 4(3) SSM Regulation. The competence to apply national law that is beyond the scope of Article 4(3) SSM Regulation is absent. Thus, even though *Berlusconi* introduced a 'single judicial review' for the selected SSM composite procedures, this centralisation of judicial review has not been accompanied by full jurisdiction of the EU Courts, nor by, for example, a reverse preliminary reference procedure that could remedy the gap.

12 See e.g. European Court of Human Rights (ECtHR) 6 November 2018, 55391/13, 57728/13 and 74041/13, ECLI:CE:ECHR:2018:1106JUD005539113 (*Ramos Nunes de Carvalho e Sá t Portugal*), para 176.

13 Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452, particularly para 15.

7.3.2.2.4 *The right to judicial proceedings within reasonable time*

Problems regarding the right to judicial proceedings within reasonable time arise for SSM top-down composite procedures due to the necessity of two-level litigation to obtain a full judicial review, comprising of both national proceedings and the preliminary reference procedure. These problems particularly affect parties other than the relevant credit institution, viz. the management, shareholders and creditors, since they lack direct access to the EU judicial level and therefore must rely on the route of an indirect review, initiated at the national court level and subsequently followed on via the preliminary reference procedure. In addition to the problems this indirect route poses to adequate access to court, it specifically compromises the right to judicial proceedings within reasonable time due to the substantial delays involved with two-staged judicial review. The average length of a preliminary request is 18 months,¹⁴ which comes in addition to the time involved with the national proceedings. When taking into account both the national and EU proceedings necessary to obtain a full review of an SSM top-down composite procedure, it must be concluded that the necessity of a preliminary reference procedure for obtaining a full review will lead to a substantial delay, in violation of the right to a final process within a reasonable time.

7.3.2.3 *Recommendations: further alignment between SSM composite procedures and the framework for the action for annulment*

7.3.2.3.1 *General*

The need for further alignment between SSM composite procedures and the accompanying EU system of judicial protection is urgent in light of the problems for effective judicial protection as stated above. Currently, only weak alignment exists between the unity of the SSM composite procedures and the system of judicial review, both for bottom-up and top-down SSM composite procedures. In bottom-up SSM composite procedures, the weak alignment results from the partial unreviewability of national preparatory acts resulting from the EU Courts' jurisdictional limits. The EU Courts are, *inter alia*, not competent to review national law beyond the scope Article 4(3) SSM Regulation. The weak alignment in top-down SSM composite procedures results from the strict division between jurisdiction over the NCA implementing decision and jurisdiction over the ECB decision addressed to the relevant NCA. Consequently, two available routes for judicial review exist. The first route starts at the national courts in an action brought against the NCA decision implementing the ECB instruction and may be

14 Legal Experts Advisory Panel (LEAP), *Fair Trials – Preliminary Reference Toolkit*, last updated March 2021, p. 13, available at www.fairtrials.org/app/uploads/2022/01/CJEU-preliminary-reference-Toolkit-July.pdf.

extended with a preliminary reference procedure on validity of the ECB instruction (indirect action). The second route is a shortcut to the EU Courts and constitutes a direct action for annulment against the ECB instruction. While the indirect action is in principle available to all parties that have legal standing under the applicable national law, including potentially the credit institution's management and its shareholders and creditors, a direct action is available exclusively to the credit institution that is the subject of the ECB instruction, for only the credit institution will satisfy the requirements of direct and individual concern. The exception to this rule is an ECB instruction to 'open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with' national law (Art. 18(5) SSM Regulation) which leaves considerable discretion to the relevant NCA and therefore is not of direct concern to the relevant credit institution. Moreover, those parties that cannot challenge an ECB instruction directly must litigate at two levels to obtain a judicial review of the entire decision-making procedure.

Notwithstanding the Court's expression that the Treaties establish a 'complete system of legal remedies and procedures',¹⁵ the above shows that this phrase is more ambition than reality. How to achieve further alignment so as to address and remedy the problems for effective judicial protection? And what should be the degree of alignment? Various solutions can lead to enhanced alignment. Some solutions will be easier to establish than others, and some will be more at odds with the constitutional tradition of a dualistic system of judicial protection. Yet on the basis of the normative framework developed in Chapter 2, the optimal solution will be a centralisation of judicial review at the EU level, not only for bottom-up composite procedures, as introduced with *Berlusconi*, but also for top-down procedures. The normative framework furthermore requires such a centralisation to be accompanied by full jurisdiction of the EU Courts. However, the centralisation of judicial review at the EU level may prove difficult to realise due to constitutional and political constraints, necessary as it may be for guaranteeing effective judicial protection. Therefore, alternative solutions will also be proposed for enhancing alignment that may be considered less invasive for the current framework and constitutional traditions, and thus may be easier to achieve. As some of the recommendations will specifically be geared towards bottom-up or top-down composite procedures, a distinction will be made where necessary.

7.3.2.3.2 *Centralising judicial review of both bottom-up and top-down SSM composite procedures at the EU Courts*

The case for centralising judicial review

As demonstrated by the application of the normative framework to the findings in Chapter 5 regarding the legal and doctrinal framework govern-

15 Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:462, para 40.

ing the action for annulment in SSM composite procedures, and particularly governing the division of jurisdiction between the national and the EU judicial level, effective judicial protection is currently not guaranteed. The provision of a clear system of judicial protection is hampered, as well as adequate access to court, full jurisdiction and the right to judicial proceedings within reasonable time.

Guaranteeing effective judicial protection within SSM composite procedures necessitates **the centralisation of judicial review at the EU Courts of both SSM bottom-up composite procedures and SSM top-down composite procedures**. The centralisation at the EU level of judicial review of SSM bottom-up composite procedures has already been realised by *Berlusconi* (albeit with limitations regarding jurisdiction over NCA preparatory acts), but not for SSM top-down composite procedures. Centralisation of judicial review of both types of composite procedures would streamline the review of top-down composite procedures with that of the ‘single judicial review’ in SSM bottom-up composite procedures and would serve as a solution to the problems detected.

Firstly, the existence of two different doctrines governing the division of jurisdiction in judicial review, one for bottom-up composite procedures and the other for top-down composite procedures, is unwarranted in view of the element of a clear system of judicial protection. These doctrines are underpinned by diametrically opposite principles. Whereas the *Berlusconi* doctrine has directed the centre of judicial protection to the EU judicial level, a principle of decentralisation is underpinning the doctrine applicable to top-down composite procedures, imposing the task of judicial review primarily on the national courts. As regards the latter doctrine, the EU legal standing requirements of direct and individual concern set a high bar for applicants wishing to challenge the EU act involved, hence directing them to the national judicial level. Undeniably, this decentralisation of judicial review of SSM top-down composite procedures leads to problems for judicial protection that were addressed above, most notably because of the necessity of a preliminary reference procedure for a full judicial review, which hampers the right to judicial proceedings within reasonable time, and the uncertainties for applicants clouding that route.

Secondly, a centralisation of judicial review at the EU Courts of both SSM bottom-up and top-down composite procedures would lead to simplifying the system of judicial protection from the perspective of the applicant, and then create a clear system of judicial protection. A single judicial review for both types of composite procedures would remove the difficulties for assessing the competent judicial level caused by the legal concepts and the necessary insight into the factual cooperation between the ECB and the relevant NCA. Regardless of whether a composite procedure qualifies as a bottom-up or top-down composite procedure, and regardless of which of the supervisory authorities enjoys discretion or exclusive decision-making power, an action for annulment can be brought before the EU Courts.

Thirdly, the centralisation of judicial review of the construction ECB instruction-NCA implementing decision would overcome the problem for adequate access to court posed by the Deggendorf doctrine, potentially blocking the route of indirect review via the preliminary reference procedure.

Revolutionary?

The centralisation of judicial review of top-down composite procedures would challenge the long-standing tradition of a decentralised judicial review. In his Opinion in *Berlusconi*, AG Sánchez-Bordona stressed this tradition of a decentralised judicial review of (SSM) top-down composite procedures. He emphasised that in composite procedures where ‘a definitive measure adopted by national authorities may be *contaminated* by allegedly unlawful action on the part of EU institutions, on which that measure is based [emphasis in the original]’, judicial review remains with the national judicial level.¹⁶

Indeed, decentralisation may fit well with the tradition of executive federalism in which the EU legislates and the Member States execute. A direct action against the relevant Member State act that applies or implements an EU act is available at the national level and via the preliminary reference procedure the relevant EU act of general application may, indirectly, also be challenged. However, such decentralised judicial protection fits significantly less with the SSM and is particularly ill-suited for the top-down situation in which the ECB instructs an NCA to exercise a specific national power vis-à-vis an individual credit institution (Art. 9(1), third subpara, SSM Regulation). In this situation, the ECB has exercised the discretion to initiate a particular type of supervisory action vis-à-vis a supervised entity, yet it lacks a corresponding power. The decision to act has been adopted by the ECB and the relevant NCA may be considered a mere executor. These characteristics stress the importance of an enhanced involvement of the EU Courts in judicial scrutiny over composite procedures, including of the top-down type, that involve the ECB exercising its direct supervisory powers.

The idea of centralisation not only fits the reality of an integrated administration better, but is also far from revolutionary. Firstly, as was demonstrated in Chapter 5, the EU Courts already have jurisdiction in actions for annulment brought against an ECB instruction that requires an NCA to exercise a specific national power vis-à-vis an individual credit institution. Such an ECB instruction qualifies as a reviewable act. Furthermore, the credit institution that is the subject of the ECB instruction meets the legal standing requirements of direct and individual concern and thus may directly challenge the instruction before the EU Courts.

16 Opinion AG Campos Sánchez-Bordona in Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:502, para 61-62.

Secondly, the EU Courts could apply the line of thought in the *Berlusconi* judgment by analogy to assume jurisdiction over national implementing acts. Nevertheless, as EU case law currently stands, there have been no developments relating to jurisdiction over national acts in top-down composite procedures similar to those in the area of bottom-up composite procedures with *Berlusconi*. The Berlusconi doctrine and the principle of a 'single judicial review' have undeniably been developed only for bottom-up composite procedures, i.e. procedures that involve national preparatory acts or national proposals and a final EU decision. Any national errors may result in 'derivative illegality' of the EU final decision. The situation is different for top-down composite procedures that involve national implementing acts. Although the EU Courts can review an ECB instruction, any errors made in the national implementing phase may not lead to derivative illegality of the ECB instruction as in bottom-up procedures. The ECB instruction is not based on the national implementing decision and thus any errors in the implementing decision will not 'infect' its validity. However, following the reasoning in *Berlusconi*, it could be argued that the involvement of an NCA when implementing an ECB instruction does not take away that the ECB exercises, alone, the final decision-making power.¹⁷ In the constellation ECB instruction-NCA implementing act, the SSM Regulation does not aim to establish a division between an EU and a national power with separate purposes, yet lays down an ECB exclusive decision-making power,¹⁸ i.e. to address a supervisory decision to a credit institution via an ECB instruction addressed to an NCA. This reasoning could thus be applied to top-down composite procedures, allowing the EU Courts to assume jurisdiction over such procedures, including the national (implementing) phase of the procedure.

Thirdly, the idea of the EU Courts reviewing national actions that are overseen by EU authorities is not revolutionary were one to look at the case law concerning actions for damages in top-down composite procedures, in particular *Vloeberghs v High Authority*.¹⁹ The Court in *Vloeberghs v High Authority* established the principle that the Commission may be held liable for any damage caused if the national act has been made possible by a consecutive illegal failure of the Commission to exercise its supervisory powers.²⁰ By transposing this principle to the construction ECB instruction-NCA implementing decision, the ECB could be regarded as having the responsibility to supervise the correct implementation by the relevant NCA of the instruction. This responsibility could arguably be derived from the ECB's responsibility to oversee the correct functioning of the SSM in general and more specifically from the ECB's instruction itself requiring the relevant

17 Cf. Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 43.

18 Cf. Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023, para 44.

19 Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:18.

20 Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:18. See Craig & De Búrca 2020, p. 632 and Toth 1997, p. 193-194.

NCA to implement it in accordance with national law. A failure by the NCA to correctly implement the ECB instruction could then be considered to have been 'enabled' by the ECB's failure to adequately oversee and supervise the implementation.

Two issues: lack of jurisdiction to annul an NCA act, and type of remedy in case of national errors in the implementation

A centralisation of judicial review of the construction ECB instruction-NCA implementing decision raises similar as well as other legal issues compared to those arising in bottom-up composite procedures. Specifically problematic is that in the construction ECB instruction-NCA implementing decision, the national implementation takes place after the instruction. Therefore, in contrast to the situation in bottom-up composite procedures, errors made by the NCA in the implementation in principle cannot lead to invalidity and annulment of the ECB instruction. Such errors may at least not lead to invalidity of the ECB decision in a similar fashion as errors in national preparatory acts which are subsequently 'incorporated' into an ECB decision. Furthermore, the EU Courts do not have jurisdiction to annul a national act, including an NCA decision implementing an ECB instruction.²¹ Finally, the EU Courts may review and annul the ECB instruction, but such an annulment will not lead to the automatic invalidity of the national implementing decision.

As regards the latter issue: the relevant NCA may be considered to be under the obligation to revoke the national implementing decision, once its legal basis, i.e. the ECB instruction, has ceased to exist. This constellation is the mirror image of the route to be followed where a binding national preparatory act, i.e. those of the *Borelli* type, is annulled. The EU decision that was adopted on the basis of the binding national preparatory will not be automatically invalid. The EU authority responsible for the adoption must be requested to revoke its final decision following the annulment of the national measure.²²

The other issue: how should errors in the NCA implementation be dealt with by the EU Courts? An NCA could for example have used a different national supervisory competence than requested by the ECB, or the NCA may have failed to adequately state reasons in its supervisory decision. In order to guarantee effective judicial protection, the EU Courts should be competent to review the national implementation and either annul the national implementing decision or declare it contrary to EU or national law in a declaratory judgment. The ECB instruction will remain valid and therefore the relevant NCA will in both instances be required to remedy its former implementing decision or adopt another, new implementing decision. It furthermore must be possible for the applicant to ask for compensation in an action for damages.

21 See Ch. 5, para 5.3.4.7.

22 On the effects of the annulment of national preparatory measures on EU final decisions, see Brito Bastos 2021, 109-117.

7.3.2.3.3 Full jurisdiction as a necessary prerequisite for centralisation of judicial review

To guarantee effective judicial protection and more specifically the element of full jurisdiction, the **centralisation of judicial review at the EU Courts of SSM composite procedures must be accompanied by ‘full jurisdiction’ of the EU judicial level.** The EU Courts must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. Most importantly, the EU Courts’ jurisdiction in judicial review must extend to the national acts involved. In bottom-up composite procedures these concern NCA preparatory acts and in top-down composite procedures any NCA implementing decisions.

National law plays a key role within the SSM and partially governs its composite procedures. Substantive banking regulation is (still) to an important extent codified in Directives and implemented into national law, and the ECB has been conferred the power to apply this national legislation. Also, the NCAs will apply national law when exercising supervision and adopting decisions in composite procedures.

As observed above, with regard to SSM bottom-up composite procedures, the gap relating to the application and interpretation of ‘purely’ national law and to reviewing national preparatory acts that constitute an exclusive NCA competence, most notably in the AML/CFT area, must be remedied. With the centralisation of judicial review of SSM bottom-up composite procedures, the EU Courts are now confronted with the task of applying national law to assess the validity of ECB and NCA acts. Irrespective of their task in relation to national law, I argued that the EU Courts cannot be regarded as *juges de droit national*.²³ Not only is their competence to apply national law restricted by the definition of national law in Article 4(3) SSM Regulation, which arguably excludes ‘purely’ national law such as national administrative rules, but they also are not necessarily sufficiently equipped to apply and interpret national law. The EU Courts have adopted a pragmatic approach to this problem. When interpreting national law, they will take into account the interpretation by the national courts. If such rulings on interpretation are absent, it is for the EU Courts to rule on the relevant national provision. How this practice should be appreciated, will be discussed below.

EU Courts interpreting national law: formal reverse preliminary reference procedure or not?

As stated, the EU Courts cannot be accused of a lack of pragmatism in their approach to situations where no national interpretative rulings are available. However, several problems with this approach have been highlighted by legal scholars, particularly the lack of instruments of the EU Courts to

23 See Ch. 5, para 5.3.4.7.

interpret national law as well as the risk it would pose for the coherence and uniformity of national law in case multiple interpretations would emerge.²⁴ There seems to be consensus on the preferred solution for these problems: increased cooperation between the EU Courts and the national courts, preferably via a reverse preliminary reference procedure.²⁵ Yet, the proposals brought forward range from informal cooperation networks to the introduction of a formal reverse preliminary reference procedure.²⁶

All solutions mentioned above advocate a strict ‘deferential approach’, rather than an ‘autonomous approach’, to interpreting national law.²⁷ A deferential interpretation of national law relies on the interpretation by the (highest) national courts.²⁸ In the absence of such rulings, the EU Courts must interpret relevant national provisions via the traditions and methods of interpretation in that Member State.²⁹ Via the autonomous interpretative method, the EU Courts would interpret a national provision themselves without recourse to national law or national interpretative methods.³⁰

From the perspective of ensuring the uniformity of national law, a strict deferential interpretation may seem to be the preferred solution,³¹ but the involvement of national courts is likely to cause substantial delays, all the more if the formal method of a reverse preliminary reference procedure would be used. These delays would risk jeopardising effective judicial protection and particularly the right to judicial proceedings within a reasonable time. Furthermore, the importance of strengthening the involvement of national courts in interpreting national law in SSM composite procedures in my view must not be overestimated, as it will to an important extent concern national provisions that implement Directives.³² **These national provisions implementing EU law must as a matter of principle be interpreted by the EU Courts in accordance with the formulation and the purpose of the Directive, thus ‘autonomously’, and therefore may not require an opinion or binding ruling of a national court on the correct interpretation of the relevant rule of national law.**

Yet, there will be situations where a national provision is ‘purely’ national, including for instance Member State options. For interpreting such national provisions, a more deferential approach would be preferred. To

24 Gagliardi & Wissink 2020, p. 41-71.

25 Gagliardi & Wissink 2020, p. 70-71; Van Rijn 2022, p. 615-617; Wissink 2021, p. 308-310; Vossen 2020, p. 259-260; Karagianni 2022, p. 253-254.

26 For an extensive overview of options, see Wissink 2021, p. 308-310.

27 For this distinction between two approaches of the interpretation of national law by the EU Courts, see Witte 2021, p. 239-241.

28 Witte 2021, p. 239.

29 Witte 2021, p. 239.

30 Witte 2021, p. 239.

31 The uniformity of national law plays a decisive role for Gagliardi and Wissink in arguing in favor of increasing the involvement of national courts in EU Courts’ decisions concerning national law, see Gagliardi & Wissink 2020, p. 51, 71.

32 See also Witte 2021, p. 240-241

avoid delays and in light of the right to judicial proceedings within reasonable time, however, **the EU Courts themselves should interpret ‘purely’ national law without the formal involvement of national courts, while taking into account any national rulings on interpretation and, in the absence of those, interpreting it within the broader context of the national system and its interpretative methods.**

Whether the EU Courts should adopt an autonomous or a deferential approach in interpreting national law will thus depend on the source of the national provision in question, which may not always be an easy question to answer. Yet, if a national provision constitutes an implementation of EU law, the EU Courts should take an autonomous approach to its interpretation. If a national provision does not have an EU source and is purely national, a deferential approach to its interpretation should be adopted.

Alternatively: further regulating and harmonising the NCA preparatory phase

If the centralisation of judicial review at the EU judicial level and the subsequent monopoly on reviewing national preparatory acts (and, following the recommendation above: national implementing acts) will not be accompanied by corresponding competences for the EU Courts in connection with national law, the alternative would be to further harmonise the NCA preparatory phase. As stated earlier, the EU Courts currently have limited jurisdiction over national preparatory acts, so that errors originating at the NCA level risk remaining unjusticiable. By further regulating and harmonising the NCA preparatory phase via EU legislation, infringements by the NCA of these harmonised provisions may more easily lead to ‘derivative illegality’ of the ECB final decision and thus provide for justiciability of national errors.

In light of the constitutional constraints, most notably the principles of uniformity and autonomy of EU law, and the EU Courts’ tradition of refraining from applying national law due to their dualistic view of the EU system of judicial protection, I consider it unlikely that the EU Courts will seek opportunities to expand their jurisdiction to national law. A Treaty reform is even more improbable.³³ Furthermore, if EU law would indeed accept that violations of purely national law may invalidate EU acts, which would entail a deviation from the principles of uniformity and autonomy of EU law,³⁴ this may be problematic from various perspectives. Most notably, it would pose serious risks to the effectiveness of EU law, including SSM supervision. In a worst-case scenario, a Member State could enact national legislation with the sole view of frustrating the effectiveness of an ECB decision. Therefore, the limits to the EU Courts’ jurisdiction regarding national law are not only preferred from an EU constitutional perspective, but from the perspective of the effectiveness of EU law as well.

³³ See also Brito Bastos 2020, p. 89.

³⁴ See Ch. 5, para 5.3.4.7.

Inevitably, however, the EU Courts' blind spot regarding national law poses problems for effective judicial protection, and more specifically for the requirement of full jurisdiction. To overcome this gap, **further regulating and harmonising the NCA preparatory phase via EU legislation should be achieved.**³⁵ By making more explicit the NCAs' investigative role, their **drafting task and the general procedural rules that govern the preparatory phase**, for example in the SSM Regulation and the SSM Framework Regulation,³⁶ the EU Courts would be empowered to exert stricter scrutiny of the national preparatory phase. Furthermore, a violation of these rules by the NCA would make it possible to impute such errors to the ECB, which may ultimately affect the validity of the ECB final decision and thus achieve 'justiciability' of national errors.

*Alternatively: duty of care as a judicial review tool for national AML/CFT assessments*³⁷

An illustrative example of national irregularities that to an important extent are beyond judicial review by the EU Courts is the AML/CFT assessment as carried out by the relevant NCA in the procedure for the assessment of the acquisition of qualifying holdings.³⁸ The ECB has not been conferred the competence to carry out such assessments, which thus has remained a competence of the Member States.³⁹ Nevertheless, the decision granting or opposing the acquisition of a qualifying holding or withdrawing a banking license is an exclusive task and power of the ECB. The division of responsibilities entails in short that the relevant NCA is responsible for establishing the facts that may constitute breaches of AML/CFT legislation whereas the issue of whether those facts justify the withdrawal of authorisation and the assessment of proportionality is an ECB competence.⁴⁰ Because the AML/

35 For similar recommendations, see Brito Bastos 2020, p. 89; Wissink 2021, p. 311.

36 Another option would be to create a general administrative EU law, that would be applicable to both national and EU authorities in areas of EU law. Such a general EU administrative law is currently absent, but the Research Network on EU Administrative Law (ReNEUAL) has proposed the 'ReNEUAL Model Rules on EU Administrative Procedure', available at www.reneual.eu/projects-and-publications/reneual-1-0/.

37 This paragraph contains and builds on Budinská & Tegelaar 2023, p. 329-351.

38 Relevant in this respect are the developments regarding the establishment of a supra-national EU AML/CFT authority (Anti-money-laundering authority (AMLA)), see Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM(2021) 421 final. The AMLA will be the central authority in an integrated system composed of the AMLA and the national authorities with an AML/CFT supervisory mandate.

39 Recital 28 SSM Regulation. See Ch. 4, para 4.3.4.1.

40 See Case T-351/18 *Ukrseľhosprom PCF and Versobank v ECB* ECLI:EU:T:2021:669, para 197. See also ECB, 'The ECB and anti-money laundering: what we can and cannot do', available via www.bankingsupervision.europa.eu/press/publications/newsletter/2018/html/ssm.nl180516_2.en.html.

CFT assessments themselves are an exclusive national competence, the EU Courts' jurisdiction in judicial review of composite procedures which include such an assessment is limited.

An attempt to remedy this gap in judicial protection relating to the requirement of full jurisdiction may be made via an extensive interpretation of the EU duty of care.⁴¹ In *Versobank v ECB*, which concerned an ECB withdrawal decision upon request of the Estonian NCA, the General Court also utilised the EU duty of care, i.e. the 'duty to conduct a careful and impartial assessment', to assert jurisdiction over the national AML/CFT assessment.⁴² However, the General Court's interpretation of the ECB's duty of care is narrow.⁴³ It held that 'the [NCA's] findings regarding breaches, which have not been properly challenged by the second applicant, had to be treated by the ECB as established facts and as not requiring, for that reason, a review by the ECB.' Accordingly, the ECB 'rightly confined itself to verifying whether those breaches did indeed constitute grounds justifying the withdrawal of authorisation'.⁴⁴ Furthermore, the applicant has to 'challenge in detail any alleged shortcomings of the ECB in the adoption of the decision'.⁴⁵

It must be inferred from the *Versobank* judgment that, according to the General Court, the ECB will only have a duty of care to check the national AML/CFT assessment if the applicant brings to bear arguments that specifically challenge elements of the national assessment.⁴⁶ In this analysis, the ECB would have no independent and self-standing obligation, i.e. an obligation that exists regardless of any objections by the applicant, to check whether the facts provided by the relevant NCA support the outcome of the AML/CFT assessment. The duty of care must of course respect the distribution of responsibilities in the area of AML/CFT, meaning that the ECB must in principle rely on the NCA's fact-finding, but it should be interpreted more broadly. Thus, the ECB should have an obligation to ascertain whether the facts support the NCA's conclusions, as well as whether the findings regarding AML/CFT justify a license withdrawal or rejection of an authorisation to acquire a qualifying holding.⁴⁷ The ECB's assessment period is 60 days and must be sufficient for carrying out its duty to ascertain the compatibility between the NCA's fact-finding and conclusions and, if necessary, request the relevant NCA to take additional action, in form of, for example, a re-assessment or the gathering of additional information.

41 Extensively on the potential of the duty of care as a judicial review tool in SSM composite procedures, and more specifically in relation to national AML/CFT assessments, see Budinská & Tegelaar 2023, p. 329-351.

42 Case T-351/18 *Ukrseļhosprom PCF and Versobank v ECB* ECLI:EU:T:2021:669, particularly para 214 et seq.

43 See also Budinská & Tegelaar 2023, p. 348.

44 Case T-351/18 *Ukrseļhosprom PCF and Versobank v ECB* ECLI:EU:T:2021:669, para. 219.

45 Case T-351/18 *Ukrseļhosprom PCF and Versobank v ECB* ECLI:EU:T:2021:669, para. 218.

46 See also Budinská & Tegelaar 2023, p. 348.

47 See also Budinská & Tegelaar 2023, p. 349.

Hence, the EU Courts should adopt an extensive interpretation of the EU duty of care in order to provide for effective judicial protection when reviewing a national AML/CFT assessment forming part of an SSM composite procedure. In addition, the ECB's responsibilities in relation to a national AML/CFT assessment should be codified in more detail in the SSM Regulation and SSM Framework Regulation, including its duty to not only ascertain whether the findings regarding AML/CFT justify a license withdrawal or rejection of an authorisation to acquire a qualifying holding, but also to determine whether the facts support the relevant NCA's conclusions.

7.3.2.3.4 Alternatives if no centralisation of judicial review of SSM top-down composite procedures is achieved

General

As stated, the centralisation of judicial review of SSM top-down composite procedures would constitute a break with the long-standing EU tradition of the national courts acting as the primary point of entry for judicial review. It would furthermore require an expansion of the EU Courts' jurisdiction, so as to encompass the judicial review of national implementing decisions in light of both EU and national law. It thus is not inconceivable that such a centralisation of judicial review of SSM top-down composite procedures will not be realised, at least not in the near future. Therefore, alternative routes to enhance effective judicial protection will be proposed hereinafter, namely increasing the transparency in composite procedures regarding both the current factual and legal complexities and strengthening the route of 'indirect review' (or 'indirect action').

More transparency

Composite procedures are inherently complex, and the content of the interaction and cooperation between the authorities involved are opaque to third parties. That opacity frustrates the necessary insight into the division of legal responsibilities and impedes assessing at which of the administrative levels an error occurred. Moreover, I argued that the legal concepts governing the division of jurisdiction between the national and EU judicial level cause legal uncertainty for applicants. Increasing transparency with respect to both the factual situation and the legal concepts would enhance effective judicial protection.

As regards the opaque interaction and cooperation between the ECB and the relevant NCA, more transparency may relatively easily be created by the ECB and the NCAs themselves. For instance, they could **proactively inform the addressee of a decision of whether or not it was based on a preceding act adopted by the ECB or an NCA.**⁴⁸ The involvement of an

48 Similarly, although only relating to ECB instructions, see Van Rijn 2022, p. 612-613.

NCA is inherent to the authorisation procedure and the procedure governing the assessment of acquisitions of qualifying holdings. Therefore, the addressee knows or at least should know that a national preparatory act preceded the ECB final decision. Furthermore, the SSM Framework Regulation requires the notification by the relevant NCA of a draft authorisation decision.⁴⁹ Yet the future addressee is not informed of an NCA draft withdrawal decision or a draft decision relating to the assessment of the acquisition of a qualifying holding. These draft decisions should however be provided for by the ECB, for example as an annex to its final decision.

Furthermore, in the construction ECB instruction-NCA implementing decision it may not always be clear for the addressee of the NCA decision that it was adopted upon binding request of the ECB. **NCA's should be transparent about an ECB instruction being the legal basis for their decision.** Moreover, **the ECB instruction should be provided to the addressee in full.** This should take place proactively by the relevant NCA; it should not be necessary for the addressee to request it. These transparency requirements for both the ECB and the NCA should best be codified in the SSM Framework Regulation and the ECB Rules of Procedure. Moreover, this principle of transparency should have a legal basis in the SSM Regulation.

In addition, transparency on the available route(s) for judicial review should be made available in the decisions via a 'remedies clause'.⁵⁰ Not only should this clause mention the 'principal' route to obtain possible remedies, i.e. through direct action against either the ECB final decision or the NCA final decision, it should also mention the possibilities of challenging the NCA preparatory act or the ECB instruction. Currently, the ECB is not under the obligation to provide such a remedies clause as the SSM Regulation does not provide for it. Under the Dutch GALA, however, DNB, the Dutch NCA, is required to include a remedies clause in its decisions.⁵¹ Nevertheless, this requirement may be interpreted too narrowly by DNB. In a decision to impose a fine on a credit institution upon instruction of the ECB, for instance, the remedies clause exclusively mentioned the route of administrative review by DNB, instead of referring to ABoR or the judicial review of the ECB instruction.⁵² In this particular situation, however, the relevant ECB instruction to open proceedings under national law left discretion to DNB and therefore the credit institution will probably be unable to prove direct concern and thus lack standing at EU level. Referral to the available remedies at the EU level should however be included in NCA decisions

49 Art. 88(3)(a) SSM Framework Regulation.

50 Also proposed by Van Rijn 2022, p. 612-613, and Wissink 2021, p. 312.

51 Art. 3:45(2) GALA.

52 DNB decision of 21 January 2020 to impose administrative sanctions on Rabobank upon an ECB instruction requesting opening proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with national law, available at www.dnb.nl/nieuws-voor-de-sector/handhavingsmaatregel-2020/dnb-legt-aan-cooperatieve-rabobank-u-a-rabobank-bestuurlijke-boetes-op-wegens-het-niet-correct-toepassen-van-europese-beloningsregels-in-2014/.

adopted on the basis ECB instructions that do not leave discretion, particularly ECB instructions adopted pursuant Article 9(1), third subparagraph, SSM Regulation regarding an individual credit institution.

Regarding the ambiguities of the legal concepts of the Court's doctrine, the EU Courts should continue to more concretely define concepts such as 'exclusive decision-making power', 'discretion', 'legal effects' and 'direct and individual concern'.

Strengthening the route of 'indirect review'

The route of 'indirect review' via a preliminary question on the validity of an ECB instruction preceding an NCA implementing decision is key to guaranteeing effective judicial protection and particularly full jurisdiction. The strict legal standing requirements for a direct action for annulment are placing the burden of providing judicial protection firmly upon the national courts. Indirect review can secure judicial scrutiny over all acts within an SSM top-down composite procedure. A judicial review of the validity of the ECB instruction is especially important, as it constitutes the legal basis of the NCA implementing decision. Put differently, the validity of the ECB instruction is a prerequisite for the validity of the NCA implementing decision. Despite the vital role of the preliminary reference procedure for securing effective judicial protection in top-down composite procedures, it was found that various factors cause difficulties in practice. These difficulties concern the dependency on the willingness of national courts to refer a preliminary question, because indirect review does not exist as a matter of right to applicants; the absence of a full exchange of pleadings between the parties involved; the Deggendorf doctrine potentially blocking the indirect review; and, the delays involved with the preliminary reference procedure.

The key role of indirect review for securing effective judicial protection underlines the importance of strengthening this route. A first recommendation is addressed to the national courts: **The national courts should take due account of the importance of the preliminary reference procedure for obtaining a full review.** Indeed, EU case law obliges them to do so. National courts must stay national proceedings and make a reference to the Court for a preliminary ruling if they consider one or more arguments by the applicant contesting the validity of the EU act or of its own motion to be well-founded.⁵³ Nevertheless, a national court not abiding by this obligation is unlikely to face any consequences, neither in form of infringement proceedings by the Commission, nor in form of Member State liability. Therefore, the SSM Regulation could for example be expanded with a section on 'loyal cooperation' between the EU Courts and the national courts in SSM composite procedures, laying down explicitly the obligation as formulated in EU case law. Such a section could contribute to raising awareness at the national courts of the importance to duly consider a request for a preliminary question on validity of the underlying ECB instruction.

53 Case C-344/04 *International Air Transport Association* ECLI:EU:C:2006:10, para 30, 32.

A second recommendation is addressed to the EU Courts regarding the application of the Deggendorf doctrine. This doctrine limits the availability of an indirect review for applicants that did not institute a direct action under Article 263 TFEU within two months, while they would ‘without any doubt’ have had legal standing and were ‘fully aware’ of the relevant EU act they wish to challenge via the preliminary reference procedure. The application of the doctrine in *Iccrea Banca v Bank of Italy* and its consequences, i.e. forfeit of the possibility of challenging an SRB decision preceding an NRA implementing act,⁵⁴ in my view did not pose problems to effective judicial protection.⁵⁵ However, situations may arise where its consequences are unwarranted. In *Iccrea Banca v Bank of Italy*, there was no doubt about legal standing, nor about the existence of an SRB decision that was the basis of the NRA decision. However, knowledge of the existence of an ECB instruction preceding an NCA decision is not self-evident. Normally, an ECB instruction is not notified to the ultimate addressee and is not necessarily mentioned in the NCA implementing decision. Furthermore, in contrast to the situation in *Iccrea Banca v Bank of Italy*, it is not clear from the SSM Regulation which types of national decisions are preceded by an ECB instruction. The power of instruction is formulated very broadly, ‘[t]o the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB’.⁵⁶ Addressees of an NCA decision therefore cannot be expected to be aware of the preceding instruction and **the Deggendorf doctrine should thus be applied by the EU Courts with great caution so as to avoid an unwarranted gap in judicial protection.**

7.3.2.3.5 Expanding legal standing for shareholders at EU level

To remedy the gap in the right to access to court at the EU level for the management, shareholders and creditors of a credit institution, **legal standing should be expanded by loosening the requirement of individual concern.** This recommendation is relevant both for bottom-up composite procedures and top-down composite procedures. Inspiration is drawn from AG Jacobs’ suggestion in his Opinion in *Unión de Pequeños Agricultores v Council*: **a party is to be considered individually concerned by an EU decision where the decision ‘has, or is liable to have, a substantial adverse effect on his interests’.**⁵⁷

54 Case C-414/18 *Iccrea Banca v Bank of Italy* ECLI:EU:C:2019:1036.

55 For an opposing view, see Van Rijn 2022, p. 460-466, 587.

56 Art. 9(1), third subpara, SSM Regulation.

57 For this terminology, see Opinion AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197, para 60.

Not only will such a widening of the individual concern criterion do justice to the interests potentially affected by a decision addressed to a credit institution, it will also make these parties in the construction ECB instruction-NCA implementing decision less dependent on the applicable national law and national courts. It will enable them to bring an action for annulment directly at the EU level against the ECB instruction. This direct route allows for a shorter, more effective and less costly route to judicial review.

Furthermore, by widening legal standing at the EU level, the degree of judicial protection for other parties than the credit institution will be less dependent on the applicable national regimes for legal standing and thus reduce differences between the protection offered under the various Member State laws. According to an analysis of Dutch case law in the area of legal standing, under Dutch administrative law the bank's management and shareholders may qualify as interested parties with regard to certain decisions addressed to the credit institution affecting their interest, most notably a license withdrawal. Yet such a regime not necessarily applies in other Member States. Therefore, the access to a judicial review and thus of the indirect review of an ECB decision of parties whose interests are directly or indirectly affected by an ECB decision may differ from Member State to Member State. This difference is unwarranted from the perspective of effective judicial protection.

7.3.3 Action for damages in SSM composite procedures

7.3.3.1 *General*

In Chapter 6, the doctrinal framework for an action for damages in SSM composite procedures was analysed, focusing on EU law, Dutch law and their interaction. The actions for annulment and for damages are closely related and complementary to each other. They nevertheless constitute distinct remedies with different functions, different legal effects and are governed by different doctrinal frameworks. Therefore, the findings in Chapter 5 cannot be applied *mutatis mutandis* to the action for damages and the doctrinal framework for the action for damages had to be analysed separately.

Notwithstanding the differences between the action for annulment and the action for damages, both types of actions are closely connected and may interact, specifically in situations where both actions pertain to the same administrative measure. Both actions may be brought in parallel, as they fulfill distinct roles. The action for annulment may lead to retroactive avoidance of the relevant act, and the action for damages provides for compensation of any damage incurred by the illegal act. Yet, both actions do not necessarily have to be lodged at the same time and in parallel. As the two-month time-limit to bring an EU action for annulment is relatively short,

pursuing an action for damages may be an attractive route to circumvent the inadmissibility of an action for annulment and obtain judicial protection at a later stage. An EU action for damages must be filed within five years of the event giving rise to liability.

In EU case law, the action for damages is considered to be an independent remedy, i.e. independent from the action for annulment. This independence is not absolute. Accordingly, it is settled EU case law that an action for damages is inadmissible, and thus not independent from an action for annulment, if: (i) the action for damages concerns the same instance of illegality as the (inadmissible) action for annulment; and (ii) has the same financial end in view.⁵⁸ I argued that this exception to the independence of an action for damages is unlikely to apply in the context of SSM composite procedures. Where a fine is imposed on a credit institution by an NCA on instruction of the ECB pursuant to Article 18(5) SSM Regulation, an action for damages will likely already be dismissed due to the absence of a direct causal link between the ECB instruction and the damage incurred. The other SSM composite procedures selected in this dissertation do not involve the payment, granting or rejection of any monetary sums, and therefore the second of the two conditions, i.e. the action for damages having the same financial end in view, that was developed in EU case law will likely not apply.

The involvement of both the ECB and NCAs in SSM composite procedures paints a complex picture of the division of jurisdiction between the EU and national judicial level and the substantive allocation of non-contractual liability. Yet the starting point is simple: the EU Courts have jurisdiction over actions for damages against the ECB and the national courts over actions for damages against the respective NCAs. Hence, an applicant that incurred damage caused by a decision resulting from an SSM composite procedure cannot bring a single action against the ECB and the relevant NCA before a national court or the EU Courts. For an applicant to select the correct competent judicial level or levels, it must focus its attention on the probable allocation of non-contractual liability between the ECB and the relevant NCA within the specific composite procedure. Accordingly, the applicant must discover whether the ECB or the relevant NCA, or both must be held responsible for causing the damage.

It was submitted that the allocation of liability in composite procedures revolves around the substantive requirements of an illegal act and a causal link. Generally speaking, if an authority commits an illegal act that caused damage to a party, that authority may be held liable. In composite procedures, establishing the existence of an illegal act and a causal link may prove difficult due to the involvement of multiple authorities and multiple acts. Of particular relevance for SSM composite procedures is that for non-contractual liability of the EU the applicant must not only show that the EU

58 Case T-468/14 *Holistic Innovation Institute v Commission* ECLI:EU:T:2016:296, para 46.

action caused the loss, but also that the ‘chain of causation’ has not been broken by the Member State’s involvement in the composite procedure.⁵⁹ An ‘independent’ or ‘autonomous’ act of a Member State authority between the damage and the EU act will break the chain of causation between the EU act and the damage.⁶⁰

For SSM bottom-up composite procedures, I argued that an NCA’s notification to an applicant of an ECB decision granting authorisation as a credit institution does not qualify as an independent or autonomous act and thus will not break the causal link between the ECB decision and any damage incurred. The same applies to an ECB decision objecting to the NCA draft decision that proposes granting authorisation. However, the situation is different for the SSM top-down composite procedure comprising an ECB instruction that is implemented by the NCA that is the addressee of the instruction. Whether the causal link between an unlawful ECB instruction and any damage will be broken will depend on the margin of discretion the instruction leaves to the NCA. Consequently, I argued that the causal link will not be broken where an ECB instruction prescribes in detail what action must be undertaken by the NCA. In contrast, no causal link will exist between an ECB instruction and any damage where the instruction requires the NCA ‘to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed’. Yet, it was found that in the latter situation the causal link may be ‘remedied’ pursuant to the principle as formulated in *Vloeberghs v High Authority*. This principle means that the Commission may be held liable if the national act has been made possible by a consecutive illegal failure of the Commission to exercise its supervisory powers.⁶¹ I have also argued that in light of the overall structure and hierarchy of the SSM, including the ECB’s responsibilities and central supervisory and overseeing role, the principle as formulated in *Vloeberghs v High Authority* should also be applied to the SSM. In this analysis, the ECB would have an obligation to check whether the NCA correctly implements that instruction. Accordingly, in my view, a causal link could be established between an illegal ECB omission which enabled the NCA’s infringement of national or EU law and any damage. The ECB can then be held liable.

It was found that due to the EU Courts’ approach to the division of jurisdiction between the EU Courts and the national courts in composite procedures, where both the relevant NCA’s as well as the ECB’s action constitute a wrongful act, litigation may be brought at two judicial levels. I further argued that the principle of a single judicial review in *Berlusconi* does not apply to national actions for damages. Therefore, EU law does not prohibit national courts from adjudicating an action for damages against an NCA preparatory act.

59 On this ‘chain of causation’, see Craig & De Búrca 2020, p. 632 and Toth 1997, p. 193 et seq.

60 Case 132/77 *Société pour l’Exportation des Sucres SA v Commission* ECLI:EU:C:1978:99, para 27. See Craig & De Búrca 2020, p. 632 and Toth 1997, p. 193.

61 Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:18.

With regard to the EU concept of joint liability, it was found that in all three situations that were discussed, i.e. a) the ECB has not taken adequate steps to prevent an infringement of EU law by DNB; b) joint action by the ECB and DNB; and c) DNB's application of an unlawful ECB act, joint liability of both the ECB and the relevant NCA may in principle arise, which could give rise to the duty to exhaust national remedies.

The findings just discussed, however, do not operate in an EU vacuum untouched by national law. To understand the interaction between EU law and national law in the doctrinal framework governing the action for damages in SSM composite procedures, the framework under Dutch law was analysed. The analyses require nuance to the conclusions drawn above. First of all, the conclusion that litigation may be initiated at two judicial levels may not apply in full under Dutch law. I argued that EU law requires the Dutch concept of *formele rechtskracht* to be applied equally in situations where the EU Courts have jurisdiction to review the ECB final decision and any DNB preparatory acts. I furthermore held that pursuant to the 'connection criterium' as developed in Dutch case law, a DNB draft decision is covered by the *formele rechtskracht* of the ECB final decision in bottom-up composite procedures. Therefore, where an ECB final decision has become definitive, DNB draft decisions cannot, as a rule, be challenged via a national action for damages by parties qualifying as interested parties at the EU level. Secondly, it was found that the duty to exhaust national remedies will most likely only apply in situation (a) and not in situations (b) and (c). I argued that, even though the current application in Dutch case law of the national statutory limitation of liability may effectively bar applicants from obtaining compensation at the national courts, the EU Courts will not allow for an exception to the EU duty to exhaust national remedies. They will most likely refer to the national courts for judicial protection and demand setting aside the national statutory limitation of liability insofar as it infringes the EU principle of Member State liability.

7.3.3.2 Assessment

7.3.3.2.1 A clear system of judicial protection

Both factual and legal complexities hamper a clear system of judicial protection in actions for damages relating to SSM composite procedures. Similar to the findings regarding the action for annulment, the involvement of both an NCA and the ECB necessitate establishing which authority, or both, may be held liable and by that which judicial level has competence. To this end, the applicant must assess which authority committed an illegal act and whether a causal link exists between the act and the damage incurred. Again, similarly to the factual and legal complexities discussed for the element of a clear system of judicial protection in the action for annulment, assessing which authority may potentially be held liable requires detailed insight into the authorities' cooperation (factual), as well as into the substantive

national and EU liability requirements (legal). To complicate matters even further, it is not necessarily either the relevant NCA or the ECB that may potentially be held liable, but it can also be both. For such situations of joint liability, a duty to exhaust national remedies and an exception to it have been developed in EU case law. As a result, an action for damages against the ECB cannot be adjudicated or will even be inadmissible where national remedies have not been exhausted. It will depend on the conduct of the relevant NCA and of the ECB, the type of damages claimed by the applicant and the applicable national law, whether compensation may be obtained at the national level and thus whether the exception will apply. I argued that whether under national law the NCA has been protected against liability claims by statutory limitations or immunities is not likely to qualify as an exception to the duty to exhaust national remedies. The EU Courts are likely to refer to the national courts for judicial protection that must, if necessary, set aside such national limitations.

7.3.3.2.2 Adequate access to court

I concluded that, at first glance, the right to adequate access to court is sufficiently guaranteed in the doctrinal framework for actions for damages in SSM composite procedures. Any party that incurred damage resulting from an SSM composite procedure may bring an action for damages either at the national level against the relevant NCA, at the EU level against the ECB, or against both supervisory authorities at both respective judicial levels. Yet, two problems hampering the right to adequate access were discerned.

The first problem relates to SSM bottom-up composite procedures and consists of the possible forfeited access to a national action for damages against DNB for damage incurred as a result of its draft decision if no successful action for annulment was instituted against the ECB final decision. Due to the Dutch principle of *formele rechtskracht* being applicable in SSM bottom-up composite procedures, annulment of the ECB final decision is a prerequisite for potential compensation in an action for damages against DNB for damage resulting from its draft decision for parties qualifying as interested parties at the EU level. That the principle of *formele rechtskracht* poses limits to the access to a national action for damages in composite procedures entailing an EU final decision is not commonly known nor, to my knowledge, addressed in Dutch legal literature. This blind spot risks that parties do not bring an action for annulment against an ECB final decision within two months, ultimately forfeiting their access to a national action for damages against DNB.

Furthermore, even if the consequences of the principle of *formele rechtskracht* in composite procedures were commonly known, I argued that blocking the route to national damages due to an unsuccessful action for annulment against the ECB final decision is problematic for adequate access. The limits that the principle of *formele rechtskracht* introduces to access to damages in a purely national decision-making procedure involv-

ing multiple authorities may be justified by the national court's jurisdiction to assess the legality of the entire procedure, including the preparatory phase. However, the EU Courts' jurisdiction to exercise judicial scrutiny over national preparatory acts is currently limited in SSM bottom-up composite procedures. Thus, whilst a national action for damages in a national multi-staged decision-making procedure may indeed be regarded as 'reopening' litigation over an act that has become definitive and its formation, this argument is valid to a lesser extent for SSM composite procedures due to the limited EU jurisdiction over national preparatory acts. A judgment upholding an ECB final decision confirms its legality. However, it does not necessarily establish the legality of the relevant NCA's draft decision. Hence, affected parties may remain deprived of access to a national action for damages, whilst judicial protection against the national draft decision in form of judicial review is not sufficiently offered at the EU level. Adequate access to court thus is not sufficiently guaranteed for errors made by DNB in the preparatory phase of an SSM bottom-up composite procedure.

A second problem is the duty to exhaust national remedies that, due to the potentially lengthy obligatory national proceedings, may cause time-barring in an action for damages at the EU judicial level. An EU action for damages must be instituted within five years from the occurrence of the event causing the damage. An applicant who has not been fully compensated at the national level after more than five years of litigation will be barred from access to an EU action for damages. To not lose the opportunity to institute an action for damages at the EU level, an applicant thus must institute an action for damages at the EU level before the national courts have given final judgment.

7.3.3.2.3 *Full jurisdiction*

Similarly to the doctrinal framework for actions for annulment, both national and EU Courts have limited jurisdiction with regard to the phase of the composite procedure beyond their jurisdiction. National courts are competent in actions for damages against their NCA. The EU Courts have jurisdiction over actions for damages against the ECB, also in situations where the damage incurred is caused by a composite procedure that involved both authorities. In addition to the limited jurisdiction of the respective judicial levels insofar as the case concerns actions by the authority beyond their jurisdiction, the EU Courts have via the duty to exhaust national remedies limited the extent to which they assess the merits of a case in situations of joint liability. The EU Courts have held that they must await a national ruling before assessing the existence and the quantum of any damage, the causal link between the EU conduct and the damage alleged and decide on the amount of the damage 'where (i) a person has brought two actions before the EU judiciary seeking compensation for the same damage, one against a national authority, before a national court, and the other against an EU institution or body, and (ii) there is a likelihood that, because of the

different assessments of that damage by the two different courts, the person in question may be insufficiently or excessively compensated, the EU judicature must, before deciding on the, wait until the national court has given final judgment on the action brought before it'.⁶² Yet the EU Courts have held that in these instances of parallel proceedings they can already ascertain the lawfulness of the EU conduct alleged and whether it is capable of giving rise to EU liability.⁶³ Nevertheless, the EU Courts do not have full jurisdiction because of the duty to exhaust national remedies and its consequences for examining the merits. However, preventing the applicant from 'being insufficiently or excessively compensated for the damage', could and should not be achieved via a route that is to the detriment of the requirement of full jurisdiction. See further the recommendation on introducing a mechanism of joint and several liability within the SSM.

7.3.3.2.4 *The right to judicial proceedings within reasonable time*

In situations of joint liability, the EU duty to exhaust national remedies may lead to substantial delays in obtaining compensation. It requires parties that incurred damage first to seek compensation at the national level and, provided full compensation is not granted, bring an action for damages at the EU level for the remainder of compensation. Illustrative of the potential delays: it took the applicants in *Kampffmeyer v Commission* twenty years to report to the Court that they had obtained compensation in the national courts.⁶⁴ Imagine they had not been awarded compensation at the national level; then it would even have taken years longer. These delays are even less palatable where national remedies must first be exhausted and the EU authority committed an illegal act capable of giving rise to liability, i.e. is 'liable in principle'. The EU Courts can, and should, independently assess the lawfulness of the conduct alleged and whether it may give rise to liability, but they will refrain from deciding on the nature and quantum of the damage, the causal link and the amount of the damage where two actions for damages were brought in parallel and where there is a likelihood that the person is insufficiently or excessively compensated. The duty to exhaust national remedies may however not apply to situations (b) (joint action by the ECB and an NCA), and (c) (an NCA's application of an unlawful ECB act) of joint liability of the ECB and DNB discussed above. It however will most likely be applied in situation (a) (the ECB has not taken adequate steps to prevent an infringement of EU law by an NCA) and will thus violate the right to judicial proceedings within reasonable time.

62 Case T-317/12 *Holcim Romania v Commission* ECLI:EU:T:2014:782, para 79-80.

63 Case T-317/12 *Holcim Romania v Commission* ECLI:EU:T:2014:782, para 80.

64 Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31.

7.3.3.2.5 *The right to damages for violations of EU law*

I argued that the application of the Dutch statutory provision of Article 1:25d Dutch Financial Supervision Act limiting the liability of DNB to cases in which the damage to an important extent results from intentional wrongful conduct or gross negligence in certain situations is likely to exceed the EU regime for Member State liability, and more specifically the standard of fault. Therefore, in situations where this holds true, applying the national limitation of liability constitutes a breach of the principle of Member State liability where DNB infringed an EU rule that aims to protect the interests of the injured party. If the statutory limitation of liability is applied in SSM composite procedures, an action for damages against the ECB at the EU level may ‘compensate’ the lack of compensatory remedies at the national level. The ECB liability regime of Article 340, third subparagraph, TFEU does not contain specific limitations of liability. ECB liability may nevertheless not easily be established in situations where DNB has violated EU or national law, i.e. situations (a) and (b), as in those cases, the ECB would have committed an omission. For example, the ECB may not have adequately intervened to prevent a DNB infringement or may not have corrected a wrong in a DNB draft decision. For an omission to give rise to non-contractual liability, there must have been a legal obligation to act. It was found that the ECB’s oversight and monitoring tasks generally do not entail such a legal duty to intervene.

7.3.3.3 *Recommendations: further alignment between SSM composite procedures and the framework for the action for damages*

7.3.3.3.1 *General*

Applying the normative framework to the findings in Chapter 6 exposed several problems hampering effective judicial protection in actions for damages brought in relation to SSM composite procedures. It follows from the assessments that effective judicial protection is currently not guaranteed within these procedures. Problems were detected regarding a clear system of judicial protection, adequate access to court, full jurisdiction, the right to judicial proceedings within reasonable time and the right to damages for violations of EU law. Furthermore, in contrast to the EU Courts’ ambition to create a ‘complete system of legal remedies and procedures’ in actions for annulment, such an ambition seems to be absent for actions for damages. Although in theory a ‘complete system of compensation’ exists, the duty to exhaust national remedies may result in the opposite, as it requires the national courts to first decide on compensation. At the same time, the EU Courts could and should themselves assume competence to adjudicate an action for damages brought against an EU institution, instead of referring to the national courts. Hereinafter, I will discuss several recommendations for achieving further alignment between SSM composite procedures and the

framework governing actions for damages. The central recommendation is introducing a mechanism of joint and several liability within the SSM. Two alternative recommendations are formulated if such a mechanism is not achieved. The recommendation discussed above in connection with the action for annulment to increase the transparency of composite procedures applies equally to actions for damages. That recommendation will not be repeated here.

7.3.3.3.2 *Joint and several liability*

The case for a mechanism of joint and several liability

The introduction of a mechanism of joint and several liability and subrogation will be essential for guaranteeing effective judicial protection in actions for damages relating to SSM composite procedures. Firstly, such a mechanism would remove the burden currently placed on a party that suffered damage to ascertain whether the ECB, the relevant NCA, or both should be considered to have caused the damage in order to decide against which of the supervisory authorities an action for damages must be brought and at which judicial forum. Introducing joint and several liability would to an important extent remove the problems relating to the element of a clear system of judicial protection.

Secondly, introducing joint and several liability would eliminate the need to litigate at two judicial levels to receive full compensation, an issue raising problems for securing adequate access to court and for the right to judicial proceedings within reasonable time. This issue is particularly acute in situation (a) of joint liability (the ECB has not taken adequate steps to prevent an infringement of EU law by DNB), because the duty to exhaust national remedies will be applied in that situation.

Thirdly, such a mechanism would do justice to the unitary nature of SSM composite procedures and the absence, especially from the perspective of the addressee or other interested parties, of clear boundaries between the decision-making by the relevant NCA and the ECB.

A mechanism of subrogation or of reimbursements would furthermore prevent that the preventative function of non-contractual liability would be undermined, by allocating the costs of compensation to the authority or authorities ultimately responsible for causing the damage.

The design

Several designs of a mechanism for several and joint liability could be proposed. In SSM bottom-up composite procedures and in situations concerning an ECB instruction requesting an NCA to take a specific action under national law vis-à-vis an individual credit institution (Art. 9(1), third subpara, SSM Regulation), strict or 'vicarious' liability of the ECB would be the best solution in light of effective judicial protection. A claim for compensation could then be lodged at the EU judicial level for both illegal acts of the ECB and illegal NCA acts committed in the preparatory or implement-

ing phase. This would create a clear system of judicial protection. All claims for damages relating to such composite procedures can be lodged at the EU Courts regardless of whether the ECB, the relevant NCA or both committed an unlawful act. Furthermore, compensation would be paid in full by the ECB, eliminating the necessity to engage in litigation at two judicial levels to secure full restitution. Nevertheless, a subrogation mechanism could provide for (partial) reimbursement claimed by the ECB from the relevant NCA where the damage is held to be (partially) caused by that NCA.

This solution of introducing a mechanism of joint and several liability is, of course, not without its difficulties. These difficulties most notably include the question which law should be applied to assess non-contractual liability of the relevant NCA. Should that be national law, or EU law? This question, important as it may be, in my view would not override the necessity to introduce a mechanism of joint and several liability as proposed. See further paragraph 7.3.3.3.4 for the recommendation to introduce a harmonised regime for non-contractual liability of the ECB and the NCAs within the SSM.

For the subrogation or reimbursement mechanism, inspiration could be drawn from the mechanism provided for in the SRM Regulation. This mechanism essentially mirrors the proposal just discussed. It pertains to compensation provided by the EU level (SRB) to the national level (NRA). In accordance with Article 87(4) SRM Regulation, the Single Resolution Board (SRB) must compensate a national resolution authority (NRA) for the damages that it has been ordered to pay by a national court. This mechanism only applies to the NRAs' tasks in relation to implementing an SRB resolution decision and not to any NRA preparatory acts relating to non-resolution issues.⁶⁵ Furthermore, the SRB's obligation to compensate an NRA does not apply where the NRA's act or omission constitutes an infringement of the SRM Regulation or another provision of EU law.⁶⁶

In top-down composite procedures involving an ECB instruction to open national sanctioning proceedings, the ultimate decision-making power lies with the relevant NCA. Although the ECB is closely involved, the ECB does not have the power to assert influence over the sanctioning proceedings and the sanction ultimately imposed. Therefore, the decisional

65 See also Lupinu 2022, p. 66.

66 The relevant Art. 87(4) SRM Regulation reads: 'The Board shall compensate a national resolution authority for the damages which it has been ordered to pay by a national court, or which it has, in agreement with the Board, undertaken to pay pursuant to an amicable settlement, which are the consequences of an act or omission committed by that national resolution authority in the course of any resolution under this Regulation of entities and groups referred to in Article 7(2), and of entities and groups referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met or pursuant to the second subparagraph of Article 7(3). That obligation shall not apply where that act or omission constituted an infringement of this Regulation, of another provision of Union law, of a decision of the Board, of the Council, or of the Commission, committed intentionally or with manifest and serious error of judgement.'

dominance here clearly lies at the NCA level and thus the national courts would be best equipped to provide for judicial protection. In this situation, therefore, strict NCA liability should be provided for and potential full compensation should be made available at the national level. Yet the ECB may also be held responsible for any damage, most notably where the ECB violated its duty to oversee the correct implementation of its instruction thereby facilitating the damage. Therefore, again, a subrogation mechanism should provide for (partial) reimbursement claimed by the NCA from the ECB where the damage is held to be (partially) caused by the ECB.

7.3.3.3 *Alternatives if a mechanism of joint and several liability is not achieved*

Extending time-limit EU action for damages in situations of joint liability

If a mechanism of joint and several liability will not be provided for within the SSM, the first alternative recommendation is to **extend the time-limit for an EU action for damages in situations of joint liability where the duty to exhaust national remedies applies**. Applicants should not be barred from access to the EU level where they have exceeded the five-year time-limit due to litigation at the national level. Regardless of the time taken to obtain a final ruling of the national courts, the action for damages should remain available at the EU level.

Berlusconi doctrine in actions for damages

The second alternative recommendation entails an extension of the Berlusconi doctrine to actions for damages in SSM bottom-up composite procedures. Accordingly, **in bottom-up composite procedures a 'single judicial review' at the EU level should exist alongside a 'single action for damages', prohibiting national courts from adjudicating both actions for annulment and actions for damages brought against NCA preparatory acts**. Not only would such a streamlining lead to a more logical, and thus clearer system of judicial protection, but it would also solve the problem of the Dutch principle of *formele rechtskracht* limiting the access to a national action for damages without a sufficient corresponding judicial review at the EU level. Furthermore, the actions for annulment and damages are closely connected, most notably because an act declared void constitutes an illegal act which may lead to liability, and may be brought in concert, which thus stresses the need for adjudication of both actions by one judicial forum. In addition, centralising actions for damages regarding SSM composite procedures at the EU Courts will harmonise the available forum for judicial protection. Under Dutch law, the principle of *formele rechtskracht* may limit the availability of an action for damages against DNB in bottom-up composite procedures, thus directing to the route of annulment at the EU judicial level. But this is not necessarily the situation in other Member States that do not have a similar principle in place. Therefore, in other Member States, annulment of the final ECB decision may not be a prerequisite for obtaining compensation from the NCA at the national level. By introducing

the Berlusconi doctrine for actions for damages, unwarranted differences between Member State laws would be eliminated.

7.3.3.3.4 *Harmonisation of non-contractual liability within the SSM*

The fourth recommendation so as to achieve effective judicial protection in actions for damages is to **harmonise the standard of non-contractual liability within the SSM**, both for the ECB and the NCAs. The liability standard must meet the requirements of the EU right to damages for violations of EU law and thus may not introduce a standard that sets a higher threshold for liability than the liability requirements as formulated in EU case law, i.e.: 1) the rule of law infringed must be intended to confer rights on individuals; 2) the breach must be sufficiently serious; and 3) there must be a direct causal link between the breach and the damage. As EU case law already aligned the non-contractual liability of Member States, which also applies to NCAs, and of the EU itself pursuant to Article 340 TFEU, it is recommended to use this liability regime within the SSM. Because a fundamental feature of financial supervision is the broad discretion of financial supervisory authorities in exercising their powers, the requirement of a 'sufficiently serious breach' will prevent that liability will too easily arise. This requirement allows for taking into account the broad discretion enjoyed by supervisory authorities.

To provide clarity, the liability standard should be explicitly codified in the SSM Regulation. Even though in theory the liability regimes of the ECB and the NCAs have been harmonised via *Francovich* and *Brasserie du Pêcheur* (Member State/NCA liability) and *Bergaderm* which aligned Member State liability and EU liability, NCA liability still seems to be largely considered a national matter by the Member State legislatures and courts. Moreover, in several Member States the NCA is subject to a statutory limitation of liability, including DNB, the Dutch NCA. I argued that this statutory limitation of liability is likely to exceed the liability requirements for Member State liability and thus may infringe the principle of effective judicial protection.

The codification of a harmonised liability standard will not remove the uncertainties clouding the question whether prudential regulation and supervision are intended to confer rights on individuals, including depositors.⁶⁷ Therefore, irrespective of such a harmonisation and codification, differences in national regimes are likely to persist. In Member States where prudential supervision is considered to be carried out in the interest of third parties, including depositors, the relevant NCA may be held liable for inadequate supervision. In Member States that consider prudential regulation and supervision to be exclusively intended to protect the public interest rather than individual interests, the relevant NCA cannot be held liable for the same type of inadequate supervision. To prevent such national differences in judicial protection, **the EU legislature should be more**

67 See Ch. 6, para 6.4.3.2.

explicit on the interests that a certain instrument of (prudential) legislation aims to protect. In addition, national courts should not take the *Peter Paul* judgment as an *acte clair*. This case established, in my view, falsely, the general rule that prudential regulation and supervision are not intended to protect the interests of individuals. Conversely, **national courts should on a case-by-case basis determine whether a certain rule of prudential regulation allegedly infringed by an NCA is intended to protect the interests of individuals and where deemed necessary, refer a preliminary question on interpretation to the Court.**

The introduction of a single liability regime within the SSM will also remove any problems concerning the applicable liability regimes when implementing a mechanism of joint liability, in which the EU Courts must also assess the liability of NCAs.

7.4 RELEVANCE FOR OTHER AREAS OF INTEGRATED ADMINISTRATION

As also emphasised in Chapter 1, the SSM represents a beacon of European administrative integration. The problems for effective judicial protection detected in this dissertation however are not unique for the SSM. Therefore, the observations, conclusions and recommendations are not necessarily restricted to the SSM, but may be relevant to other areas of integrated administration in which decision-making transpires via composite procedures as well. These other areas range from the Single Resolution Mechanism (SRM) to state aid, and from genetically modified organisms (GMOs) to pharmaceuticals.

Furthermore, the EU and Member State administrations continue to develop into an ‘ever closer union’. Especially in the area of financial regulation and supervision, it is expected that the SSM will provide inspiration for future mechanisms of cooperation between national and EU (supervisory) authorities. Illustrative is the Commission proposal currently on the table, already briefly referred to in Chapter 1, for establishing an EU supervisory authority in the area of AML/CFT (Anti-Money-Laundering Authority (AMLA)). According to the proposal, ‘the Authority will become a centrepiece of an integrated AML/CFT supervisory system, consisting of the Authority itself and the national authorities with an AML/CFT supervisory mandate’.⁶⁸ The proposed Regulation laying down the groundworks of the supervisory mechanism shows remarkable similarities with the SSM, including the conferral of both direct and indirect supervisory powers, the AMLA’s responsibility ‘for the effective and consistent functioning of the AML/CFT supervisory system’, the setting up of Joint Supervisory Teams

⁶⁸ Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM(2021) 421 final, p. 3.

(JSTs) composed of both AMLA staff and staff from the national authorities, and the AMLA's power to address a binding request to a national supervisory authority to adopt an individual decision vis-à-vis a supervised entity.

Hence, considering the potential broader relevance of the conclusions and recommendations in this dissertation, a number of take-aways for areas of integrated administration in general can be formulated.

First, the EU legislature should more explicitly and more elaborately consider and address the theme of judicial protection when designing and setting up a mechanism with characteristics of an integrated administration. As is shown with the SSM, not only the absence of sufficiently explicit provisions on judicial protection, but also the ambiguities surrounding the division of tasks and responsibilities between the national and EU administrative level, and concerning the specific content of concepts such as 'draft decisions' and 'instructions', will lead to legal uncertainty. This legal uncertainty will ultimately hamper effective judicial protection.

It is also recommended that the EU Courts start with further aligning the currently dualistic system of judicial protection with the integrated reality of composite procedures. The EU Courts should actively explore the possibilities EU law gives to guarantee effective judicial protection in an integrated administration and composite procedures. As I argued in Chapter 2, the principle of effective judicial protection in its organisational function may provide for such possibilities.

7.5 FINAL THOUGHTS

The integration between Union and Member State administrations is proceeding at an unprecedented speed, also in financial regulation and supervision. Integration combines the benefits of a decentralised system, with expert knowledge and experience at the national level, with a more harmonised and coordinated approach via a central, EU authority.

However, as was demonstrated in this dissertation, the current mismatch between this highly integrated supervisory mechanism, and particularly its composite procedures, and a dualistically organised system of judicial protection hamper effective judicial protection, and thus obstruct the exercise of effective judicial control over actions taken within the SSM framework. This is directly at the expense of the rule of law and the legitimacy of the SSM.

To guarantee effective judicial protection in SSM composite procedures, the system of judicial protection must become aligned with the reality of administrative unity in composite procedures, thereby also taking account of the central, hierarchical role of the ECB. Several recommendations to achieve this were formulated. Most importantly, I argued that judicial review of both SSM bottom-up and top-down composite procedures must be centralised at the EU Courts and a mechanism of joint and several liability of the ECB and the NCAs should be introduced.

The SSM, as well as the EU administration in general, continue to evolve and mature. Whilst, albeit understandably, the effective implementation of EU law has long been at the forefront when the mechanisms of integrated administration were designed, there now is an urgent need to expand the focus to effective judicial protection. In sum: single supervision must be accompanied by single judicial protection.

Samenvatting (Summary in Dutch)

Geïntegreerd toezicht, geïntegreerde rechtsbescherming?

*Naar effectieve rechtsbescherming in gemengde procedures
in het Gemeenschappelijk Toezichtsmechanisme*

Als directe reactie op de financiële en bankencrisis van 2008 is tien jaar geleden het Gemeenschappelijk Toezichtsmechanisme (hierna: GTM; in het Engels aangeduid als het Single Supervisory Mechanism (SSM)) opgericht. Met het GTM is het prudentieel banktoezicht in de eurozone en de andere deelnemende lidstaten geëuropeïst en gecentraliseerd bij de Europese Centrale Bank (ECB). Het toezicht wordt in nauwe samenwerking met de Nationale Bevoegde Autoriteiten (hierna: NBA's; in het Engels aangeduid als National Competent Authorities (NCAs)) uitgevoerd. De NBA's zijn onder meer verantwoordelijk voor het directe toezicht op de minder significante banken en zij assisteren de ECB bij het nemen van besluiten, onder meer door ontwerpbesluiten op te stellen.

De nauwe samenwerking tussen de ECB en de NBA's leidt ertoe dat kan worden gesproken van 'gemengd bestuur' of 'gedeeld bestuur', in Engelse-juridische literatuur ook wel aangeduid als *integrated administration* of *shared administration*. Gemengd of gedeeld bestuur kenmerkt zich door een intensieve samenwerking tussen Europese en nationale autoriteiten bij de uitvoering van administratieve taken. Als gevolg raken de Europese en nationale rechtsordes met elkaar geïntegreerd en vervagen de grenzen tussen hun bevoegdheden.

Gemengd bestuur kan naar zijn aard problemen opleveren voor het garanderen van effectieve rechtsbescherming tegen overheidshandelen binnen dat gemengd bestuur, wat in bijzondere mate geldt voor het GTM. De integratie tussen de ECB en de NBA's is ongeëvenaard en leidt tot een complexe interactie tussen de Europese en de nationale rechtsordes. Daarnaast is een uniek element van het GTM dat de ECB waar nodig nationaal recht toepast, zoals voorzien in artikel 4(3) GTM-Verordening. Het gemengde bestuur van het GTM vormt een tegenstelling met het Europese systeem van rechtsbescherming, bestaande uit de nationale gerechten en het Hof van Justitie van de Europese Unie,¹ dat zijn wortels heeft in een traditie van *executive federalism* en dualistisch is georganiseerd. Deze tegenstelling tussen een geïntegreerd toezichtssysteem enerzijds en een dualistisch georganiseerd stelsel van rechtsbescherming anderzijds kan leiden tot

1 Het Hof van Justitie van de Europese Unie omvat het Hof van Justitie, het Gerecht en de gespecialiseerde rechtbanken (art. 19, lid 1, Verdrag betreffende de Europese Unie (VEU)). Het Hof van Justitie en het Gerecht zullen hierna tezamen worden aangeduid als de 'Unierechter'.

problemen voor de rechtsbescherming. De centrale onderzoeksvraag die dit proefschrift dan ook beoogt te beantwoorden, luidt:

Is effectieve rechtsbescherming gewaarborgd in het Gemeenschappelijk Toezichtsmechanisme; en, als dat niet het geval is, hoe moet effectieve rechtsbescherming worden bereikt?

Om deze onderzoeksvragen te beantwoorden, worden de volgende subvragen behandeld:

1. Waaruit bestaat effectieve rechtsbescherming?
2. Hoe is de administratieve integratie van het prudentieel banktoezicht geïnstitutionaliseerd in het GTM?
3. Wat is het juridisch raamwerk voor rechtsbescherming in het GTM en hoe interaceert dat raamwerk met de eigenschappen van gemengd bestuur?
4. Doen zich problemen voor in het juridisch raamwerk voor rechtsbescherming en, zo ja, hoe moeten deze problemen worden opgelost?

Centraal in dit proefschrift staat de rechtsbescherming in zogeheten ‘gemengde procedures’ (in Engelstalige juridische literatuur ook wel aangeduid als *composite procedures*). In gemengde procedures is het finale besluit gebaseerd op besluitvorming van zowel nationale als Europese autoriteiten, in het geval van het GTM de ECB en de relevante NBA. De volgende gemengde SSM-procedures zullen als *case study* worden gebruikt in dit proefschrift:

- a. Procedure voor vergunningverlening;
- b. Procedure voor de intrekking van een bankvergunning;
- c. Procedure voor het verkrijgen van een verklaring van geen bezwaar (vvgb);
- d. ECB-instructie gericht aan een NBA inhoudende dat de NBA moet gebruikmaken van een nationale bevoegdheid jegens een individuele, onder toezicht staande instelling (hieronder valt zowel een ECB-instructie die een NBA verplicht gebruik te maken van een specifieke nationale bevoegdheid jegens een individuele significante instelling (art. 9(1), derde subpara, GTM-Verordening), als een ECB-instructie die een NBA verplicht een sanctieprocedure te openen (art. 18(5) GTM-Verordening)).

Procedures (a), (b) en (c) beginnen bij de desbetreffende NBA op het nationale niveau en eindigen met een eindbesluit van de ECB op Unieniveau en worden dan ook aangeduid als *bottom-up* procedures. Procedure (d) kwalificeert als een *top-down* procedure; gestart op Unieniveau door de ECB en afgesloten met een NBA-besluit gericht tegen een individuele instelling op nationaal niveau. Het onderscheid tussen *bottom-up* en *top-down* procedures is relevant voor de jurisdictieverdeling tussen de nationale rechter en de Unierechter; de aan de jurisdictieverdelingsdoctrine van het Europees Hof ten grondslag liggende concepten verschillen voor de beide procedures. Kenmerkend voor rechtsbescherming in gemengde procedures is de interactie tussen Unierecht en nationaal recht. Om die interactie te analyseren,

wordt in dit proefschrift steeds zowel het Europese stelsel als het Nederlandse stelsel van rechtsbescherming behandeld.

In hoofdstuk 2 is het normatief kader ontwikkeld aan de hand waarvan de centrale onderzoeksvraag wordt beantwoord. Het Uniebeginsel van effectieve rechtsbescherming vormt het centrale element. Vijf elementen daarvan zijn geselecteerd als meest relevant voor de potentiële rechtsbeschermingsproblemen in gemengde procedures:

1. Een helder stelsel van rechtsbescherming;
2. Adequate toegang tot de rechter;
3. Volledige rechtsmacht;
4. Recht op een tijdige, finale geschilbeslechting;
5. Recht op schadevergoeding bij schendingen van Unierecht.

Hoofdstuk 2 betoogt dat de huidige interpretatie en toepassing van het beginsel van effectieve rechtsbescherming geen adequaat antwoord hebben voor rechtsbeschermingsproblemen in gemengde procedures. De huidige toepassing van het beginsel leidt ertoe dat gemengde procedures gesplitst worden in een nationaal en Europees deel, wat rechtsbeschermingsproblemen kan veroorzaken, met name voor de effectiviteit van rechtsmiddelen. Zo moeten in *top-down* gemengde procedures bijvoorbeeld zowel de nationale als de Europese rechter worden aangezocht om toetsing van de gehele gemengde procedure te verkrijgen en heeft de Europese rechter beperkte rechtsmacht ten aanzien van nationale voorbereidende besluiten in *bottom-up* gemengde procedures. In dit hoofdstuk wordt dan ook gepleit voor afstemming tussen de eenheid van gemengde procedures en het systeem van rechtsbescherming. Daartoe dient het beginsel van effectieve rechtsbescherming te worden geherinterpreteerd op basis van het Unierechtelijke beginsel van behoorlijk bestuur (*principle of good administration*) en meer in het bijzonder het zorgvuldigheidsbeginsel (*duty of care*). Het is aan de hand van deze algemene zorgplicht dat de Europese rechter het concept van ‘toerekening’ heeft ontwikkeld, waarmee in gemengde procedures fouten gemaakt door een nationale autoriteit kunnen worden toegerekend aan de desbetreffende Europese autoriteit.

Hoofdstuk 3 behandelt een korte geschiedenis van het GTM en plaatst het in de historische ontwikkeling van de financiële integratie van de Europese Unie. Geconcludeerd wordt dat het GTM een breuk vormt met de traditie van een gedecentraliseerd, dat wil zeggen: nationaal georganiseerd, financieel toezicht, door het prudentieel bankentoezicht in de deelnemende lidstaten te centraliseren bij de ECB. Waar de financiële integratie tussen de lidstaten eerder slechts plaats had via materiële normen, is die integratie nu versterkt door het toezicht op die normen te europeaniseren en centraliseren. Het GTM bevat ook decentraliserende elementen vanwege de betrokkenheid van de NBA's. Naast de ‘revolutionaire’ breuk, bouwt het GTM voort op al langer bestaande elementen van financiële integratie in de EU, te weten met het concept van het zogeheten *single rulebook* dat al met het Rapport De Larosière in 2009 werd geïntroduceerd.

Hoofdstuk 4 bespreekt het GTM als archetype van gemengd bestuur en behandelt die elementen van het GTM die het tot een vorm van gemengd bestuur maken. Het GTM bestaat uit de ECB en de NBA's tezamen en de ECB is als de centrale toezichthouder exclusief bevoegd alle prudentiële toezichttaken uit de GTM-Verordening uit te voeren. Zij staat in hiërarchie boven de NBA's en de toezichttaken van de NBA's moeten worden begrepen als afgeleid van de exclusieve bevoegdheden van de ECB. De ECB houdt direct toezicht op significante instellingen en indirect, via de NBA's, op minder significante instellingen. De stafleden van NBA's maken deel uit van de zogeheten Joint Supervisory Teams (JST's) die het dagelijks toezicht uitvoeren. Daarnaast werken de ECB en de NBA's samen in gemengde procedures, waarin zowel de ECB als de desbetreffende NBA verantwoordelijk is voor (een deel van) de besluitvorming. Onder die gemengde procedures vallen de procedures voor de vergunningverlening, de intrekking van een bankvergunning en de verlening van een vvgb, alsmede de procedures waarin de ECB een instructie richt tot een NBA die deze moet uitvoeren met gebruikmaking van haar nationale bevoegdheden.

Hoofdstuk 5 en 6 vormen de kernhoofdstukken van dit proefschrift en analyseren respectievelijk het stelsel van bestuursrechtelijke rechtsbescherming bij de bestuursrechter (vernietigingsberoep (Nederland) of beroep tot nietigverklaring (EU) (*action for annulment*)) en het stelsel van civielrechtelijke rechtsbescherming in de vorm van een schadevergoedingsactie (*action for damages*) in gemengde SSM-procedures.

Hoofdstuk 5 concentreert zich op bestuursrechtelijke rechtsbescherming bij de bestuursrechter en meer in het bijzonder op de jurisdictieverdeling tussen de nationale rechter en de Unierechter. Voor *bottom-up* procedures is ingevolge *Berlusconi en Fininvest t. Banca d'Italia* beslissend voor die verdeling of de ECB de 'exclusieve beslissingsbevoegdheid' heeft in de procedure.² In de Europese jurisprudentie bestaan twee smaken: ofwel de desbetreffende Europese autoriteit heeft de exclusieve beslissingsbevoegdheid (procedures van het type *Berlusconi*), ofwel de handelingen van de nationale autoriteit die voorafgaan aan het EU-besluit zijn bindend voor de Europese autoriteit waarmee die laatste geen exclusieve beslissingsbevoegdheid heeft (procedures van het type *Borelli*³). Het Hof heeft in *Berlusconi en Fininvest t. Banca d'Italia* beslist dat procedures van het eerste type onder de exclusieve rechtsmacht van de Unierechter vallen, inclusief de nationale voorbereidende handelingen die daarvan deel uitmaken. De Unierechter komt beperkte rechtsmacht toe bij de toetsing van nationale voorbereidende handelingen. In gemengde procedures waarin het nationale handelen de Unie-autoriteit bindt moet de nationale rechter worden aangezocht in een procedure gericht tegen het nationale (voorbereidende) handelen. Van parallelle jurisdictie kan geen sprake zijn: of de nationale rechter is bevoegd, of de Unierechter.

2 Zaak C-219/17 *Berlusconi en Fininvest t. Banca d'Italia* ECLI:EU:C:2018:1023.

3 Zaak C-97/91 *Borelli* ECLI:EU:C:1992:491.

Voor de jurisdictieverdeling in *top-down* procedures is beslissend of de desbetreffende ECB-instructie op rechtsgevolg is gericht en of de rechtzoekende kan worden geacht daardoor rechtstreeks en individueel te zijn geraakt. In het bijzonder relevant voor de vraag of tegen een ECB-instructie bij de Unierechter kan worden geageerd op grond van artikel 263 Verdrag betreffende de Werking van de Europese Unie (VWEU) is of de rechtzoekende daardoor rechtstreeks is geraakt, of dat de nationale implementatie aan die geraaktheid in de weg staat. Een bank waartegen een NBA-implementatiebesluit zich richt is direct geraakt door de ECB-instructie als deze geen beoordelingsruimte laat aan de NBA in kwestie. Betoogd wordt in dit hoofdstuk dat een ECB-instructie die een NBA verplicht gebruik te maken van een specifieke nationale bevoegdheid jegens een individuele significante instelling (art. 9(1), derde subpara, GTM-Verordening) weinig tot geen beoordelingsruimte zal laten aan de NBA. De ECB-instructie is namelijk bindend en zal gedetailleerd voorschrijven van welke nationale bevoegdheid de NBA gebruik zal moeten maken en ten opzichte van welke bank. ECB-instructies die een NBA verplichten een sanctieprocedure te openen (art. 18(5) GTM-Verordening) raken de gesanctioneerde bank niet rechtstreeks, omdat een dergelijke instructie veel beoordelingsruimte laat aan de NBA.

Een ECB-instructie die een NBA verplicht gebruik te maken van een specifieke nationale bevoegdheid jegens een individuele significante instelling zal de desbetreffende instelling bovendien individueel raken. Deze instelling kan dan ook bestuursrechtelijk opkomen tegen zowel het NBA-besluit, bij de nationale rechter, als tegen de ECB-instructie, bij de Unierechter. Het bestuur van de instelling, de aandeelhouders en crediteuren zullen echter niet voldoen aan het Unierechtelijke vereiste van individuele geraaktheid en kunnen derhalve geen directe actie instellen tegen de ECB-instructie bij de Unierechter. Deze partijen zijn dan ook aangewezen op rechtsbescherming op nationaal niveau tegen het NBA-besluit, mits het nationale recht voorziet in toegang voor deze partijen. Via de route van de prejudiciële procedure kan vervolgens alsnog toetsing worden verkregen van de ECB-instructie. Het is aan de nationale rechter een prejudiciële procedure te starten.

Uit de vergelijking tussen het Europese en het Nederlandse stelsel van bestuursrechtelijke rechtsbescherming volgen enkele verschillen. Zo verschilt de benadering van de ontvankelijkheidsvereisten. Uit Europese rechtspraak volgt bijvoorbeeld dat aandeelhouders niet rechtstreeks worden geraakt door een besluit tot intrekking van een bankvergunning.⁴ Nederlands recht biedt meer ruimte om derde partijen, waaronder aandeelhouders, te kwalificeren als belanghebbenden via het leerstuk van afgeleid belang.

4 Zie Zaak T-247/16 *Trasta Komercbanka AS t. ECB* ECLI:EU:T:2017:623 en Gevoegde Zaken C-663/17 P, C-665/17 P en C-669/17 P *Trasta Komercbanka AS t. ECB* ECLI:EU:C:2019:923.

Hoofdstuk 5 sluit af met het toepassen van het normatief kader op de bevindingen. Daaruit volgt dat er tekortkomingen bestaan ten aanzien van alle vier de elementen van het beginsel van effectieve rechtsbescherming die betrekking hebben op bestuursrechtelijke rechtsbescherming. Problematisch voor het bieden van een helder stelsel van rechtsbescherming zijn het hanteren van verschillende doctrines voor de jurisdictieverdeling in *bottom-up* procedures enerzijds en *top-down* procedures anderzijds en de complexiteit van de samenwerking tussen de ECB en de NBA's en van de juridische concepten (waaronder 'rechtgevolgen', 'beoordelingsruimte' en 'exclusieve beslissingsbevoegdheid'). Het vereiste van toegang tot de rechter is met name problematisch voor partijen tot wie een toezichtbesluit zich niet richt, maar die wel een gerechtvaardigd belang hebben bij het aanvechten ervan, bijvoorbeeld omdat het besluit hun economische positie aantast. Voor partijen als het bestuur van de bank, haar aandeelhouders en crediteuren is het vrijwel onmogelijk individuele geraaktheid aan te tonen, waardoor het direct opkomen tegen een ECB-besluit voor hen niet mogelijk is. Aandeelhouders worden bovendien naar Europese jurisprudentie over het algemeen niet geacht een eigen belang afzonderlijk van de vennootschap te hebben, als gevolg waarvan zij niet zelfstandig kunnen opkomen tegen een besluit gericht tot de vennootschap. Een ander probleem voor adequate toegang tot de rechter in *top-down* procedures is de zogeheten Deggendorfdocctrine. Op grond van deze doctrine kan niet via een prejudiciële procedure worden opgekomen tegen een ECB-instructie (indirecte toetsing) door partijen die 'zonder twijfel' direct bij de Unierechter tegen de instructie hadden kunnen opkomen en die kennis hebben van het bestaan van de ECB-instructie. De uitwerking van deze doctrine kan problematisch zijn voor de toegang tot de rechter van partijen die weliswaar weten van het bestaan van een ECB-instructie, maar niet de exacte inhoud daarvan kennen en daardoor niet of te laat een procedure starten op Europees niveau. Problematisch voor het vereiste van volle rechtsmacht is dat de Unierechter weliswaar bevoegd is in *bottom-up* procedures voorbereidende NBA-handelingen te toetsen, maar slechts beperkte rechtsmacht heeft ten aanzien nationaal recht, waardoor fouten naar nationaal recht mogelijk ongetoetst blijven. Voor het recht op een tijdige, finale geschilbeslechting is het een probleem dat andere partijen dan de bank een *top-down* procedure moeten aanvechten op twee niveaus om de gehele procedure te laten toetsen. Tegen het NBA-implementatiebesluit moet worden opgekomen bij de nationale rechter om vervolgens de ECB-instructie te laten toetsen door de Unierechter via de prejudiciële procedure. Het ageren op twee gerechtelijke niveaus brengt aanzienlijke vertragingen mee die ertoe leiden dat het recht op een tijdige, finale geschilbeslechting in het geding komt.

Hoofdstuk 6 behandelt het stelsel van civielrechtelijke rechtsbescherming in de vorm van een schadevergoedingsactie (*action for damages*) in gemengde SSM-procedures. Het uitgangspunt is dat de nationale rechter bevoegd is te oordelen in schadevergoedingsacties tegen de desbetreffende NBA en de Unierechter in schadevergoedingsacties tegen de ECB. In

gemengde SSM-procedures kunnen dus in beginsel parallelle schadevergoedingsprocedures worden gestart op zowel Europees als nationaal niveau. Bovendien wordt betoogd dat het beginsel van 'één enkele rechterlijke toetsing', zoals geïntroduceerd in *Berlusconi*, op basis van dit arrest niet geldt voor een schadevergoedingsactie. Het Unierecht staat derhalve in beginsel niet eraan in de weg dat een nationale rechter oordeelt over een nationale schadevergoedingsactie betreffende een voorbereidend DNB-besluit.

Voor de aansprakelijkheidsverdeling in gemengde SSM-procedures zijn met name de aansprakelijkheidsvereisten van een onrechtmatige handeling (of: omissie) en causaal verband relevant. Het is mogelijk dat zowel de ECB als DNB aansprakelijk zijn voor schade die voortvloeit uit de besluitvorming in een gemengde procedure. Voor die gevallen heeft het Hof van Justitie het concept van 'gezamenlijke aansprakelijkheid' (*joint liability*) ontwikkeld.

Voor de niet-contractuele aansprakelijkheid van de ECB op grond van artikel 340(3) VWEU gelden drie vereisten: onrechtmatige handeling, schade en een causaal verband tussen de schade en de onrechtmatige handeling. De onrechtmatige handeling kan ook een onrechtmatige omissie zijn, waarvoor is vereist dat de ECB een Europese verplichting tot handelen had en deze heeft geschonden. Gesteld wordt dat als gevolg van de ruime formulering van de verscheidene monitorings- en interventiebevoegdheden van de ECB niet snel sprake zal zijn van een harde verplichting voor de ECB om in te grijpen bij een NBA. De ECB zal dan ook niet snel aansprakelijk worden gehouden voor het nalaten in te grijpen bij een NBA. Voor aansprakelijkheid moet ook een direct causaal verband bestaan tussen de onrechtmatige handeling van de ECB en de schade. De tussenkomst van een NBA kan de causaliteitsketen doorbreken als de NBA-handeling kwalificeert als een onafhankelijke en autonome handeling. Betoogd wordt dat het informeren van een bank door een NBA over een toekenning of weigering van een bankvergunning door de ECB niet als zodanig geldt. Hetzelfde zal over het algemeen gelden voor een ECB-instructie ingevolge artikel 9(1), derde subparagraaf, SSM-Verordening als deze gedetailleerd voorschrijft welke nationale bevoegdheid moet worden uitgeoefend jegens welke instelling. Een ECB-instructie die inhoudt dat de NBA een sanctieprocedure moet inleiden laat echter een ruime discretionaire marge aan de NBA, waardoor de causaliteitsketen wel wordt verbroken. Desalniettemin, ook waar sprake is van een nationale onafhankelijke en autonome handeling, kan een direct causaal verband tussen een Uniehandeling en schade worden aangenomen, mits de nationale handeling mogelijk werd gemaakt door een onrechtmatige omissie door een Unie-instelling. Dit beginsel volgt uit *Vloeberghs t. Hoge Autoriteit*.⁵

Non-contractuele DNB-aansprakelijkheid wordt beheerst door de onrechtmatige daadsactie van artikel 6:162 Burgerlijk Wetboek (BW). Daar-

5 Gevoegde Zaken 9/60 en 12/60 *Vloeberghs t. Hoge Autoriteit* ECLI:EU:C:1961:18.

naast geldt op grond van artikel 1:25d Wet op het financieel toezicht (Wft) een aansprakelijkheidsbeperking die de aansprakelijkheid van DNB beperkt tot die gevallen waarin de schade in belangrijke mate het gevolg is van opzet of grove schuld. Betoogd wordt dat deze aansprakelijkheidsbeperking een hogere drempel kan opwerpen dan de aansprakelijkheidsvereisten die voortvloeien uit het Europese beginsel van lidstaataansprakelijkheid, met name ten aanzien van het schuldvereiste. In gevallen waarin artikel 1:25d Wft minder snel leidt tot aansprakelijkheid dan de Europese aansprakelijkheidsvereisten en er een Europese norm is geschonden die strekt tot bescherming van de persoon die schade heeft geleden (het Europese relativiteitsvereiste), moet artikel 1:25d Wft buiten toepassing worden gelaten. Het gerechtshof Amsterdam heeft in een zaak betreffende AFM-aansprakelijkheid voor vermeend falend toezicht artikel 1:25d Wft niet toegepast, waaruit kan worden afgeleid dat de Nederlandse rechter bereid is de aansprakelijkheidsbeperking waar nodig buiten toepassing te laten. Het zal echter geheel van de feiten en omstandigheden van de zaak afhangen en van de argumenten van de benadeelde partij of een rechter daartoe zal overgaan. Die complexiteit en onzekerheid brengen het risico mee dat artikel 1:25d Wft wordt toegepast in situaties waarin dit in strijd is met het beginsel van lidstaataansprakelijkheid.

In gemengde procedures zijn potentieel zowel DNB als de ECB aansprakelijk, waarmee het in de Unierechtspraak ontwikkelde concept van gezamenlijke aansprakelijkheid relevant wordt. Dit concept brengt mee dat een benadeelde partij eerst de nationale rechtsmiddelen moet uitputten alvorens een procedure te entameren op Europees niveau, tenzij hij geen nationale effectieve rechtsmiddelen tot zijn beschikking heeft. Drie varianten van gezamenlijke aansprakelijkheid worden besproken: de ECB heeft onvoldoende ondernomen om een inbreuk van Unierecht door DNB te voorkomen; een gezamenlijke actie van de ECB en DNB; en het toepassen door DNB van een ongeldige ECB-handeling. Geconcludeerd wordt dat het uitputtingsvereiste naar alle waarschijnlijkheid alleen van toepassing is in de situatie waarin DNB een inbreuk maakt op Unierecht en de ECB onvoldoende heeft ondernomen om die inbreuk te voorkomen; in de andere gevallen is in beginsel geen sprake van een onrechtmatige daad door DNB en daarmee is geen effectieve nationale rechtsgang beschikbaar.

Hoewel uit het voorgaande volgt dat in gemengde SSM-procedures parallelle aansprakelijkheidsprocedures kunnen worden gevoerd tegen zowel de ECB als DNB, zorgt de wisselwerking tussen Nederlands en Europees recht ervoor dat daarop enige nuancering moet worden aangebracht. Gesteld wordt dat het Nederlandse beginsel van formele rechtskracht toepassing vindt in gemengde SSM-procedures en meebrengt dat in *bottom-up* procedures de formele rechtskracht van een ECB-besluit zich mede uitstrekt tot ontwerpbesluiten van DNB. Waar een ECB-besluit formele rechtskracht heeft gekregen, kunnen partijen die tegen dat ECB-besluit bij de Unierechter hadden kunnen opkomen derhalve in beginsel niet via een schadevergoedingsprocedure ageren tegen het DNB-ontwerpbesluit.

Ook hoofdstuk 6 sluit af met het toepassen van het normatief kader op de bevindingen. Daaruit volgt dat er tekortkomingen bestaan ten aanzien van alle vijf de elementen van het beginsel van effectieve rechtsbescherming. De moeilijkheden met betrekking tot het selecteren van de bevoegde rechter of rechters staan in de weg aan een helder stelsel van rechtsbescherming. Die moeilijkheden worden veroorzaakt door de complexiteit van de samenwerking tussen de ECB en de NBA's en van de Europese en nationale aansprakelijkheidsvereisten, alsmede door het uitputtingsvereiste en de uitzonderingen daarop. Adequate toegang tot de rechter wordt verhinderd door het Nederlandse beginsel van formele rechtskracht, dat de toegang tot een Nederlandse schadevergoedingsactie ingesteld tegen DNB kan verhinderen, en door de uitputtingseis, die ertoe kan leiden dat de vijftienertermijn voor instellen van een schadevergoedingsactie op Europees niveau is verstreken voordat een actie aanhangig is gemaakt. Problematisch voor het vereiste van volledige rechtsmacht is dat de Nederlandse en de Unierechter slechts kunnen beslissen over die handelingen die binnen de reikwijdte van hun jurisdictie vallen. Daarnaast beperkt de Unierechter haar eigen jurisdictie ten aanzien ECB-handelingen door de uitputtingseis te introduceren. De uitputtingseis maakt bovendien inbreuk op het recht op een tijdige, finale geschilbeslechting door potentieel aanmerkelijke vertragingen mee te brengen voor het recht op schadevergoeding. Tot slot kan artikel 1:25d Wft het recht op schadevergoeding bij schendingen van Unierecht bemoeilijken waar deze in strijd met het beginsel van lidstaataansprakelijkheid wordt toegepast door de nationale rechter.

Het afsluitende hoofdstuk 7 bevat de synthese, conclusies en aanbevelingen. De overkoepelende conclusie is dat de intensieve integratie tussen de nationale en de Europese rechtsorde in het SSM zich slecht verhoudt tot het stelsel van rechtsbescherming dat nog voornamelijk dualistisch is georganiseerd. Deze tegenstelling is niet uniek voor het SSM en doet zich steeds sterker gevoelen met de toenemende integratie tussen de lidstaten en de EU. In de hoofdstukken 5 en 6 is aangetoond dat deze tegenstelling in het SSM leidt tot verscheidene rechtsbeschermingsproblemen. Het slot-hoofdstuk bevat een aantal aanbevelingen dat ertoe strekt het stelsel van rechtsbescherming beter af te stemmen op het geïntegreerde systeem van het SSM.

Voor bestuursrechtelijke rechtsbescherming wordt aanbevolen de toetsing van niet alleen SSM *bottom-up* procedures, maar ook van *top-down* procedures te centraliseren bij de Unierechter. Daarnaast zou de Unierechter volledige rechtsmacht moeten verkrijgen ten aanzien van nationale handelingen in gemengde procedures, voor zowel voorbereidende handelingen (in *bottom-up* procedures) als implementerende handelingen (in *top-down* procedures). Noodzakelijk vanwege het vereiste van volledige rechtsmacht is dat de Unierechter rechtsmacht moet hebben te oordelen over al het nationale recht dat in de gemengde procedure is toegepast. Nationale normen die een implementatie vormen van Unierecht moeten aan de hand van de relevante Uniewetgeving worden uitgelegd en daarvoor is geen opinie of

bindende uitspraak van een nationale rechter nodig. Ook volledig nationaal recht, dat wil zeggen nationaal recht dat geen implementatie vormt van Unierecht, moet worden geïnterpreteerd door de Unierechter, zij het met inachtneming van nationale uitspraken of, wanneer die ontbreken, aan de hand van de bredere context van het nationale systeem en de gangbare methoden van uitleg. Voor het geval een volledige jurisdictie zoals hierboven beschreven (politiek) niet haalbaar is, worden enkele alternatieve benaderingen voorgesteld. Deze benaderingen zijn het nader reguleren en harmoniseren van de voorbereidende handelingen van NBA's, het extensief interpreteren van het Unierechtelijke zorgvuldigheidsbeginsel bij de toetsing van nationale AML/CFT-beoordelingen en het verder uitwerken van de verantwoordelijkheden van de ECB ten aanzien van een dergelijke nationale beoordeling.

Mocht het volledig centraliseren van bestuursrechtelijke rechtsbescherming in gemengde procedures (politiek) niet mogelijk zijn, worden enkele alternatieve wegen voorgesteld. Deze wegen bestaan allereerst uit het bieden van meer transparantie in gemengde procedures over de besluiten die daarvan deel uitmaken: wie heeft wat beslist? Ten tweede zal de route van de indirecte toetsing (*indirect review*) moeten worden versterkt: de nationale rechter dient zich ervan te vergewissen dat een prejudiciële procedure noodzakelijk kan zijn voor het verkrijgen van een volledige toetsing van de gemengde procedure en de Unierechter zal met terughoudendheid de Deggendorfdocrine moeten toepassen. Ten derde zal de ontvankelijkheid voor aandeelhouders op Europees niveau moeten worden versoepeld door het vereiste van individuele geraaktheid minder strikt toe te passen.

Voor het stelsel van schadevergoedingsacties worden ook aanbevelingen gedaan strekkende tot een betere afstemming met het geïntegreerde stelsel van het SSM. De belangrijkste aanbeveling daartoe is het introduceren van een mechanisme voor hoofdelijke aansprakelijkheid van de ECB en de NBA's alsmede voor subrogatie. Waar de schade (mede) is veroorzaakt door de ECB of een NBA, moet een subrogatiemechanisme erin voorzien dat schadevergoeding betaald door ofwel de ECB ofwel de NBA (gedeeltelijk) kan worden verhaald op de ander. Daarnaast wordt voorgesteld de maatstaf voor niet-contractuele aansprakelijkheid te harmoniseren. Voor het geval een stelsel van hoofdelijke aansprakelijkheid en subrogatie niet zal worden geïntroduceerd, worden enkele alternatieven geformuleerd. Deze alternatieven bestaan uit het verlengen van de termijn voor het instellen van een schadevergoedingsactie op Unieniveau als de uitputtingseis van toepassing is en het introduceren van de Berlusconi-doctrine voor schadevergoedingsacties in *bottom-up* procedures, waarmee zowel een actie tot nietigverklaring als een schadevergoedingsactie tegen de ECB en nationale voorbereidende handelingen van de NBA's gecentraliseerd worden behandeld door de Unierechter.

Concluderend: geïntegreerd toezicht moet hand in hand gaan met geïntegreerde rechtsbescherming.

Bibliography

LITERATURE

Albors-Llorens 1996

A. Albors-Llorens, *Private Parties in European Community Law: Challenging Community Measures* (Oxford University Press 1996).

Alexander 2015

K. Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism', *European Law Review* 2015, p. 154-187.

Almhofer 2018

M. Almhofer, *Die Haftung der Europäischen Zentralbank für rechtswidrige Bankenaufsicht* (Mohr Siebeck 2018) (diss. Vienna).

Alonso de León 2016

S. Alonso de León, *Composite Administrative Procedures in the European Union* (Universidad Carlos III de Madrid 2016).

Amtenbrink 2019

F. Amtenbrink, 'The application of national law by the European Central Bank: challenging European legal doctrine?', in: ECB, *ECB Legal Conference 2019: Building bridges: central banking in an interconnected world*, p. 136-151.

Annunziata 2019

F. Annunziata, 'Fostering Centralization of EU Banking Supervision Through Case-Law. The European Court of Justice and the Role of the European Central Bank', *Bocconi Legal Studies Research Paper Series* 2019.

Arnulf 1995

A. Arnulf, 'Private Applications and the Action for Annulment Under Article 173 of the EC Treaty', *Common Market Law Review* 1995, p. 7-49.

Arnulf 2001

A. Arnulf, 'Private Applications and the Action for Annulment since Codorniu', *Common Market Law Review* 2001, p. 7-52.

Arons 2020

T.M.C. Arons, 'Judicial Protection of Supervised Credit Institutions in the European Banking Union', in: D. Busch & G. Ferrarini, (eds.), *European Banking Union* (Oxford University Press 2020), p. 93-141.

Asser/Sieburgh 6-II 2017

C.H. Sieburgh, Mr. C. Assers *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte* (Wolters Kluwer 2017).

Bassani 2019

G. Bassani, *The Legal Framework Applicable to the Single Supervisory Mechanism? Tapestry or patchwork?* (Kluwer Law International 2019).

Biondi & Spano 2020

A. Biondi & A. Spano, 'The ECB and the Application of National Law in the SSM: New Yet Old...', *European Business Law Review* 2020, p. 1023-1046.

Bonelli 2019

M. Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature', *Review of European Administrative Law* 2019, p. 35-62.

Boonekamp, GS Schadevergoeding

R.J.B. Boonekamp, *Groene Serie Schadevergoeding* (Wolters Kluwer) (available online).

Boucon & Jaros 2018

L. Boucon & D. Jaros, 'The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism: A New Mode of European Integration?', *European Journal of Legal Studies* 2018, p. 155-187.

Bovenschen et al 2013

W.H. Bovenschen et al, 'Europees banktoezicht (SSM). Juridische en praktische perspectieven', *Nederlands tijdschrift voor Europees recht* 2013, p. 364-373.

Brescia Morra 2014

C. Brescia Morra, 'From the Single Supervisory Mechanism to the Banking Union. The Role of the ECB and the EBA', *LUISS Guido Carli Working Paper* 2014.

Brito Bastos 2015

F. Brito Bastos, 'The Borelli Doctrine Revisited: Three Issues of Coherence in a Landmark Ruling for EU Administrative Justice', *Review of European Administrative Law* 2015, p. 269-298.

Brito Bastos 2018

F. Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures', *Common Market Law Review* 2018, p. 101-134.

Brito Bastos 2019

F. Brito Bastos, 'Judicial Review of Composite Administrative Procedures in the Single Supervisory Mechanism: Berlusconi', *Common Market Law Review* 2019, p. 1355-1378.

Brito Bastos 2020

F. Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Nonjusticiable National Law', *European Constitutional Law Review* 2020, p. 63-90.

Brito Bastos 2021

F. Brito Bastos, 'Judicial Annulment of National Preparatory Acts and the Effects on Final Union Administrative Decisions: Comments on the Judgment of 29 January 2020, Case C-785/18 Jeanningros, EU:C:2020:46', *REALaw* 2021, 109-117.

Budinská & Tegelaar 2023

B. Budinská & J.T. Tegelaar, 'Duty of Care as a Judicial Review Tool for SSM Composite Procedures', in: L. Böffel & J. Schürger (eds.), *Digitalisation, Sustainability, and the Banking and Capital Markets Union. Thoughts on Current Issues of EU Financial Regulation* (Palgrave Macmillan 2023), p. 329-351.

Cassese 2004

S. Cassese, 'European Administrative Proceedings', *Law and Contemporary Problems* 2004, p. 21-36.

Chalmers, Davies & Monti 2019

D. Chalmers, G. Davies & G. Monti, *European Union Law* (Cambridge University Press 2019).

Chiti 2009

E. Chiti, 'The administrative implementation of European Union law: a taxonomy and its implications', in: H.C.H. Hofmann & A.H. Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009), p. 9-33.

Coman-Kund & Amttenbrink 2018

F. Coman-Kund & F. Amttenbrink, 'On the Scope and Limits of the Application of National Law by the European Central Bank within the Single Supervisory Mechanism', *Banking & Finance Law Review* 2018, p. 133-172.

Craig 2018

P. Craig, *EU Administrative Law* (Oxford University Press 2018).

Craig & De Búrca 2020

P. Craig & G. de Búrca, *EU Law. Text, Cases, and Materials* (Oxford University Press 2020).

D'Ambrosio 2012

R. D'Ambrosio, 'The Involvement of the NCAs in the ECB's Supervisory Proceedings', in: R. D'Ambrosio (ed.), *Law and Practice of the Banking Union and its governing Institutions (Cases and Materials)*, *Quaderni di Ricerca Giuridica della Consulenza Legale* 2012, p. 163-180.

D'Ambrosio 2015

R. D'Ambrosio, 'The ECB and NCA liability within the Single Supervisory Mechanism', *Quaderni di Ricerca Giuridica della Consulenza Legale* 2015.

De Bellis 2015

M. De Bellis, 'European Financial Supervision After the Crisis: Multi-Speed Models Within a Two-Track Framework', in: E. Chiti & G. Vesperini (eds.), *The Administrative Architecture of Financial Integration. Institutional Design, Legal Issues, Perspectives* (il Mulino 2015), p. 61-92.

De Groot 2004

J.F. de Groot, case note on *College van Beroep voor het bedrijfsleven* 29 April 2004 ECLI:NL:CBB:2004:AO9910, *Jaarboek Ondernemingsrecht* 2004/173.

De Poorter 2003

J.C.A. de Poorter, *De belanghebbende: Een onderzoek naar de betekenis van het belanghebbendebegrip in het bestuurs(proces)recht* (Boom Juridische Uitgevers 2003).

De Visser 2004

M. de Visser, 'The Concept of Concurrent Liability and its Relationship with the Principle of Effectiveness: A One-way Ticket into Oblivion?', *Maastricht Journal of European and Comparative Law* 2004, p. 47-70.

Della Cananea 2004

G. della Cananea, 'The European Union's Mixed Administrative Proceedings', *Law & Contemporary Problems* 2004, p. 197-217.

Demková 2019

S. Demková, 'The Grand Chamber's Take on Composite Procedures under the Single Supervisory Mechanism', *Review of European Administrative Law* 2019, p. 209-202.

Dermine 2003

J. Dermine, 'Banking in Europe: Past Present and Future', in: V. Gaspar, P. Hartmann & O. Sleijpen (eds.), *The transformation of the European financial system* (Second ECB Central Banking Conference) 2003, p. 31-96.

Dermine & Eliantonio 2019

P. Dermine & M. Eliantonio, 'Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)', *Review of European Administrative Law* 2019, p. 237-253.

Di Bucci 2021

V. Di Bucci, 'Procedural and Judicial Implications of Composite Procedures in the Banking Union', in: C. Zilioli & K-P. Wojcik (eds.), *Judicial Review in the European Banking Union* (Edward Elgar 2021), p. 114-129.

Dorucci et al 2015

E. Dorrucci et al, 'The four unions "PIE" on the Monetary Union "CHERRY": a new index of European Institutional Integration', *ECB Occasional Paper Series* 2015.

Dragomir 2010

L. Dragomir, *European Prudential Banking Regulation and Supervision: The Legal Dimension* (Routledge 2010).

Drake 2006

S. Drake, 'Scope of Courage and the Principle of "Individual Liability" for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice', *European Law Review* 2006, p. 841-864.

Eilmansberger 2004

T. Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: in Search of the Missing Link', *Common Market Law Review* 2004, p. 1199-1246.

Eliantonio 2008

M. Eliantonio, *Europeanisation of Administrative Justice? The influence of the CJEU's case law in Italy, Germany and England* (diss. Maastricht) (Europa Law Publishing 2008).

Eliantonio 2014

M. Eliantonio, 'Judicial Review in an Integrated Administration: The Case of the Habitats Directive', *European Energy and Environmental Law Review* 2014, p. 116-126.

Eliantonio 2015

M. Eliantonio, 'Judicial Review in an Integrated Administration: the Case of "Composite Procedures"', *Review of European Administrative Law* 2015, p. 65-102.

Enoch et al 2013

C. Enoch et al, 'Securing a Safer Financial System for Europe', in: C. Enoch et al (eds.), *From Fragmentation to Financial Integration in Europe* (Report International Monetary Fund 2013), p. 1-35.

Ferran & Babis 2013

F. Ferran & V. Babis, 'The European Single Supervisory Mechanism', *Journal of Corporate Law Studies* 2013, p. 255-285.

Ferrarini & Chiarella 2013

G. Ferrarini & L. Chiarella, 'Common Banking Supervision in the Eurozone: Strengths and Weaknesses', *ECGI Law Working Paper* 2013.

Ferrarini 2015a

G. Ferrarini, 'Cross-border Banking and the SSM', *European Economy* 2015, p. 57-69.

Ferrarini 2015b

G. Ferrarini, 'Single Supervision and the Governance of Banking Markets: Will the SSM Deliver the Expected Benefits?', *European Business Organization Law Review* 2015, p. 513-537.

Fines 1997

F. Fines, 'A General Analytical Perspective on Community Liability', in: T. Heukels & A.M. McDonnell (eds.), *The Action for Damages in Community Law* (Kluwer Law International 1997), p. 11-39.

Gagliardi & Wissink 2020

E. Gagliardi & L. Wissink, 'Ensuring effective judicial protection in case of ECB decisions based on national law', *Review of European Administrative Law* 2020, p. 41-71.

Gaztea 2019

J.F. Gaztea, 'A Jurisdiction of Jurisdictions', *Review of European Administrative Law* 2019, p. 9-37.

Gerbrandy 2009

A. Gerbrandy, *Convergentie in het mededingingsrecht: de invloed van het EG-recht op materiele toepassing, toegang, bewijs en toetsing bij de Nederlandse mededingingsbestuursrechter, gezien in het licht van effectieve rechtsbescherming* (diss. Utrecht) (Boom juridische uitgevers 2009).

Giesen 2005

I. Giesen, *Toezicht en aansprakelijkheid. Een rechtsvergelijking naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden* (Kluwer 2005).

Goodhart 1995

C.A.E. Goodhart, *The Central Bank and the Financial System* (Macmillan 1995).

Goyal et al 2013

R. Goyal et al, 'A Banking Union for the Euro Area', *IMF Staff Discussion Note* 2013.

Gurlit 2013

E. Gurlit, 'Handlungsformen der Finanzmarktaufsicht', *Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht* 2013, p. 862-901.

Gutman 2011

K. Gutman, 'The Evolution of the Action for Damages Against the European Union and its Place in the System of Judicial Protection', *Common Market Law Review* 2011, p. 695-750.

Haentjens & De Gioia-Carabellese 2020

M. Haentjens & P. De Gioia-Carabellese, *European Banking and Financial Law* (Routledge 2020).

Haentjens, Tegelaar & Verheij 2018

M. Haentjens, J.T. Tegelaar & D.J. Verheij, 'Financial Market Regulation and Supervision', in: P.J. Kuijper et al (eds.), *The Law of the European Union* (Wolters Kluwer 2018), p. 951-993.

Harding 1979

C. Harding, 'The Choice of Court Problem in Cases of Non-Contractual Liability Under E.E.C. Law', *Common Market Law Review* 1979, p. 389-406.

Harlow & Rawlings 2006

C. Harlow & R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach', *European Governance Papers* 2006.

Hartley 1977

T.C. Hartley, 'Concurrent Liability in EEC Law: A Critical Review of Cases', *European Law Review* 1977, p. 249-265.

Hernández Saseta 2021

C. Hernández Saseta, 'The Legal Review of ECB Instructions Under Article 9 SSM Regulation', in: C. Zilioli & K.-P. Wojcik (eds.), *Judicial Review in the European Banking Union* (Edward Elgar 2021), p. 304-315.

J. Hofmann 2005

J. Hofmann, 'Rechtsschutz und Haftung im Europäischen Verwaltungsverbund', in: E. Schmidt-Aßmann & B. Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund* (Mohr Siebeck 2005), p. 163-182.

J. Hofmann 2011

J. Hofmann, 'Legal Protection and Liability in the European Union Composite Administration', in: O. Jansen & B. Schöndorf-Haubold (eds.), *The European Composite Administration* (Intersentia 2011), p. 441-466.

Hofmann 2009a

H.C.H. Hofmann, 'Composite decision making procedures in EU administrative law', in: H.C.H. Hofmann & A.H. Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009), p. 136-167.

Hofmann 2009b

H.C.H. Hofmann, 'Seven Challenges for EU Administrative Law', in: K.J. de Graaf et al (eds.), *European Administrative Law: Top-Down and Bottom-Up* (Europa Law Publishing 2009), p. 37-59.

Hofmann 2019

H.C.H. Hofmann, 'Multi-Jurisdictional Composite Procedures. The Backbone of the EU's Single Regulatory Space', *Université du Luxembourg Legal Working Paper Series* 2019.

Hofmann 2020

H.C.H. Hofmann, 'The Duty of Care in EU Public Law – A Principle Between Discretion and Proportionality', *Review of European Administrative Law* 2020, p. 87-112.

Hofmann 2021

H.C.H. Hofmann, 'Article 47', in: S. Peers et al (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021), p. 1245-1384.

Hofmann & Tidghi 2014

H.C.H. Hofmann & M. Tidghi, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks', *European Public Law* 2014, p. 147-163.

Hofmann & Türk 2006a

H.C.H. Hofmann & A.H. Türk, 'Conclusions: Europe's integrated administration', in: H.C.H. Hofmann & A.H. Türk (eds.), *EU Administrative Governance* (Edward Elgar Publishing 2006), p. 573-596.

Hofmann & Türk 2006b

H.C.H. Hofmann & A.H. Türk, 'Policy implementation', in: H.C.H. Hofmann & A.H. Türk (eds.), *EU Administrative Governance* (Edward Elgar 2006), p. 74-112.

Hofmann & Türk 2007

H.C.H. Hofmann & A.H. Türk, 'The Development of Integrated Administration in the EU and its Consequences', *European Law Journal* 2007, p. 253-271.

Hofmann & Türk 2009a

H.C.H. Hofmann & A.H. Türk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009).

Hofmann & Türk 2009b

H.C.H. Hofmann & A.H. Türk, 'Introduction: towards a legal framework for Europe's integrated administration', in: H.C.H. Hofmann & A.H. Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009), p. 1-6.

Hofmann & Türk 2009c

H.C.H. Hofmann & A.H. Türk, 'Legal challenges in EU administrative law by the move to an integrated administration', in: H.C.H. Hofmann & A.H. Türk (eds.), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009), p. 355-379.

Jans, Prechal & Widdershoven 2011

J.H. Jans, S. Prechal & R.J.G.M. Widdershoven (eds.), *Inleiding tot het Europees bestuursrecht* (Ars Aequi Libri 2011).

Jansen & Schöndorf-Haubold 2011

O.J.D.M.L. Jansen & B. Schöndorf-Haubold (eds.), *The European Composite Administration* (Intersentia 2011).

Jansen, GS Onrechtmatige daad

K.J.O. Jansen, *Groene Serie Onrechtmatige daad* (Wolters Kluwer) (available online).

Jansen, Gullo & Aggarwal 2013

B. Jansen, A. Gullo & N. Aggarwal, 'Legal Underpinnings of an EU Banking Union', in: C. Enoch et al (eds.), *From Fragmentation to Financial Integration in Europe*, Report International Monetary Fund 2013, p. 193-205.

Karagianni 2022

A.M. Karagianni, *The Protection of Fundamental Rights in Composite Banking Supervision Procedures* (diss. Utrecht) (Utrecht University Repository 2022).

Karagianni & Scholten 2018

A.M. Karagianni & M. Scholten, 'Accountability Gaps in the Single Supervisory Mechanism (SSM) Framework', *Utrecht Journal of International and European Law* 2018, p. 185-194.

Kawczyńska 2014

M. Kawczyńska, 'Concurrent Liability of the European Union and the Member States', in: J. Iliopoulos-Strangas, S. Biernat & M. Potacs (eds.), *Verantwortung, Haftung und Kontrolle des Verfassungsstaates und der Europäischen Union im Wandel der Zeit – Responsibility, Accountability and Control of the Constitutional State and the European Union in Changing Times – Responsabilités et Contrôle de l'État constitutionnel et de l'Union européenne au fil du temps* (Nomos 2014), p. 73-92.

Kortmann 2017

C.N.J. Kortmann, case note on Afdeling bestuursrecht van de Raad van State 2 August 2017 ECLI:NL:RVS:2017:2081, *Jurisprudentie Bestuursrecht* 2017/152.

Lackhoff 2014

K. Lackhoff, 'How will the Single Supervisory Mechanism (SSM) function? A brief overview', *JIBLR* 2014, p. 13-28.

Lackhoff 2017

K. Lackhoff, *Single Supervisory Mechanism. A Practitioner's Guide* (CH Beck-Hart-Nomos 2017).

Lamandini, Muñoz & Alvarez 2015

M. Lamandini, D.R. Muñoz & J.S. Álvarez, 'Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection', *Quaderni di Ricerca Giuridica della Consulenza Legale* 2015.

Lamandini, Ramos & Solana 2017

M. Lamandini, D. Ramos & J. Solana, 'The European Central Bank (ECB) Powers as a Catalyst for Change in EU Law. Part 2: SSM, SRM, and Fundamental Rights'. *Columbia Journal of European Law* 2017, p. 201-263.

Lang 2003

J.T. Lang, 'Actions for Declarations that Community Regulations are Invalid: the duties of national courts under Article 10 EC', *European Law Review* 2003, p. 102-111.

Lastra 2006

R.M. Lastra, *Legal foundations of international monetary stability* (Oxford University Press 2006).

Lastra 2015

R.M. Lastra, *International Financial and Monetary Law* (Oxford University Press 2015).

Lefterov 2015

A. Lefterov, 'The Single Rulebook: legal issues and relevance in the SSM context', *ECB Legal Working Paper Series* 2015.

Lenaerts 2007

K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', *Common Market Law Review* 2007, p. 1625-1659.

Lenaerts, Arts & Maselis 2006

K. Lenaerts, D. Arts & I. Maselis, *Procedural Law of the European Union* (Sweet & Maxwell 2006).

Lo Schiavo 2014

G. Lo Schiavo, 'From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe? The Stability Function of the Single Supervisory Mechanism', *Maastricht Journal of European and Comparative Law* 2014, p. 110-140.

Lo Schiavo 2015

G. Lo Schiavo, 'The Single Supervisory Mechanism: Building the New Top-Down Cooperative Supervisory Governance in Europe', in: F. Fabbrini, E. Hirsch Ballin & H. Somsen (eds.), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015), p. 111-130.

Lo Schiavo 2019

G. Lo Schiavo, 'The ECB and its application of national law in the SSM', in: G. Lo Schiavo (ed.), *The European Banking Union and the Role of Law* (Edward Elgar 2019), p. 177-196.

Lupinu 2022

P.M. Lupinu, 'Judicial consequences for the enforcement of administrative decisions in multilevel regulatory systems: The case of the Single Resolution Mechanism', in: K. Ligeti & K. Hannah Brodersen (eds.), *Studies on Enforcement in Multilevel Regulatory Systems* (Nomos 2022), p. 51-72.

Marseille & Tolsma 2022

A.T. Marseille & H.D. Tolsma (eds.), *Bestuursrecht 2. Rechtsbescherming tegen de overheid* (Boom juridisch 2022).

Mead 1997

P. Mead, 'The Relationship Between an Action for Damages and an Action for Annulment: The Return of Plaumann', in: T. Heukels & A.M. McDonnell (eds.), *The Action for Damages in Community Law* (Kluwer Law International 1997), p. 243-258.

Mihaescu Evans 2015

B.C. Mihaescu Evans, *The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system* (Nomos 2015).

Mok 2012

M.R. Mok, case note on Hoge Raad 25 May 2012 ECLI:NL:HR:2012:BU9920, *Nederlandse Jurisprudentie* 2012/688.

Mok & Tjittes 1995

M.R. Mok & R.P.J.L. Tjittes, 'Formele rechtskracht en overheidsaansprakelijkheid', *Rechtsgeleerd Magazijn Themis* 1995, p. 383-404.

Moloney 2014a

N. Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press 2014).

Moloney 2014b

N. Moloney, 'European Banking Union: Assessing its Risks and Resilience', *Common Market Law Review* 2014, p. 1609-1670.

Mourlon-Druol 2016

E. Mourlon-Druol, 'Banking Union in Historical Perspective: The Initiative of the European Commission in the 1960s-1970s', *Journal of Common Market Studies* 2016, p. 913-927.

Nehl 1999

H.P. Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing 1999).

Nehl 2011

H.P. Nehl, 'Legal Protection in the Field of EU Funds', *European State Aid Law Quarterly* 2011, p. 629-652.

Nuijten 2014

S.M.C. Nuijten, 'Rechtsbescherming bij toezicht onder het SSM', *Tijdschrift voor Financieel Recht* 2014, p. 469-478.

Oliver 1997

P. Oliver, 'Joint Liability of the Community and the Member States', in: T. Heukels & A.M. McDonnell (eds.), *The Action for Damages in Community Law* (Kluwer Law International 1997), p. 285-309.

Ortlep & Widdershoven 2015

R. Ortlep & R.J.G.M. Widdershoven, 'Judicial Protection', in: J.H. Jans et al (eds.), *Europeanisation of Public Law* (Europa Law Publishing 2015), p. 333-434.

Padoa-Schioppa 2004

T. Padoa-Schioppa, *The Euro and Its Central Bank: Getting United After the Union* (MIT Press 2004).

Pech 2009

L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *The Jean Monnet Working Paper Series* 2009.

Petit 2019

C.A. Petit, 'The SSM and the ECB decision-making governance', in: G. Lo Schiavo (ed.), *The European Banking Union and the Role of Law* (Edward Elgar 2019), p. 108-129.

Polak 2022

J.E.M. Polak in T. Barkhuysen et al (eds.), *AB Klassiek. Standaarduitspraken bestuursrecht, opnieuw en thematisch geannoteerd* (Wolters Kluwer 2022) (available online).

Polak 2019

J.E.M. Polak, 'De toekomst van de formele rechtskracht. Een inleidende beschouwing', in: J.E.M. Polak et al, *De toekomst van de formele rechtskracht. Preadviezen* (preadvies Vereniging voor Administratief Recht) (Boom juridisch 2019), p. 7-70.

Prechal 2016

S. Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?', in: C. Paulussen et al (eds.), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (Springer 2016), p. 143-157.

Prechal & Widdershoven 2011

S. Prechal & R.J.G.M. Widdershoven, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection', *Review of European Administrative Law* 2011, p. 31-50.

Prek & Lefèvre 2017

M. Prek & S. Lefèvre, 'The EU Courts as "National" Courts: National Law in the EU Judicial Process', *Common Market Law Review* 2017, p. 369-402.

Röhl 2008

H.C. Röhl, 'Procedures in the European Composite Administration', in: J. Barnes (ed.), *Transforming Administrative Procedure* (Global Law Press 2008), p. 75-96.

Roth 2011

G.P. Roth, 'De belanghebbenden in het financieel toezichtsrecht: wie zijn het, wat kunnen ze?', *Ondernemingsrecht* 2011, p. 192-198.

Safjan & Düsterhaus 2014

M. Safjan & D. Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU', *Yearbook of European Law* 2014, p. 3-40.

Scheltema, GS Onrechtmatige daad

M.W. Scheltema, *Groene Serie Onrechtmatige daad* (Wolters Kluwer) (available online).

Schillig 2016

M. Schillig, *Resolution and Insolvency of Banks and Financial Institutions* (Oxford University Press 2016).

Schlössels & Zijlstra 2017

R.J.N. Schlössels & S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat, Band 1* (Kluwer 2017).

Schoenmaker 2011

D. Schoenmaker, 'The financial trilemma', *Economics Letters* 2011, p. 57-59.

Scholten & Ottow 2014

M. Scholten & A. Ottow, 'Institutional Design of Enforcement in the EU: The Case of Financial Markets', *Utrecht Law Review* 2014, p. 80-91.

Scholten 2017

M. Scholten, 'Mind the trend! Enforcement of EU law has been moving to 'Brussels'', *Journal of European Public Policy* 2017, p. 1348-1366.

Scholten 2019

M. Scholten, 'Shared Tasks, but Separated Controls: Building the System of Control for Shared Administration in an EU Multi-Jurisdictional Setting', *European Journal of Risk Regulation* 2019, p. 538-553.

Schürger 2021

J. Schürger, 'Unionsrechtskonformität nationaler Beschränkungen der Staatshaftung im Bank- und Kapitalmarktrecht', *Zeitschrift für Bank- und Kapitalmarktrecht* 2021, p. 601-608.

Schuster 2014

G. Schuster, 'The banking supervisory competences and powers of the ECB', *Europäische Zeitschrift für Wirtschaftsrecht – Beilage* 2014, p. 3-9.

Schütze 2010

R. Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union', *Common Market Law Review* 2010, p. 1385-1427.

Schütze 2018

R. Schütze, *European Union Law* (Cambridge University Press 2018).

Senden 2004

L. Senden, *Soft Law in European Community Law* (Hart 2004).

Shelton 2015

D. Shelton, *Remedies in International Human Rights Law* (Oxford 2015).

Simoncini 2020

M. Simoncini, 'Different shades of legal standing and the right to judicial protection of private parties in the Banking Union: *Trasta Komerbanka*. Joined Cases C-663/17 P, C-665/17 P and C-669/17 P, *European Central Bank v. Trasta Komerbanka AS, Ivan Fursin and Others, and European Commission v. Trasta Komerbanka AS, Ivan Fursin and Others, and Trasta Komerbanka AS, Ivan Fursin and Others v. European Central Bank*, Judgment of the Court of Justice (Grand Chamber), EU:C:2019:923', *Common Market Law Review* 2020, p. 1867-1886.

Sluysmans 2015

J.A.M.A. Sluysmans in M.W.C. Feteris et al (eds.), *De burgerlijke rechter in het publiekrecht* (Wolters Kluwer 2015) (available online).

Smits 1997

R. Smits, *European Central Bank. Institutional Aspects* (Kluwer Law International 1997).

Smits 2017

R. Smits, 'Competences and alignment in an emerging future. After L-Bank: how the Eurosystem and the Single Supervisory Mechanism may develop', *Ademu Working Paper Series* 2017.

Smits 2019

R. Smits, 'ECJ annuls a national measure against an independent central banker', *European Law Blog* 5 March 2019.

Smits 2020

R. Smits, 'A National Measure Annulled by the European Court of Justice, or: High-level Judicial Protection for Independent Central Bankers', *European Constitutional Law Review* 2020, p. 120-144.

Spoor & Fleuren 2013

N.B. Spoor & B.M.H. Fleuren, 'De Bankenunie – rechtsbescherming bij het Single Supervisory Mechanism', *Tijdschrift voor Financieel Recht* 2013, p. 233-237.

Story & Walter 1997

J. Story & I. Walter, *Political Economy of financial integration in Europe. The battle of the systems* (The MIT Press 1997).

Tegelaar 2016

J.T. Tegelaar, 'Immuun voor de Unie? Semi-(immunititeit) van nationale financiële toezichthouders onder nieuw recht', *Ars Aequi* 2016, p. 705-715.

Tegelaar 2017

J.T. Tegelaar, *Exit Peter Paul? Divergente toezichthoudersaansprakelijkheid in de Europese Unie voor falend financieel toezicht, gezien vanuit het Europeesrechtelijke beginsel van effectieve rechtsbescherming*, Meijers-reeks (Jongbloed 2017).

Tegelaar 2018

J.T. Tegelaar, 'De Unierechter als *juge de droit national*? Nationaal recht en de rechterlijke toetsing van gemengde procedures', in: L.W. Verboeket et al (eds.), *Bestuursrecht in het echt. Vriendenbundel voor prof. mr. drs. Willemien den Ouden* (Wolters Kluwer 2018), p. 285-300.

Tegelaar 2022

J.T. Tegelaar, 'The EU Courts as *juges de droit national* in the Single Supervisory Mechanism?', in: M. Haentjens et al (eds.), *The Enforcement of EU Financial Law* (Hart Publishing 2022), p 119-136.

Tegelaar & Haentjens 2019

J.T. Tegelaar & M. Haentjens, 'Judicial protection in cross-border bank resolution', in: M. Haentjens & B. Wessels (eds.), *Research Handbook on Cross-Border Bank Resolution* (Edward Elgar 2019), p. 260-287.

Teixeira 2014

P.G. Teixeira, 'European prudential banking supervision. Legal foundations and implications for European integration', in: J.E. Fossum & A.J. Menéndez (eds.), 'The European Union in Crises or the European Union as Crises?', *ARENA Report* 2014, p. 527-573.

Teixeira 2017

P.G. Teixeira, 'The Legal History of the Banking Union', *European Business Organization Law Review* 2017, p. 535-565.

Ter Kuile, Wissink & Bovenschen 2015

G.J.S. ter Kuile, L. Wissink & W.H. Bovenschen, 'Tailor-Made Accountability Within the Single Supervisory Mechanism', *Common Market Law Review* 2015, p. 155-189.

Toth 1997

A.G. Toth, 'The Concepts of Damage and Causality as Elements of Non-Contractual Liability', in: T. Heukels & A.M. McDonnell (eds.), *The Action for Damages in Community Law* (Kluwer Law International 1997), p. 179-198.

Tridimas 2011

T. Tridimas, 'EU Financial Regulation: Federalization, Crisis Management, And Law Reform', in: P. Craig & G. de Búrca (eds.) *The Evolution of EU Law* (Oxford University Press 2011), p. 783-804.

Tridimas 2019

T. Tridimas, 'The Constitutional Dimension of Banking Union', in: S. Grundmann & H.W. Micklitz (eds.), *The European Banking Union and Constitution. Beacon for Advanced Integration or Death-Knell for Democracy?* (Hart Publishing 2019), p. 25-48.

Tröger 2014

T.H. Tröger, 'The Single Supervisory Mechanism – Panacea or Quack Banking Regulation?', *European Business Organization Law Review* 2014, p. 449-497.

Tröger 2017

T.H. Tröger, 'How Not To Do Banking Law in the 21st Century – The Judgement of the European General Court (EGC) in the Case T-122/15 – Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank (ECB)', *Oxford Business Law Blog* 16 June 2017, available at www.law.ox.ac.uk/business-law-blog/blog/2017/06/how-not-do-banking-law-21st-century-judgement-european-general-court.

Türk 2009a

A.H. Türk, *Judicial Review in EU Law* (Edward Elgar 2009).

Türk 2009b

A.H. Türk, 'Judicial review of integrated administration in the EU', in: H.C.H. Hofmann & A.H. Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar 2009), p. 218-256.

Türk 2017

A.H. Türk, 'Liability and accountability for policies announced to the public and for press releases', in: ECB, *ECB Legal Conference 2017: Shaping a new legal order of Europe: a tale of crises and opportunities*, p. 43-58.

Türk & Xanthoulis 2019

A.H. Türk & N. Xanthoulis, 'Legal accountability of the European Central Bank in bank supervision: A case study in conceptualising the legal effects of Union acts', *Maastricht Journal of European and Comparative Law* 2019, p. 151-164.

Van Buuren 1978

P.J.J. van Buuren, *Kringen van belanghebbenden. In het bijzonder in procedures tegen de overheid* (Kluwer 1978).

Van Cleynenbreugel 2014

P. Van Cleynenbreugel, *Market Supervision in the European Union. Integrated Administration in Constitutional Context* (Brill Nijhoff 2014).

Van Cleynenbreugel 2016

P. Van Cleynenbreugel, 'Sharing Powers within Exclusive Competences: Rethinking EU Antitrust Law Enforcement', *Croatian Yearbook of European Law and Policy* 2016, p. 49-79.

Van der Grinten 2008

J.H.A. van der Grinten, 'Het samenhangcriterium van Kuijpers, Valkenswaard', *Overheid en Aansprakelijkheid* 2008, p. 225-238.

Van der Woude 1997

M.H. van der Woude, 'Liability for Administrative Acts under Article 215(2) EC', in: T. Heukels & A.M. McDonnell (eds.), *The Action for Damages in Community Law* (Kluwer Law International 1997), p. 109-128.

Van Gerven 2000

W. Van Gerven, 'Of rights, remedies and procedures', *Common Market Law Review* 2000, p. 501-536.

Van Male 1992

R.M. van Male, 'Enkele aspecten van het begrip belanghebbende in de Algemene wet bestuursrecht', in M.B. Koetsier, C.J. Langereis & R.M. van Male, *De belanghebbende* (preadvies Vereniging voor Administratief Recht) (Samsom H.D. Tjeenk Willink 1992), p. 6-100.

Van Praag 2014

E.J. van Praag, 'Aansprakelijkheid van financiële toezichthouders naar Europees recht', *Tijdschrift voor Europees en economisch recht (SEW)* 2014, p. 214-231.

Van Praag 2017

E.J. van Praag, case note on College van Beroep voor het bedrijfsleven 15 November 2016 ECLI:NL:CBB:2016:323 (*GSFS Pensionfund*), *Jaarboek Ondernemingsrecht* 2017/39.

Van Rijn 2022

M. van Rijn, *Judicial Protection for Banks under the Single Rulebook and the Single Supervisory Mechanism* (diss. Nijmegen) (Wolters Kluwer 2022).

Van Triet 2023

N. van Triet, *Afspraken en Aanspraken. Overheidsverplichtingen voor een schending van gerechtvaardigd vertrouwen, op het grensvlak van het bestuursrecht en het civiele recht* (diss. Nijmegen) (Wolters Kluwer 2023).

Verón 2014

N. Verón, 'Tectonic Shifts', *IMF Finance & Development* 2014, available at www.imf.org/external/pubs/ft/fandd/2014/03/veron1.htm.

Von Danwitz 2014

T. von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ', *Fordham International Law Journal* 2014, p. 1311-1347.

Vossen 2020

K. Vossen, *Rechtsschutz in der europäischen Bankenaufsicht* (diss. Humboldt-Universität Berlin) (Mohr Siebeck 2020).

Widdershoven 1996

R.J.G.M. Widdershoven, 'Naar een bestuurs(proces)rechtelijk Ius Commune in Europa', in: E. Steyger, R.J.G.M. Widdershoven & A.W.H. Meij, *Europees recht en het Nederlands bestuursrecht* (preadvies Vereniging voor Administratief Recht) (Samsom H.D. Tjeenk Willink 1996), p. 107-122.

Widdershoven 2011

R.J.G.M. Widdershoven, 'Het beginsel van effectieve rechtsbescherming', in: A. van den Brink, S.A. de Vries & M.P.A. DeKoninck (eds.), *Beginselen bouwen burger-schap* (Boom Juridische uitgevers 2011), p. 105-112.

Widdershoven 2022

R.J.G.M. Widdershoven, case note on Case C-579/19 *Association of Independent Meat Suppliers* ECLI:EU:C:2021:665, *AB Rechtspraak Bestuursrecht* 2022/10.

Wils 1992

W. Wils, 'Concurrent Liability of the Community and a Member State', *European Law Review* 1992, p. 191-206.

Wissink 2015

L. Wissink, 'Het (nieuwe) Europese banktoezicht en de uitdagingen in een gemengde rechtsorde', *Tijdschrift voor Europees en economisch recht (SEW)* 2015, p. 4-14.

Wissink 2021

L. Wissink, *Effective Legal Protection in Banking Supervision* (diss. Utrecht) (Europa Law Publishing 2021).

Wissink, Duijkersloot & Widdershoven 2014

L. Wissink, A.P.W. Duijkersloot & R.J.G.M. Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', *Utrecht Law Review* 2014, p. 92-115.

Witte 2014

A. Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?', *Maastricht Journal of European and Comparative Law* 2014, p. 89-109.

Witte 2015

A. Witte, 'Standing and Judicial review in the New EU Financial Markets Architecture', *Journal of Financial Regulation* 2015, p. 1-37.

Witte 2021

A. Witte, 'The Application of National Law by the ECB, Including Options and Discretions, and its Impact on the Judicial Review', in: C. Zilioli & K.-Ph. Wojcik (eds.), *Judicial Review in the European Banking Union* (Edward Elgar 2021), p. 236-250.

Wolfers & Volland 2014

B. Wolfers & T. Volland, 'Level the playing field: The new supervision of credit institutions by the European Central Bank', *Common Market Law Review* 2014, p. 1463-1495.

Wymeersch 2005

E. Wymeersch, 'The Future of Financial Regulation and Supervision in Europe', *Common Market Law Review* 2005, p. 988-1010.

Wymeersch 2012

E. Wymeersch, 'The European Banking Union, a first analysis', *Ghent University Financial Law Institute Working Paper* 2012.

Wymeersch 2014

E. Wymeersch, 'The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union', *Ghent University Financial Law Institute Working Paper* 2014.

LEGISLATION, OFFICIAL DOCUMENTS AND REPORTS

- C. Segré (chairman) et al, Report of a Group of experts appointed by the EEC Commission, The Development of a European Capital Market, November 1966.
- Banking Advisory Commission 94/1985, n°99, Communication de M. Simonet, Proposition d'une directive du Conseil visant à la coordination des dispositions législatives, réglementaires et administratives concernant l'accès à l'activité des établissements de crédit et son exercice, 28 November 1974.
- European Commission, White Paper on Completing the Internal Market, COM(1985) 310 final.
- Explanatory Memorandum to the Dutch General Administrative Law Act (*Kamerstukken II* 1988/89, 21221, nr. 3).
- European Commission, Communication from the Commission, Implementing the Framework for Financial Markets: Action Plan, COM(1999) 232 final.
- A. Lamfalussy (chairman) et al, Final Report of The Committee of Wise Men on The Regulation of European Securities Markets, 15 February 2001 (Lamfalussy Report).
- Council of the European Union, Ecofin Council Minutes 3 December 2002, Ecofin Council, 3 December 14368/02 (Presse 361).
- Committee of European Securities Regulators, Preliminary Progress Report. Which Supervisory Tools for the EU Securities Market? An Analytical Paper by CESR, October 2004 (Himalaya Report).
- European Commission, Review of the Lamfalussy Process. Strengthening Supervisory Convergence, COM(2007) 727 final.
- Explanations Relating to the Charter of Fundamental Rights, 14 December 2007, C 303/17.
- J. de Larosière (chairman) et al, High-Level Group on Financial Supervision in the EU, Report, 25 February 2009 (De Larosière Report).
- European Commission, Communication from the Commission on European financial supervision, COM(2009) 252 final.

- Explanatory Memorandum to the Act amending administrative procedure law (*Kamerstukken II* 2009/10, 32450, nr. 3).
- Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511 final.
- H. Van Rompuy (President of the European Council) et al, Towards a genuine economic and monetary union, 26 June 2012 (Van Rompuy Report).
- European Council, Press release, Euro Area Summit Statement, 29 June 2012, available at www.consilium.europa.eu/media/21400/20120629-euro-area-summit-statement-en.pdf.
- European Commission, Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511 final.
- Deutsche Bundesbank, European Single Supervisory Mechanism for banks – a first step on the road to a banking union, Monthly Report July 2013.
- ECB, Guide to banking supervision, November 2014.
- Explanatory Memorandum to the Act implementing the SSM Regulation (*Kamerstukken II* 2014/15, 34049, nr. 3)
- Letter of D. Nouy in the capacity of chair of the Supervisory Board of the ECB to a Member of the European Parliament, 2 May 2016, available at www.bankingsupervision.europa.eu/ecb/pub/pdf/160502letter_melo.en.pdf.
- ECB Letter to Significant Institutions re Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law, 31 March 2017, SSM/2017/0140.
- D. Nouy in the capacity of chair of the Supervisory Board of the ECB, 'Everything is connected – the international dimension of banking regulation and supervision', Speech King's College, London, 23 October 2017, available at www.banking-supervision.europa.eu/press/speeches/date/2017/html/ssm.sp171023.en.html.
- European Commission, Report from the Commission to the European Parliament and the Council on the SSM Regulation, COM(2017) 591 final.
- Letter of D. Nouy in the capacity of chair of the Supervisory Board of the ECB to a Member of the European Parliament, 23 April 2018, available at www.banking-supervision.europa.eu/ecb/pub/pdf/ssm.mepletter180426_Giegold.en.pdf?356f39a0f181af7b67a225b88e3a25f3.
- European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)', *Case-law Guide Series* 2020.
- Letter of A. Enria in the capacity of chair of the Supervisory Board of the ECB to a Member of the European Parliament, 16 April 2020, available at www.banking-supervision.europa.eu/ecb/pub/pdf/ssm.mepletter200416_Giegold~507f397489.en.pdf.
- Legal Experts Advisory Panel (LEAP), *Fair Trials – Preliminary Reference Toolkit*, last updated March 2021, available at <https://www.fairtrials.org/app/uploads/2022/01/CJEU-preliminary-reference-Toolkit-July.pdf>.
- Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM(2021) 421 final.
- ECB, The ECB and anti-money laundering: what we can and cannot do, available via www.bankingsupervision.europa.eu/press/publications/newsletter/2018/html/ssm.nl180516_2.en.html (accessed 01.09.2023).

CASE LAW

EU Courts

Court of Justice

- Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:18.
- Case 25/62 *Plaumann* ECLI:EU:C:1963:17.
- Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.
- Case 28-30/62 *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie* ECLI:EU:C:1963:6.
- Joined Cases 106 and 107/63 *Alfred Toepfer and Getreide-Import Gesellschaft v Commission* ECLI:EU:C:1965:65.
- Case 6/64 *Costa/ENEL* ECLI:EU:C:1964:66.
- Case 59/65 *Schrekenberg v Commission* ECLI:EU:C:1966:60.
- Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer v Commission* ECLI:EU:C:1967:31.
- Case 4/69 *Lütticke GmbH v Commission* ECLI:EU:C:1971:40.
- Case 9/69 *Sayag v Leduc* ECLI:EU:C:1969:37.
- Case C-69-69 *Alcan Aluminium v Commission* ECLI:EU:C:1970:53.
- Case 22/70 *Commission v Council* ECLI:EU:C:1971:32.
- Case 62-70 *Bock v Commission* ECLI:EU:C:1971:108.
- Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* ECLI:EU:C:1971:116, p. 990.
- Case 33/76 *Rewe* ECLI:EU:C:1976:188.
- Case 45/76 *Comet* ECLI:EU:C:1976:191.
- Case 132/77 *Société pour l'Exportation des Sucres SA v Commission* ECLI:EU:C:1978:99.
- Joined Cases 64, 113/76, 167, 239/78, 27, 28 & 45/79 *Dumortier frères SA and Others v Council* ECLI:EU:C:1979:223.
- Case 133/79 *Sucrimex v Commission* ECLI:EU:C:1980:104.
- Case C-60/81 *IBM v Commission* ECLI:EU:C:1981:264.
- Case C-11/82 *Piraiiki-Patraiki v Commission* ECLI:EU:C:1985:18.
- Case C-281/82 *Unifrex v Commission and Council* ECLI:EU:C:1984:165.
- Case 294/83 *Les Verts* ECLI:EU:C:1986:166.
- Case 175/84 *Krohn v Commission* ECLI:EU:C:1986:85.
- Case 222/84 *Johnston* ECLI:EU:C:1986:206.
- Joined Cases C-133 to 136/85 *Rau v BALM* ECLI:EU:C:1987:244.
- Case 314/85 *Foto-Frost* ECLI:EU:C:1987:452.
- Joined Cases C-89 and 91/86 *CNTA v Commission* ECLI:EU:C:1987:337.
- Case 222/86 *Heylens* ECLI:EU:C:1987:442.
- Case 247/87 *Star Fruit Company v Commission* ECLI:EU:C:1989:58.
- Case 20/88 *Roquette Frères v Commission* ECLI:EU:C:1989:221.
- Case C-322/88 *Grimaldi* ECLI:EU:C:1989:646.
- Joined Cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:428.
- Case C-16/90 *Eugen Nölle v Hauptzollamt Bremen-Freihafen* ECLI:EU:C:1991:402.
- Joined Cases C-106/90, C-317/90 and C-129/91 *Emerald Meats v Commission* ECLI:EU:C:1993:19.
- Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* ECLI:EU:C:1991:438.
- Case C-97/91 *Oleificio Borelli v Commission* ECLI:EU:C:1992:491.
- Case C-146/91 *KYDEP v Council and Commission* ECLI:EU:C:1994:329.
- Case C-188/92 *TWD Textilwerke Deggendorf* ECLI:EU:C:1994:90.

- Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79.
- Case C-24/95 *State of Rhineland-Palatinate v Alcan Deutschland GmbH* ECLI:EU:C:1997:163.
- Case C-386/96 P *Dreyfus v Commission* ECLI:EU:C:1998:193.
- Case C-352/98 P *Bergaderm* ECLI:EU:C:2000:361.
- Case C-6/99 *Association Greenpeace France* ECLI:EU:C:2000:148.
- Case C-269/99 *Carl Kühne and Others* ECLI:EU:C:2001:659.
- Case C-435/99 *Courage* ECLI:EU:C:2001:465.
- Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:462.
- Case C-276/01 *Steffensen* ECLI:EU:C:2003:228.
- Case C-222/02 *Peter Paul and Others v Germany* ECLI:EU:C:2004:606.
- Case C-12/03 P *Tetra Laval* ECLI:EU:C:2005:87.
- Case C-344/04 *International Air Transport Association* ECLI:EU:C:2006:10.
- Case C-490/04 *Commission v Slovakia* ECLI:EU:C:2015:602.
- Case C-506/04 *Wilson* ECLI:EU:C:2006:587.
- Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802.
- Case C-432/05 *Unibet* ECLI:EU:C:2007:163.
- Case C-268/06 *Impact* ECLI:EU:C:2008:223.
- Case C-17/10 *Toshiba Corporation and Others* ECLI:EU:C:2011:522.
- Case C-69/10 *Samba Diouf* ECLI:EU:C:2011:524.
- Case C-177/10 *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía* ECLI:EU:C:2011:557.
- Joined Cases C-462/10 P and C-475/10 P *Deutsche Post and Germany v Commission* ECLI:EU:C:2011:656.
- Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:280.
- Case C-199/11 *Otis* ECLI:EU:C:2012:684.
- Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625.
- Case C-433/13 *Commission v Slovakia* ECLI:EU:C:2015:602.
- Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701.
- Case C-72/15 *Rosneft* ECLI:EU:C:2017:236.
- Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2018:79.
- Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.
- Case C-135/16 *Georgsmarienhütte and Others v Germany* ECLI:EU:C:2018:582.
- Case C-284/16 *Achmea* ECLI:EU:C:2018:158.
- Case C-571/16 *Kantarev v Balgarska Narodna Bank* ECLI:EU:C:2018:807.
- Case C-207/17 *Rotho Blaas Srl v Agenzia delle Dogane e dei Monopoli* ECLI:EU:C:2018:840.
- Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:1023.
- Case C-450/17 P *Landeskreditbank Baden-Württemberg – Förderbank v ECB* ECLI:EU:C:2019:372.
- Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komerbanka AS v ECB* ECLI:EU:C:2019:923.
- Joined Cases C-152/18 P and C-153/18 P *Crédit mutuel Arkéa v ECB* ECLI:EU:C:2019:810.
- Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2019:139.
- Case C-414/18 *Iccrea Banca v Bank of Italy* ECLI:EU:C:2019:1036.
- Case C-501/18 BT v *Balgarska Narodna Banka* ECLI:EU:C:2021:249.
- Case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793.

- Joined Cases C-551/19 P and C-552/19 P *ABLV Bank and others v ECB* ECLI:EU:C:2021:369.
- Case C-579/19 *Association of Independent Meat Suppliers* ECLI:EU:C:2021:665.
- Case C-911/19 *Fédération bancaire française v Autorité de contrôle prudentiel et de résolution* ECLI:EU:C:2021:599.
- Joined Cases C-65/21 P and C-73/21 P to C-75/21 P *SGL Carbon SE and Others v Commission* ECLI:EU:C:2022:470.

Opinion AG Court of Justice

- Opinion AG Roemer in Joined Cases 9/60 and 12/60 *Vloeberghs v High Authority* ECLI:EU:C:1961:6.
- Opinion AG Roemer in Case C-25/62 *Plaumann* ECLI:EU:C:1963:7.
- Opinion AG Roemer in Joined Cases 106 and 107/63 *Alfred Toepfer and Getreide-Import Gesellschaft v Commission* ECLI:EU:C:1964:46.
- Opinion AG Roemer in Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council* ECLI:EU:C:1971:96.
- Opinion AG Lenz in Joined Cases C-133 to 136/85 *Rau v BALM* ECLI:EU:C:1986:469.
- Opinion AG Jacobs in C-358/89 *Extramet Industrie v Council* ECLI:EU:C:1991:144.
- Opinion AG Mischo in C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:221.
- Opinion AG Darmon in Case C-97/91 *Borelli* ECLI:EU:C:1992:254.
- Opinion AG Mischo in Case C-6/99 *Association Greenpeace France* ECLI:EU:C:1999:587.
- Opinion AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* ECLI:EU:C:2002:197.
- Opinion AG Kokott in *Opinion 2/13 (ECHR Accession II)* ECLI:EU:C:2014:2475.
- Opinion AG Bobek in Case C-16/16 *Belgium v Commission* ECLI:EU:C:2017:959.
- Opinion AG Wathelet in Case C-284/16 *Achmea* ECLI:EU:C:2017:699.
- Opinion AG Campos Sánchez-Bordona in Case C-219/17 *Berlusconi and Fininvest v Bank of Italy* ECLI:EU:C:2018:502.
- Opinion AG Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* ECLI:EU:C:2019:323.
- Opinion AG Kokott in Joined Cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and ECB v Republic of Latvia* ECLI:EU:C:2018:1030.
- Opinion AG Hogan in Case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:396.
- Opinion AG Kokott in Case C-750/21 P and C-256/22 P *Pilatus Bank v ECB* ECLI:EU:C:2023:431.

General Court

- Case T-450/93 *Lisrestal and Others v Commission* ECLI:EU:T:1994:290.
- Case T-514/93 *Cobrecap and Others v Commission* ECLI:EU:T:1995:49.
- Case T-571/93 *Lefebvre v Commission* ECLI:EU:T:1995:163.
- Case T-167/94 *Detlef Nölle v Council and Commission* ECLI:EU:T:1995:169.
- Case T-185/94 *Geotronics v Commission* ECLI:EU:T:1995:184.
- Case T-230/95 *Société Bretagne Angleterre Irlande v Commission* ECLI:EU:T:1999:11.
- Case T-69/99 *DSTV v Commission* ECLI:EU:T:2000:302.
- Case T-195/00 *Travellex and Other v Commission* ECLI:EU:T:2003:111.
- Case T-244/00 *Coillte Teoranta v Commission* ECLI:EU:T:2001:124.
- Case T-310/00 *MCI v Commission* ECLI:EU:T:2004:275.

- Case T-47/02 *Danzer* ECLI:EU:T:2006:167.
- Case T-168/02 *IFAW v Commission* ECLI:EU:T:2004:346.
- Case T-86/03 *Holcim France* ECLI:EU:T:2006:90.
- Case T-262/10 *Microban v Commission* ECLI:EU:T:2011:623.
- Case T-453/10 *Northern Ireland Department of Agriculture and Rural Development v Commission* ECLI:EU:T:2012:106.
- Case T-317/12 *Holcim Romania v Commission* ECLI:EU:T:2014:782.
- Case T-499/12 *HSH Investment Holdings Coinvest-C and HSH Investment Holdings FSO v Commission* ECLI:EU:T:2015:840.
- Case T-79/13 *Accorinti v ECB* ECLI:EU:T:2015:756.
- Case T-468/14 *Holistic Innovation Institute v Commission* ECLI:EU:T:2016:296.
- Case T-122/15 *Landeskreditbank Baden-Württemberg-Förderbank v ECB* ECLI:EU:T:2017:337.
- Case T-712/15 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:900.
- Case T-52/16 *Crédit Mutuel Arkéa v ECB* ECLI:EU:T:2017:902.
- Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* ECLI:EU:T:2018:219.
- Case T-247/16 *Trasta Komerbanka AS v ECB* ECLI:EU:T:2017:623.
- Case T-494/17 *Iccrea Banca v ECB and SRB* ECLI:EU:T:2018:804.
- Case T-351/18 *Ukrselhosprom PCF and Versobank v ECB* ECLI:EU:T:2021:669.
- Case T-27/19 *Pilatus Bank and Pilatus Holding v ECB* ECLI:EU:T:2022:46.

European Court of Human Rights

- ECtHR 28 June 1990 11761/85 ECLI:CE:ECHR:1990:0628JUD001176185 (*Obermeier v Austria*).
- ECtHR 16 December 1992 12964/87 ECLI:CE:ECHR:1992:1216JUD001296487 (*De Geouffre de la Pradelle v France*).
- ECtHR 23 October 1995 15523/89 ECLI:CE:ECHR:1995:1023JUD001552389 (*Schmautzer v Austria*).
- ECtHR 23 October 1995 15963/90 ECLI:CE:ECHR:1995:1023JUD001596390 (*Gradinger v Austria*).
- ECtHR 26 February 1998, 20323/92 ECLI:CE:ECHR:1998:0226JUD002032392 (*Pafitis v Greece*).
- ECtHR 21 July 2011, 32181/04 and 35122/05 ECLI:CE:ECHR:2011:0721JUD003218104 (*Sigma Radio Television v Cyprus*).
- ECtHR 6 November 2018, 55391/13, 57728/13 and 74041/13 ECLI:CE:ECHR:2018:1106JUD005539113 (*Ramos Nunes de Carvalho e Sá t Portugal*).

Dutch National Courts

Hoge Raad der Nederlanden

- Hoge Raad 16 May 1986 ECLI:NL:HR:1986:AC9347 (*Heesch/Van de Akker*).
- Hoge Raad 20 November 1987 ECLI:NL:HR:1987:AD6026 (*Montenegro c.s./Staat*).
- Hoge Raad 31 May 1991 ECLI:NL:HR:1991:ZC0261 (*Van Gog/Nederweert*).
- Hoge Raad 8 September 1995 ECLI:NL:HR:1995:ZC1799 (*Utrecht/Budinovski*).
- Hoge Raad 26 November 1999 ECLI:NL:HR:1999:AA3382 (*Noord-Brabant/Janse*).
- Hoge Raad 9 September 2005 ECLI:NL:HR:2005:AT7774 (*Kuijpers/Valkenswaard*).
- Hoge Raad 13 October 2006 ECLI:NL:HR:2006:AW2077 (*Vie d'Or*).
- Hoge Raad 23 February 2007 ECLI:NL:HR:2007:AX3070 (*X/DNB*).

- Hoge Raad 23 December 2011 ECLI:NL:HR:2011:BT7193 (*Palthe/DNB and AFM*).
- Hoge Raad 21 November 2014 ECLI:NL:HR:2014:3349 (*Band/AFM*).
- Hoge Raad 2 June 2017 ECLI:NL:HR:2017:987 (*X/Staat*).
- Hoge Raad 9 March 2018 ECLI:NL:HR:2018:309 (*Stichting GSFS Pension Fund v DNB*).

Opinion AG Hoge Raad der Nederlanden

- Opinion AG Langemeijer in Hoge Raad 17 January 1958 ECLI:NL:PHR:1958:AG2051 (*Beukers/Dorenbos*).
- Opinion AG Keus in Hoge Raad 9 November 2007 ECLI:NL:PHR:2007:BB3776 (*Euroase hotel Bergen*).

Afdeling bestuursrechtspraak van de Raad van State

- Afdeling bestuursrechtspraak van de Raad van State 26 October 2005 ECLI:NL:RVS:2005:AU4987.
- Afdeling bestuursrechtspraak van de Raad van State 30 January 2008 ECLI:NL:RVS:2008:BC3065.
- Afdeling bestuursrechtspraak van de Raad van State 27 August 2014 ECLI:NL:RVS:2014:3200.
- Afdeling bestuursrechtspraak van de Raad van State 2 August 2017 ECLI:NL:RVS:2017:2081.
- Afdeling bestuursrechtspraak van de Raad van State 24 April 2019 ECLI:NL:RVS:2019:1356.

Opinion AG Afdeling bestuursrechtspraak van de Raad van State

- Opinion AG Widdershoven in Afdeling bestuursrechtspraak van de Raad van State 2 December 2015 ECLI:NL:RVS:2015:3680.
- Opinion AG Widdershoven in Afdeling bestuursrechtspraak van de Raad van State 2 May 2018 ECLI:NL:RVS:2018:249.

College van Beroep voor het bedrijfsleven

- College van Beroep voor het bedrijfsleven 29 April 2004 ECLI:NL:CBB:2004:AO9910 (*X/AFM*).
- College van Beroep voor het bedrijfsleven 10 mei 2016 ECLI:NL:CBB:2016:105 (*SNS*).
- College van Beroep voor het bedrijfsleven 15 November 2016 ECLI:NL:CBB:2016:323 (*GSFS Pensionfund*).
- College van Beroep voor het bedrijfsleven 14 December 2021 ECLI:NL:CBB:2021:1063 (*X/DNB*).

Centrale Raad van Beroep

- Centrale Raad van Beroep 5 March 2019 ECLI:NL:CRVB:2019:655.
- Centrale Raad van Beroep 5 March 2019 ECLI:NL:CRVB:2019:669.

Opinion AG Centrale Raad van Beroep

- Opinion AG Widdershoven in Centrale Raad van Beroep 7 November 2018 ECLI:NL:CRVB:2018:3474.

Court of appeal

- Gerechtshof Amsterdam 21 June 2016 ECLI:NL:GHAMS:2016:2389 (*GSFS Pensionfund/AFM*).

- Gerechtshof Amsterdam 22 July 2022 ECLI:NL:GHAMS:2022:1961 (*X/AFM and State of the Netherlands*).
- Gerechtshof Amsterdam 15 December 2009 ECLI:NL:GHAMS:2009:BK6541 (*Chipshol/Luchtverkeersleiding Nederland*).

District court

- Rechtbank Amsterdam 22 August 2018 ECLI:NL:RBAMS:2018:6034.
- Rechtbank Rotterdam 26 February 2021 ECLI:NL:RBROT:2021:1486.
- Rechtbank Rotterdam 26 February 2021 ECLI:NL:RBROT:2021:1487.
- Rechtbank Rotterdam 26 February 2021 ECLI:NL:RBROT:2021:1488.
- Rechtbank Rotterdam 26 February 2021 ECLI:NL:RBROT:2021:1489.
- Rechtbank Rotterdam 16 September 2022 NL:RBROT:2022:11948.

Curriculum Vitae

J.T. (Jouke) Tegelaar (Leiden, 1991) completed her secondary education at Stedelijk Gymnasium Leiden in 2008. She holds a Bachelor's degree in Law, a Master's degree in Financial Law (*summa cum laude*) and a Master's degree in Civil Law, all from Leiden University. In 2013, she studied a semester abroad at UC Hastings College of the Law, San Francisco (now known as UC Law San Francisco). During her studies, she worked as a student trainer in the Moot Court course and as a mentor for first-year students. Following her time as a lecturer at the Hazelhoff Centre for Financial Law of Leiden Law School (Leiden University) from 2015 to 2017, she obtained a position as a PhD candidate at the same department, under the guidance of Prof. Dr. M. Haentjens and Prof. Dr. W. den Ouden. During her research, she taught financial law, actively participated as a member of the Young Researchers Group of the European Banking Institute and served on the editorial board of law journal *Ars Aequi*. She was also a member of the Leiden Law School Research Board, acting as the PhD representative. In 2023, Jouke joined the Dutch Authority for the Financial Markets (Autoriteit Financiële Markten (AFM)) as a legal counsel.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2022 and 2023

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