The General Court gives with one hand and takes away with the other: reflections on the judgment in BAWAG PSK Bank v ECB (T-667/21) concerning the ECB's mandate to apply national law

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The General Court gives with one hand and takes away with the other: Reflections on the judgment in *BAWAG PSK Bank v ECB* (T-667/21) concerning the ECB's mandate to apply national law

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Abstract

A decade ago, the European Central Bank (ECB) became the chief prudential supervisor of euro area's credit institutions. In order to carry out its supervisory tasks, the ECB is, inter alia, competent to apply national legislation transposing directives, including Capital Requirements Directive IV (CRD IV). The ECB is thus the first EU institution with a mandate to apply not only EU law but also national law. This has raised a number of practical and legal-constitutional questions, many of which remain to be answered. The BAWAG PSK v ECB judgment by the General Court offers some new important insights. In particular, it sheds some light on the scope of national law which the ECB is competent to apply, further clarifies the principles of judicial review of ECB decisions based on national law, and indicates the obligations of the ECB in case the national law which it intends to rely on or apply is in conflict with the directive which it (the national law) is supposed to transpose.

1. Introduction

On 28 February 2024, in *BAWAG PSK v ECB* the General Court annulled a decision of the ECB imposing an obligation to pay absorption interest on BAWAG PSK, an Austrian credit institution (BAWAG).[1] The ECB based its decision, *inter alia,* on a provision of the Austrian Banking Act.[2] Before annulling the ECB's decision, the General Court answered two ques-

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1 I would like to thank the anonymous reviewers for their valuable feedback. All flaws remain my own. This case note contains and builds on arguments developed in B Budinská, 'The European Central Bank's centralised application of national law under the Single Supervisory Mechanism: A rule of law analysis' (Dissertation Leiden, forthcoming 2025).
Case C-667/21 *BAWAG PSK v ECB* [2024] ECLI:EU:T:2024:131.

2 *Bundesgesetz über das Bankwesen* (BWG) (30 July 1993) BGI Nr. 532/1993 (Austria).

tions: whether the ECB was competent to rely on this particular provision and, if so, whether it had correctly interpreted and applied it. The General Court answered the first question in the affirmative and the second in the negative, and provided valuable new insights into the ECB's mandate to apply national legislation transposing directives when performing its tasks under the Single Supervisory Mechanism (SSM). In order to examine these insights, this case note is structured as follows: Section 2 gives a brief overview of the legal rules establishing the ECB's mandate to apply national law, Section 3 sets out the background to the dispute, Section 4 summarises the judgment, Section 5 examines the General Court's reasoning, and, finally, Section 6 concludes.

2. The ECB's Mandate to Apply National Law

The SSM is a multi-level system of financial supervision established by the SSM Regulation and consisting of the ECB and the national competent authorities.[3] Article 4(1) and (2) of the SSM Regulation contains a list of micro-prudential supervisory tasks that the ECB is exclusively competent to carry out. To carry out these tasks, the ECB is, according to the first subparagraph of Article 4(3) of the SSM Regulation, empowered to apply:

> 'all relevant Union law and, where such Union law consists of directives, the national legislation transposing those directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options'.

Additionally, Article 9(1) of the SSM Regulation provides that, for the purpose of carrying out its tasks, the ECB shall be considered the competent authority in the participating Member States (first subparagraph) and shall have all the powers which competent authorities have under 'the relevant Union law' (second subparagraph). Where the SSM Regulation does not confer a power on the ECB, the latter may instruct the national authorities to make use of their powers under national law (third subparagraph).

Finally, Article 6(4) of the SSM Regulation distinguishes between significant and less significant credit institutions. The ECB carries out its tasks directly only *vis-à-vis* significant credit institutions, while national competent authorities are responsible for supervising less significant credit institutions.[4]

3 Council Regulation (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63.

4 This distinction does not apply with respect to the tasks under art 4(1)(a) and (c) SSM Regulation.

3. Background to the Dispute

In order to avoid unexpected and disproportionately large losses, banks must control and limit their exposure to a single client or a group of connected clients.[5] Therefore, the Capital Requirements Regulation (CRR) dictates that, as a matter of principle, a credit institution shall not incur an exposure to a client or a group of connected clients the value of which exceeds 25% of that credit institution's eligible capital.[6] Using different calculation methods, credit institutions must monitor and calculate the value of their exposures.[7]

In 2016, BAWAG indirectly acquired the so-called 'Vermeer portfolio' from two French credit institutions. This portfolio comprised approximately 20.000 residential real estate loans with an initial total amount of approximately EUR 1,4 billion, as well as related ancillary rights and collateral. In order to transfer the loans and collateral without having to amend the loan agreements, the Vermeer portfolio was first securitized, meaning it was transferred to a joint fund called 'FCT Pearl'. This fund was created solely for the purpose of this acquisition. Its custodian was Société Générale SA, a French credit institution, which was responsible for holding the FCT Pearl's assets and supervising the fund's management company. My Money Bank, another French credit institution, was appointed as the management body for the loans constituting the assets of FCT Pearl.[8]

BAWAG acquired all the shares in FCT Pearl and became the beneficial owner. As such, it received all loan repayments but was not involved in the operational management of the fund (which was the responsibility of Société Générale SA as the fund's custodian and of the fund management company) or the operational management of the underlying loans (which was the responsibility of My Money Bank).[9]

In 2017, in the context of an inspection at BAWAG's premises ('on-site inspection'), the ECB inspection team examined, *inter alia,* the method BAWAG had used to calculate its overall exposure in respect of the Vermeer portfolio. The ECB inspection team established, in essence, that BAWAG was only in possession of data enabling it to identify the amount of each of the loans underlying the portfolio, but not of data enabling it to identify each of the debtors of these loans. Consequently, and on the basis of the on-site inspection

5 K Lackhoff and J Heinz, 'Großkredite' in Jens-Hinrich Binder *et al* (eds), *Handbuch Bankenaufsichtsrecht* (RWS 2020) 507.
6 See art 395(1) and the entire Part Four of Regulation (EU) No 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms [2013] OJ L 176/1 (Capital Requirements Regulation, CRR).
7 See CRR, art. 387.
8 *BAWAG PSK v ECB* (n 1), paras 2-4.
9 *BAWAG PSK v ECB* (n 1), para 5.

report and further information submitted by BAWAG to the Austrian competent authority (the *Finanzmarktaufsichtsbehörde*, FMA), the ECB concluded that BAWAG had incorrectly chosen the so-called 'look-through' method under Article 390(7) CRR to calculate its exposure in respect to the Vermeer portfolio. Instead, the ECB inferred that BAWAG was supposed to calculate its exposure on the basis of Article 6(2)(a) of Commission Delegated Regulation (EU) No 1187/2014 on the calculation of exposure in respect of transactions with underlying assets.[10] Following the latter calculation method, the ECB came to the conclusion that BAWAG had exceeded the threshold of 25% of its eligible capital for exposure to FCT Pearl for ten consecutive months between December 2016 and September 2017.[11]

On the basis of this finding, the ECB considered that the advantage obtained by BAWAG as a result of the unlawful exceeding of the large exposure limit had to be recovered. Accordingly, it adopted the contested decision imposing so-called absorption interest (*Abschöpfungszins*) on BAWAG in the total amount of EUR 19.332.923,82. It based this decision on Articles 4(1)(d) and 9(1) of the SSM Regulation, in conjunction with Article 395(1) CRR and point 2 of Paragraph 97(1) of the Austrian Banking Act.

Article 4(1)(d) of the SSM Regulation entrusts the ECB with the task of 'ensuring compliance with the acts referred to in the first subparagraph of Article 4(3) which impose prudential requirements on credit institutions in the area of [*inter alia*] large exposure limits'. This provision thus refers to Article 395(1) CRR, according to which a bank shall not incur an exposure to a client or group of connected clients the value of which exceeds 25% of its eligible capital. Point 2 of Paragraph 97(1) of the Austrian Banking Act empowers the competent authority to impose on a credit institution absorption interest in the amount of '2% of the excess over the large exposure limit laid down in Article 395(1) [CRR] [...]'.

BAWAG brought an action for annulment of the ECB decision, putting forward six pleas in law.[12] The General Court addressed only two of them: first, the plea alleging that the ECB lacked competence to impose absorption interest and, second, the plea alleging breach of the principle of proportionality. Given that the General Court upheld the second plea and, as a result, annulled the decision, it ruled that there was no need to examine the remaining pleas put forward by BAWAG, including pleas pertaining to the calculation of the amount of the absorption interest levied.[13]

10 Commission Delegated Regulation (EU) No 1187/2014 of 2 October 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council as regards regulatory technical standards for determining the overall exposure to a client or a group of connected clients in respect of transactions with underlying assets [2014] OJ L 324/1.

11 *BAWAG PSK v ECB* (n 1), paras 6-17.

12 *BAWAG PSK v ECB* (n 1), para 22.

13 ibid, para 83.

4. The Judgment

4.1. The Competence of the ECB

In its first plea, BAWAG argued that the competence to apply point 2 of paragraph 97(1) of the Austrian Banking Act and thus to levy absorption interest was not conferred on the ECB, but remained with the FMA. Thus, the core issue of the first plea was whether the power to levy absorption interest falls under the second subparagraph of Article 9(1) of the SSM Regulation and thus constitutes one of the powers conferred on the ECB by 'the relevant Union law', or whether this power falls under the third subparagraph of Article 9(1) of the SSM Regulation and thus has to be exercised by the FMA upon the ECB's instruction.[14]

The General Court first inferred that 'the relevant Union law' is:

> 'the law which constitutes the legal framework for the prudential supervision of credit institutions. That legal framework includes, in particular, in addition to [the SSM Regulation], the [CRR] and [CRD IV[15]], which, according to recitals 5 [of the CRR] and 2 [of CRD IV], must be read together'.[16]

Then, it referred, *inter alia,* to Article 67(1)(k) CRD IV. This provision states that where a credit institution has incurred an exposure in excess of the limits set out in Article 395 CRR, Member States shall ensure that the administrative penalties and other administrative measures which may be applied include at least those listed in Article 67(2) CRD IV. The General Court noted that the imposition of absorption interest is not included in that list.

However, it then recalled that the Court of Justice held in *VTB Bank* that the levying of absorption interest is an administrative measure falling within the scope of Article 65(1) CRD IV.[17] According to this provision:

> 'Member States shall lay down rules on administrative penalties and other administrative measures in respect of breaches of the national provisions transposing [CRD IV] and [of the CRR] and shall take all measures necessary to ensure that they are implemented [...]'.

14 ibid, para 40.

15 Directive 2013/36/EU of the European Parliament and of the Council on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176/338.

16 *BAWAG PSK v ECB* (n 1), para 36.

17 Case C-52/17 *VTB Bank* [2018] ECLI:EU:C:2018:648.

In light of this, the General Court concluded that the levying of absorption interest 'falls within the legal regime established by the Directive'.[18] Consequently, it is part of the 'relevant Union law' as defined in the second subparagraph of Article 9(1) SSM Regulation. As a result, the ECB is competent to rely on point 2 of Paragraph 97(1) of the Austrian Banking Act.

4.2. Interpretation of National Law

In its other plea, BAWAG argued that the ECB had levied absorption interest in breach of the proportionality principle. The General Court found that the ECB had interpreted point 2 of paragraph 97(1) of the Austrian Banking Act to mean that the levying of absorption interest was automatic in the event of a breach of the large exposure limit. Put differently, the ECB considered that it had no discretion as to whether to apply point 2 of paragraph 97(1) of the Austrian Banking Act once a breach of Article 395 CRR had been established. The General Court reasoned that if this interpretation were incorrect, meaning if the ECB did have a margin of discretion, the latter would have to assess whether the levying of absorption interest was proportionate in a particular case. Therefore, the General Court considered that it must first determine whether the ECB's interpretation of point 2 of paragraph 97(1) of the Austrian Banking Act was correct.

The ECB confirmed that it had relied on the interpretation of point 2 of paragraph 97(1) of the Austrian Banking Act provided by Austrian courts.[19] The General Court recalled that the scope of national laws must, in principle, be assessed in the light of the interpretation given to them by the national courts.[20] It then added that:

> 'where the Court is called upon to review the substance of the ECB's application of national law transposing a directive, the interpretation of national courts is sufficient to establish the scope of that national law where it results in a finding that it is compatible with the directive which it transposes. In such a situation, criticisms seeking to call into question the substance of the interpretation by those courts are liable to be rejected at the outset'.[21]

However, this must be distinguished from a situation 'where the interpretation of the national courts does not make it possible to ensure the compatibility of national law with a directive'.[22] In such a situation:

18 *BAWAG PSK v ECB* (n 1), paras 42 and 45.
19 ibid, para 49.
20 ibid, para 57.
21 ibid, para 58.
22 ibid, para 59.

> ‘compliance with the principle of the primacy of EU law means that, the General Court must, as must a national court, where necessary, interpret national law so far as possible in the light of the wording and the purpose of the directive transposed in order to achieve the result sought by the directive’.[23]

If such an interpretation of national law is not possible:

> ‘the General Court, like the national court which is called upon to apply provisions of EU law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any national legislation, even if adopted subsequently, which is contrary to a provision of EU law with direct effect’.[24]

The General Court then concluded that the relevant provisions of CRD IV, particularly Article 70, must be interpreted as requiring the ECB (and the FMA) to examine the particular circumstances of the case when adopting an administrative measure.[25] This means that:

> ‘an interpretation of point 2 of Paragraph 97(1) of the [Austrian Banking Act] which places the ECB in a situation of non-discretionary competence would prevent it from taking into account all the relevant circumstances and would have the effect that that provision would be incompatible with Article 70 of [CRD IV]’.[26]

The General Court found that the wording of point 2 of Paragraph 97(1) of the Austrian Banking Act does not preclude an interpretation according to which the ECB may have a margin of discretion as to whether to apply it. Moreover, the recognition of such a discretion does not adversely affect the applicant.[27] Consequently, the General Court held that the ECB had relied on a legally incorrect premise in assuming that absorption interest was automatically levied. In so doing, it failed to examine whether the levying of absorption interest was proportionate in the case.[28] The General Court rejected the ECB’s argument that the levying of absorption interest in the present case was not disproportionate. It stated that it is ‘not for the EU Courts to take the place of the defendant by carrying out in its stead an examination which it never undertook and speculating as to the conclusions which it would have reached had it done so’.[29]

23 ibid, para 60.
24 ibid, para 62.
25 ibid, paras 63-69.
26 ibid, para 70.
27 ibid, paras 71-78.
28 ibid, para 79.
29 ibid, paras 80-81.

5. Analysis

5.1. The Competence of the ECB

5.1.1. The Power to Levy Absorption Interest as a Transposition of CRD IV

The power to levy absorption interest on a credit institution that has breached the large exposure limit has existed in the Austrian legal system long before the establishment of the SSM. What is more, it has been the subject of rulings by the Austrian Supreme Administrative Court and the Austrian Constitutional Court.[30] Both courts had agreed that the imposition of absorption interest was essentially a non-punitive measure under competition law, which did not give the competent authority any discretion to determine the amount of interest to be charged according to the circumstances of the case. The Austrian courts had therefore concluded that the imposition of absorption interest did not have the characteristics of an administrative penalty. The purpose of the measure was 'merely' the lump-sum recovery of the actual or potential advantage obtained as a result of the unlawful exceeding of the large exposure limit.[31]

Prior to the establishment of the SSM, the FMA was responsible for levying absorption interest in respect of all banks established in Austria. However, once the SSM became operational in 2014, and the ECB was given the mandate to (also) apply national legislation transposing CRD IV, the question arose as to whether (what is today) point 2 of Section 97(1) of the Austrian Banking Act constituted national legislation transposing CRD IV,[32] and if so, whether the ECB was competent to apply it *vis-à-vis* significant Austrian banks. In 2018, in *VTB Bank*, a preliminary ruling in a case that predates the SSM, the Court of Justice answered the first of the two questions.[33] Referring to its previous case law, the Court essentially agreed with the Austrian courts that 'the obliga-

30 Case 96/17/0006 (Austrian Supreme Administrative Court (VwGH), 1999) ECLI:AT:VWGH:1999:1996170006.X00 (Austria); and Case 96/17/0359 (Austrian Supreme Administrative Court (VwGH), 2000) ECLI:AT:VWGH:2000:1996170359.X00 (Austria) and Case G 257/2017-13 (Austrian Constitutional Court (VfGH), 2018) ECLI:AT:VFGH:2018:G257.2017 (Austria).

31 See, Case G 257/2017-13 (n 30), para 29 and *VTB Bank* (n 17), paras 26-27.

32 Generally, the fact that a rule of national law existed before the directive is irrelevant for the purpose of determining whether that rule constitutes a transposition of that directive, see Case 248/83 *Commission v Germany* [1985] ECLI:EU:C:1985:214.

33 For a case note on the *VTB Bank* judgment, in particular the importance, for the legal framework of the SSM, of the distinction between administrative penalties and administrative measures, see J Poscia, 'The *VTB* case: Administrative penalties and administrative measures' in C Zilioli and KP Wojcik (eds), *Judicial review in the European Banking Union* (Elgar 2021) 571.

tion to give back an advantage improperly received by means of an irregularity is not an [administrative] penalty' but an administrative measure.[34]

However, the Court disagreed with the classification of the levy as a national measure of competition law. Instead, it ruled that (what is now) point 2 of Paragraph 97(1) of the Austrian Banking Act constitutes a transposition of Article 65(1) CRD IV. The Court noted that the CRR and CRD IV lay down prudential rules applicable to credit institutions and the legal framework governing their supervision. For the purposes of the prudential supervision of credit institutions, CRD IV provides competent authorities with supervisory tools and powers.[35]

Then, the Court inferred from Articles 67(1)(k) and 67(2) CRD IV that, in the case of breaches of large exposure limits under Article 395(1) CRR, Member States must ensure that at least the administrative penalties and other administrative measures listed in Article 67(2) CRD IV can be applied. The levying of absorption interest is not on the list, but the Court has ruled that this is irrelevant. This list is clearly not exhaustive, and Article 65(1) CRD IV provides for a general clause under which all administrative penalties and other administrative measures are subsumed that Member States may lay down in respect of breaches of national legislation transposing CRD IV and of the CRR.[36]

5.1.2. Establishing the ECB's Competence

Having established that the levying of absorption interest constitutes a transposition of CRD IV, the question remained whether the ECB is competent to apply point 2 of Paragraph 97(1) of the Austrian Banking Act. One could argue that the answer is straight-forward: the second subparagraph of Article 9(1) of the SSM Regulation states that the ECB shall have all the powers which competent authorities have under 'the relevant Union law'. The relevant Union law includes CRD IV.[37] The levying of absorption interest on credit institutions that had breached the large exposure limit constitutes a transposition of Article 65(1) CRD IV. The first subparagraph of Article 4(3) SSM Regulation states that, in order to carry out its supervisory tasks, the ECB shall, *inter alia,* apply national legislation transposing CRD IV. Article 4(1)(d) of the SSM Regulation entrusts the ECB with the task of ensuring compliance with large exposure limits. Hence, the ECB should be competent to apply point 2 of Paragraph 97(1) of the Austrian Banking Act *vis-à-vis* significant Austrian banks.

34 *VTB Bank* (n 17), para 40 and see also Case T-647/21 *Sber v ECB* [2024] ECLI:EU:T:2024:127, paras 39 and 41.
35 *VTB Bank* (n 17), paras 30-42.
36 ibid, paras 43-48.
37 See SSM Regulation, recital 34.

Nevertheless, the existence of the ECB's competence was questioned since the levying of absorption interest is one of several supervisory powers that are not explicitly mentioned in CRD IV and therefore do not (have to) exist in every national legal system.[38] Within the SSM, this problem has been identified early on. Already in 2017, one year before the *VTB Bank* ruling, the SSM Supervisory Board—an internal body responsible for the planning and execution of the tasks conferred on the ECB[39]—issued a letter to significant credit institutions aimed at providing some clarification on the ECB's competence to exercise supervisory powers granted under national law that are not explicitly provided for in EU law.[40] The letter refers to two cumulative conditions that must be met in order for the ECB to be competent to exercise such supervisory powers: (i) the powers must 'fall within the scope of the ECB's tasks under Articles 4 and 5 of the SSM Regulation and (ii) underpin a supervisory function under Union law'.[41]

Conversely, 'national authorities remain exclusively competent to exercise powers which do not fall within the scope of the ECB's tasks or which do not underpin the ECB's supervisory function'.[42] One such power, according to the letter, is the power to 'impos[e] penalties to absorb the economic advantage gained from the breach of prudential requirements (which primarily serve competition law purposes)'.[43] The letter does not explicitly refer to point 2 of Section 97(1) of the Austrian Banking Act or any other similar provision of national law. Nonetheless, the wording strongly suggests that the SSM Supervisory Board had come to the conclusion at the time that the power to levy absorption interest granted under Austrian law was an exclusive competence of the FMA because it did not fall within the scope of the ECB's tasks and/or did not underpin the ECB's supervisory function. There is no further explanation in the letter with respect to this power. However, it can be assumed that the SSM Supervisory Board, in an effort to overcome the practical difficulties arising from the ECB's mandate to apply national law and to provide a degree of clarity and legal certainty, based itself on the Austrian courts' interpretation of point 2 of Section 97(1) of the Austrian Banking Act.

As regards the two cumulative conditions, it is relatively clear that the first condition refers, *inter alia*, to the ECB's micro-prudential supervisory tasks

38 For other supervisory powers, see ECB 'Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law' SSM/2017/0140, Annex II, 6-14; available at: https://www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.en.pdf (accessed 16.01.2025).

39 SSM Regulation, art 26(1).

40 ECB, SSM Supervisory Board letter (n 38).

41 ibid 2.

42 ibid 2, fn 4.

43 ibid.

listed in Article 4(1) and (2) of the SSM Regulation.[44] As regards the second condition, it is not immediately evident what is meant by the requirement that the supervisory power must 'underpin the ECB's supervisory function'.[45] This condition is likely to be intended to distinguish the supervisory powers of competent authorities from the powers these authorities have for carrying out tasks in other policy areas, such as competition or bank resolution.[46]

In any event, in the light of the present judgment, it is clear that, in order to establish the ECB's competence to apply a supervisory power under national law, the decisive condition is whether the supervisory power is a transposition of CRD IV or another relevant directive. Admittedly, the conceptual question of how to establish whether a rule of national law constitutes a transposition of a directive if there is no textual overlap between that rule and the provisions of that directive is, generally, not always easy to answer.[47] The issue of lacking textual overlap often arises in the context of minimum harmonisation. Certain provisions of directives, including CRD IV, leave national legislators some room for manoeuvre in the transposition process by allowing them to maintain or introduce measures other than those expressly prescribed by the directive.[48] In order to create this room, CRD IV uses a number of legislative techniques. For example, it relies on 'open-textured' provisions and provisions that allow the adoption of gold-plated national rules.

Open-textured provisions must be fleshed out so that they can be applied by administrative authorities and invoked before national courts.[49] Article 65(1) CRD IV, which imposes on Member States the general obligation to introduce 'all' necessary 'administrative penalties and other administrative measures' is an example of an open-textured provision.

Provisions that allow the adoption of national gold-plated rules essentially let Member States adopt rules that go beyond the required standard of the

44 And the macro-prudential tasks in art 5 SSM Regulation. On the distinction between macro- and micro-prudential supervision, see, for example, K Lackhoff, *Single Supervisory Mechanism: A Practitioner's Guide* (CH Beck 2017) 27.

45 See also European Commission, 'Commission Staff Working Document, Accompanying the document Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013' SWD (2017) 336 final 26–27.

46 ibid, fn 78.

47 See also A Witte, 'When does national law transpose a directive?' (ESCB Legal Conference, Frankfurt, 2016) 247.

48 For different meanings of the concept of (minimum) harmonization see, for instance, M Klamert, 'What we talk about when we talk about harmonisation' (2015) 17 Cambridge Yearbook of European Studies 360, 362 and S Weatherill, 'How much, How Little?' (2005) 16 European Business Law Review 533, 534.

49 This has been also referred to as 'Elaboration Discretion', see T van den Brink, 'Refining the Division of Competences in the EU: National Discretion in EU Legislation' in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart 2017) 258.

directive.[50] The national discretion might, for example, be implied by the use of the expression 'at least' when requiring certain courses of action.[51] Article 67(2) CRD IV is an example of a provision that allows national gold-plating.

Both open-textured provisions and provisions that allow the adoption of national gold-plated rules might give rise to national rules with no textual overlap with the provisions of the directive. However, there is a crucial difference between these two types of provisions: while going beyond the minimum standard of a directive and adopting gold-plated rules is a Member States' choice, the concretisation of an open-textured norm may well be an obligation under EU law to ensure the effective implementation of the directive.[52]

This distinction is crucial in the present case. In paragraph 41, the General Court stated that:

> 'the expression "under Union law" has been interpreted as including all the powers resulting from the legal framework established by a directive, whether they result from an obligation or power for the Member State to legislate, as opposed to the recognition by that directive of the power which the Member States enjoy under national law to provide for stricter provisions outside the framework of the regime established by that directive'.[53]

The language used here strongly resembles the language the Court of Justice employs in its case law on the interpretation of Article 51(1) of the Charter of Fundamental Rights.[54] Article 51(1) states that provisions of the Charter are addressed to the Member States 'only when they are implementing Union law'. This provision aims at distinguishing Member State measures originating, stemming from or based on Union law (which trigger the application of the Charter) from autonomous Member State action (which leaves the Charter inapplicable). Similarly, by stating that the ECB must apply, *inter alia,* national legislation transposing directives, the first subparagraph of Article 4(3) SSM Regulation distinguishes between national law that is the result of a transposition of a directive (and can be applied by the ECB) and autonomous national law that does not transpose a directive (and cannot be applied by the ECB).[55]

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50 S Weatherill (n 48) 539 and European Commission, 'Better Regulation Guidelines' SWD (2021) 305 final.

51 This is also referred to as 'real gold-plating', see F Burmeister and E Staebe, 'Grenzen des sog. Gold Plating bei der Umsetzung europäischer Richtlinien in nationales Recht' (2009) 44 Europarecht 444, 445.

52 T van den Brink (n 49) 259.

53 *BAWAG PSK v ECB* (n 1), para 41, referring to Case C-235/14 *Safe Interenvíos* [2016] ECLI:EU:C:2016:154.

54 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

55 Cf G Bassani, *The legal framework applicable to the Single Supervisory Mechanism: Tapestry or Patchwork* (Wolters Kluwer 2019) 102-106; T Pascher, *Umgekehrter Vollzug im Europäischen Verwaltungsrecht* (Mohr Siebeck 2023) 95-100 and A Witte (n 47) 255-256.

In the context of Article 51(1) of the Charter, the Court developed a line of case-law distinguishing between, on the one hand, provisions of directives which impose an obligation or power on the Member States to legislate and, on the other hand, provisions which merely recognise the Member States' power under national law to introduce certain rules. In *Julian Hernández,* the Court ruled that national rules resulting from provisions of directives which impose an obligation or power on the Member States are considered an implementation of Union law and, therefore, fall within the scope of application of the Charter.[56] In contrast, in *TSN,* the Court ruled that by adopting national gold-plated rules, Member States are not implementing Union law and, therefore, the Charter does not apply.[57]

The General Court applied the same reasoning in the present context. Consequently, by using the expression 'at least', Article 67(2) CRD IV allows—but does not oblige—Member States to introduce or maintain administrative penalties and other administrative measures not listed therein. Thus, in the absence of Article 65(1) CRD IV, the levying of absorption interest would constitute a provision of national law gold-plating Article 67(2) CRD IV. In that case, point 2 of paragraph 97(1) of the Austrian Banking Act would not constitute a transposition of the CRD IV and thus of the relevant Union law. As a result, the ECB would not be competent to apply it.

Still, as the General Court emphasised, it is irrelevant that the levy is not listed in Article 67(2) CRD IV, since it is the general clause of Article 65(1) CRD IV that brings the levy within the scope of the Directive. Article 65(1) CRD IV may not define specific administrative penalties and other administrative measures to be introduced in national legislation; however, it clearly imposes an obligation on Member States to provide for such penalties and measures, where necessary, in respect of breaches of national legislation transposing CRD IV and of the CRR.

Consequently, the implication of the present judgment is that, to establish the competence of the ECB under the second subparagraph of Article 9(1) read in conjunction with the first subparagraph of Article 4(3) SSM Regulation, the determining factor is not whether a specific power is explicitly stipulated in a directive. A textual overlap between a provision of a directive and a rule of national law is not strictly necessary. What is decisive is whether that national rule is a concretisation of an open-textured provision of a directive establishing an obligation on Member States or whether it constitutes a gold-plated national rule that Member States are allowed but not obliged to adopt. If it is the former, the ECB is competent to apply that national rule directly. If it is the latter, the ECB must instruct the national competent authority to apply it.

56 Case C-198/13 *Julian Hernández* [2014] ECLI:EU:C:2014:2055, para 44; see also Joined Cases C-411/10 and C-493/10 *N.S.* [2011] ECLI:EU:C:2011:865, para 68.

57 Joined Cases C-609/17 and C-610/17 *TSN* [2019] ECLI:EU:C:2019:981, paras 52-53.

The General Court's conclusion is cogent and can also be explained by reference to the doctrine of pre-emption, which plays a particular role in the context of shared competence.[58] The adoption of rules on banking regulation and prudential supervision falls within shared competence pursuant to Article 2(2) TFEU. This means that both the Union and the Member States may legislate, but the Member States shall exercise their competence to the extent that the Union has not exercised its competence. Furthermore, according to the Treaty Protocol No 25:

> 'when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.[59]

Therefore, the Union has the power to pre-empt the exercise of Member State competence by legislating on a particular matter. Consequently, the precise scope of Member States' retained competence depends on the degree of pre-emption achieved by the Union legislation within that area.[60] Accordingly, the degree of pre-emption in the area of banking regulation and prudential supervision is determined by the scope of the legal instruments adopted by the Union legislator in this area; meaning, essentially, the scope of the SSM Regulation, the CRR, and CRD IV.[61] Member States retain the competence to adopt autonomous rules outside the scope of these instruments.[62]

Zooming in on individual provisions, with Article 67(2) CRD IV, the Union legislator has pre-empted the adoption of seven concrete administrative penalties and other administrative measures laid down therein. In other words, with regard to this provision, the obligation to adopt rules as a matter of Union law ends with the transposition of those seven administrative penalties and other administrative measures. In contrast, with Article 65(1) CRD IV, the Union legislator has pre-empted the adoption of all administrative penalties and other administrative measures in respect of breaches of the national provisions transposing CRD IV and of the CRR. Accordingly, all such penalties and administrative measures enshrined in national law constitute a transposition of (Article 65(1)) CRD IV.

58 Pre-emption is, essentially, a doctrine based on determining whether there is a normative conflict, a 'friction between two legal norms', see R Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 Yearbook of European Law 91, 111.

59 Protocol (No 25) on the exercise of shared competence [2016] OJ C 202/306.

60 R Schütze (n 58) 111.

61 And other acts of 'relevant Union law' pursuant to the first subparagraph of SSM Regulation, art 4(3).

62 For a different view, essentially dismissing pre-emption as a suitable theory to delineate the scope of the ECB's powers under national law, see O Voordeckers, 'National Banking Law in the European Single Supervisory Mechanism' (Dissertation Luxembourg 2020) 148-151.

5.1.3. Implications of the Judgment for 'Options' Laid Down in Directives

The judgment has implications for yet another legislative technique that CRD IV—and the CRR—employ: 'options'. In this context, options are provisions which allow Member States to choose whether and how to implement particular (prudential) requirements.[63] Options are characterised by words such as, for example, 'Member States may exempt/set a higher or lower limit/waive'. For instance, Article 12(3) CRD IV contains two options. It states that:

> 'Member States may decide that credit institutions which do not fulfil the requirement to hold separate own funds and which were in existence on 15 December 1979 may continue to carry out their business. They may exempt such credit institutions from complying with the requirement contained in the first subparagraph of Article 13(1)'.

National legislators are not obliged to implement options, but if they do, the question arises whether the ECB can apply national laws exercising such options. In case of options enshrined in regulations, the answer is clear—the first subparagraph of Article 4(3) of the SSM Regulation explicitly states that the ECB shall apply national legislation exercising options granted to the Member States in regulations. The present judgment strongly implies that the ECB is also competent to apply national legislation exercising options granted to Member States in directives.[64]

Options give Member States a choice about whether and how to transpose certain requirements. However, in contrast to provisions that allow the adoption of gold-plated national rules, the exercise of an option has been pre-empted by the Union legislator in its entirety. Whatever way Member States choose to transpose an option, they are doing so as a matter of Union law, not as a matter of autonomous national law. Accordingly, a rule of national law exercising an option laid down in a directive constitutes a transposition of that directive. As a result, the ECB should be competent to apply it.

The same conclusion can be drawn from the Court's reasoning in the context of Article 51(1) of the Charter. In *TSN,* the Court of Justice ruled that options are 'an integral part of the regime established by [a regulation or a

63 See, Z Kudrna and SP Riekmann, 'Harmonising national options and discretions in the EU banking regulation' (2018) 21 Journal of Economic Policy Reform 144, 146.

64 A contextual reading already suggests that since the ECB must apply the national legislation exercising options enshrined in regulations, it shall also apply national legislation exercising options enshrined in *directives,* see, to that effect, K Lackhoff (n 44) 97.

directive], and [...] authorise the adoption, by the Member States, of specific measures intended to contribute to the achievement of the objective of that [regulation or directive]'.[65] Therefore, when Member State legislators exercise options granted in directives or regulations, they are implementing Union law pursuant to Article 51(1) of the Charter.[66]

5.2. Interpretation of National Law

5.2.1. Principles of Judicial Review

The second part of the judgment focuses on the principles governing judicial review of ECB decisions based on national law and contains implications for the obligations of the ECB with regard to the interpretation of national law. The question of how to approach judicial review of ECB decisions based on national law is not easy to answer. Let us suppose for a moment that it was not the ECB but the FMA that levied absorption interest on BAWAG (similarly to *VTB Bank*).[67] In this case, BAWAG would have the right to bring an action for annulment before a competent Austrian court. If that court had doubts as to whether the FMA had correctly interpreted and applied point 2 of Paragraph 97(1) of the Austrian Banking Act in light of EU law, it could refer the matter to the Court of Justice under Article 267 TFEU.

According to settled case-law, the preliminary ruling procedure under Article 267 TFEU is based on the 'separation of functions' between the Court of Justice and the referring national court. In particular:

> 'it is not the function of the Court of Justice to rule on the interpretation of national provisions, that being within the exclusive jurisdiction of the national courts. In addition, when hearing a reference for a preliminary ruling from a national court, the Court of Justice must base its reasoning on the interpretation of national law as described to it by that court'.[68]

This means that the Court's task would be to interpret the relevant provisions of CRD IV in order to determine whether they 'preclude national legislation, such as that at issue in the main proceedings, concerning the power of the competent authority to impose absorption interest on credit institutions which breach the large exposure limit'. The Court would treat the interpretation of

65 *TSN* (n 57), para 50.
66 ibid.
67 *VTB Bank* (n 17).
68 For instance, Case C-409/06 *Winner Wetten GmbH* [2010] ECLI:EU:C:2010:503, para 35.

point 2 of Paragraph 97(1) of the Austrian Banking Act provided by the national court as a question of fact.[69]

In addition, the Court would likely provide guidance to the national court on what to do if it finds that the interpretation of point 2 of Paragraph 97(1) of the Austrian Banking Act conflicts with CRD IV. Typically, the Court would recall two approaches that national courts must take to resolve the conflict. First, they must try remedial interpretation.[70] If remedial interpretation is not possible, they are required to disapply conflicting national law and, sometimes, even apply a provision of the directive instead.[71] It would normally be for the national court to decide which approach to take to resolve the conflict and to give final judgment in the case.

However, when the ECB applies point 2 of Paragraph 97(1) of the Austrian Banking Act, the way in which judicial review is carried out changes significantly. The exclusive competence to review the legality of measures adopted by the ECB, other than recommendations and opinions, lies with the General Court at first instance and the Court of Justice on appeal.[72] National courts are currently not actively involved in proceedings concerning the legality of ECB decisions based on national law.

Nevertheless, it could be said that the national courts are 'passively involved'—through their (existing) rulings. Since the judgments in *Crédit Mutuel Arkéa* and *Caisse régionale de crédit agricole mutuel Alpes Provence*, the General Court has 'borrowed' a formula developed by the Court of Justice in infringement procedures,[73] according to which 'the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts'.[74] In the present case, the General Court reaffirmed, in no uncertain terms, that it is primarily for the national courts to interpret national law by stating that it would reject from the outset any criticism seeking to call such an interpretation into question.

However, it then added that it has the power to review the interpretation of national law by national courts for compliance with EU law. This means that

69 M Prek and S Lefèvre, 'The EU courts as "national" courts: national law in the EU judicial process' (2017) 54 Common Market Law Review 369, 384-385.

70 Case C-573/17 *Popławski* [2019] ECLI:EU:C:2019:530, para 57.

71 Case 106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49; but see also *Popławski* (n 70), paras 60-68 and Case 41/74 *Van Duyn* [1974] ECLI:EU:C:1974:133.

72 Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 256(1) in conjunction with art 263(1); see also Case C-219/17 *Berlusconi* [2018] ECLI:EU:C:2018:1023.

73 For an explanation, see E Gagliardi and L Wissink, 'Ensuring effective judicial protection in case of ECB decisions based on national law' (2020) 13 Review of European Administrative Law 41, 59-62.

74 Case T-712/15 *Crédit mutuel Arkéa* [2017] ECLI:EU:T:2017:900, para 132; and Case T-52/16 *Crédit mutuel Arkéa* [2017] ECLI:EU:T:2017:902, para 131; appealed in Joined Cases C-152/18 P and C-153/18 P *Crédit mutuel Arkéa* [2019] ECLI:EU:C:2019:810 and Case T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence* [2018] ECLI:EU:T:2018:219, para 84.

if the interpretation is consistent with EU law, the General Court will apply it to the case (even if a different interpretation, equally consistent with EU law, is possible). However, if the national courts' interpretation is contrary to EU law, the General Court will first seek to (re)interpret national law, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result sought by it. This includes, if necessary, changing the established jurisprudence of the national courts. If it is not possible to interpret national law in conformity with EU law, the General Court must, essentially, disapply the conflicting national law.

The General Court did not go as far as to disapply point 2 of Paragraph 97(1) of the Austrian Banking Act. It concluded that an administrative measure falling within the scope of Article 65(1) CRD IV must leave a certain margin of discretion to the competent authorities. As a result, the interpretation by Austrian courts conflicted with CRD IV. However, there was no need to disapply point 2 of Paragraph 97(1) of the Austrian Banking Act, as, according to the General Court, its wording allowed for an interpretation consistent with CRD IV. As regards the ECB decision, the General Court annulled it because it was based on an incorrect interpretation and thus application of point 2 of paragraph 97(1) of the Austrian Banking Act.

The approach taken by the General Court may generally work where a settled interpretation of the relevant provision of national law by national (apex) courts exists. However, where, for example, different national (apex) courts have interpreted the same provision of national law differently (and in conformity with EU law) or where there is no interpretation by national courts available, it is unclear how the General Court should proceed. In *Crédit Mutuel Arkéa,* the General Court stated that 'in the absence of decisions by the competent national courts, it is for the [General] Court to rule on the scope of those provisions'.[75] However, it is unclear from which constitutional principles or rules the General Court derived its competence to interpret national law. The question of competence is an important one. In an action for annulment, national law applied or relied on by the ECB does not serve the function of fact, as it does in preliminary ruling procedures.[76] Rather, it finds itself on an equal footing with EU law, and serves the function of law.[77] It has been argued that, in such a context, the General Court lacks the competence to interpret national law, as that competence

75 Case T-712/15 *Crédit mutuel Arkéa* (n 74), para 132 and Case T-52/16 *Crédit mutuel Arkéa* (n 74), para 131.

76 Although, it seems that the Court of Justice is of a different view, see Case C-579/22 P *Anglo Austrian AAB v ECB and Far East* [2024] ECLI:EU:C:2024:731, paras 85-86. For an analysis on the nature of national law in the context of this judgment, see B Budinská, 'Op-Ed: "On the Function and Standard of Review of national Banking Law before EU Courts: Anglo Austrian AAB v ECB (C-579/22 P)"' EU Law Live, 5 November 2024.

77 At least according to the prevailing view in the literature: see, for instance, E Gagliardi and L Wissink (n 73), 60; T Pascher (n 55) 219 *et seq* and M Prek and S Lefèvre (n 69) 381 *et seq*.

remains firmly with national courts.[78] This lack of competence arguably creates a gap in effective judicial protection against ECB decisions based on national law.[79]

In light of that, some have suggested that national courts should essentially become active participants in proceedings concerning the legality of an ECB decision based on national law. While the EU Treaties do not provide for a procedure similar to a 'reverse preliminary ruling', EU Courts could invite national courts to provide an interpretation of the relevant national law, for example by relying on the principle of sincere cooperation enshrined in Article 4(3) TEU.[80]

5.2.2. Obligations of the ECB in the Event of a Conflict Between National and EU Law

Finally, it can be assumed that to be able to adopt decisions which pass the General Court's legality test, the ECB—like the General Court—must also accept the interpretation of national law by national courts, unless that interpretation is in conflict with EU law. If the ECB identifies such a conflict, it must determine whether a remedial interpretation is possible. If not, the ECB must in principle set aside the conflicting national rule.[81]

While this last obligation may appear controversial, it should be recalled that the Court held in *Costanzo* that national administrative authorities are obliged to set aside conflicting national law.[82] They are also obliged, under particular circumstances, to apply a provision of EU law instead.[83] *Costanzo* has been heavily criticised in the literature for undermining the principle of the separation of powers and the rule of law, in particular the principle of legality of the administration, which presupposes the subordination of the executive to the legislature. Moreover, the judgment is seen as undermining legal certainty, since national administrative authorities, unlike national courts, cannot request a preliminary ruling to confirm that there is indeed an 'irreconcilable' conflict between national and EU law.[84]

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78 E Gagliardi and L Wissink (n 73).

79 ibid.

80 Or on art 24(2) of Protocol No 3 On the Statute of the Court of Justice of the European Union [2008] OJ C115/210, see E Gagliardi and L Wissink (n 73) 65-68.

81 See, for instance, F Amtenbrink, 'The application of national law by the European Central Bank: challenging European legal doctrine? Building bridges: central banking law in an interconnected world' (ECB Legal Conference, location, 2019) 136, 138.

82 Case 103/88 *Costanzo* [1989] ECLI:EU:C:1989:256.

83 ibid, paras 28-33.

84 For a comprehensive analysis of the *Costanzo* judgment, see M Verhoeven, *The Costanzo Obligation*
The obligations of national administrative authorities in the case of incompatibility between national law and European law (Intersentia 2011).

Despite this arguably valid criticism, *Costanzo* is (still) good law and, for that reason, it should apply in analogy to the ECB.[85] After all, '[w]hile the ECB does not qualify as an organ of the member states, by the virtue of its powers pursuant to Article 4(3) of the SSM Regulation, it exercises public authority on the territory of the respective member state'.[86] Moreover, without the '*Costanzo* obligation', the ECB would have to rely on rules of national law that conflict with EU law.[87] This would not sit well with the principle of EU law primacy, which the ECB is obliged to comply with.[88]

Still, practically speaking, the obligations arising from case-law, in particular from the *Costanzo* judgment, do not make it easier for the ECB to navigate its mandate to apply national law. The ECB does not have the right to request a preliminary ruling. Therefore, before taking a decision, it has no way of confirming with the Court of Justice whether the relevant provision of national law or its interpretation by national courts indeed conflicts with EU law, and whether a remedial interpretation is possible or whether an EU law provision can and must be applied instead.

Moreover, a situation may arise, such as that which gave rise to the first-instance proceedings in the *Corneli* case.[89] The General Court reasoned that, first, a remedial interpretation of a rule of Italian banking law was impossible because it would require an interpretation of that rule *contra legem*, and, second, a direct application of the corresponding provision of a directive was also impossible because it would require relying on that provision to the detriment of an individual (credit institution). It is unclear how the ECB should proceed in such a case. As the case-law currently stands, it will most likely not be able to take a decision due to a lack of legal basis.

6. Conclusion

The *BAWAG* judgment is an important piece of the puzzle in understanding (some of) the practical and legal-constitutional challenges and implications of an administrative model in which an EU executive authority must rely on national law in order to implement EU policies and take decisions addressed to individuals. This 'model of centralised application of

85 See, F Amtenbrink (n 81) 138 with further references to literature.
86 F Coman-Kund and F Amtenbrink, 'On the Scope and Limits of the Application of National Law by the European Central Bank within the Single Supervisory Mechanism' (2018) 33 Banking & Finance Law Review 133, 157.
87 See Joined Cases C-777/22 P and C-789/22 P *Corneli* ECLI:EU:C:2024:973, opinion of AG Kokott, para 5.
88 SSM Regulation, recital 34 and *BAWAG PSK v ECB* (n 1), para 60.
89 See, Case T-502/19 *Corneli* [2022] ECLI:EU:T:2022:627.

national law'[90] differs from the two more traditional EU administration models: the 'indirect' or 'decentralised' administration model and the 'direct' or 'centralized' administration model. In a nutshell, in the context of indirect administration, national administrative authorities are responsible for implementing EU policies. In contrast, the direct administration model is characterized by the fact that an EU authority is responsible for implementing EU policies.[91]

Before the establishment of the SSM and the conferral on the ECB of the mandate to apply national law, it was not necessary to establish with precision whether a particular provision of national law transposed a directive in order to determine whether an administrative authority was competent to apply it. According to the indirect administration model, national administrative authorities are required to apply directly applicable EU law, national law implementing EU law, as well as autonomous national law. In the direct administration model, EU authorities rely typically only on directly applicable EU law, such as EU Treaties and regulations. It is only with the introduction of the first subparagraph of Article 4(3) of the SSM Regulation that a methodology has to be developed for determining which national laws the ECB can and cannot apply. The General Court's answer to the first plea lays the foundation for that.

Furthermore, according to the indirect administration model, national authorities' decisions are reviewed by national courts, which have the option or the obligation to ask questions on the interpretation and validity of EU law to the Court of Justice in the context of the preliminary ruling procedure. Decisions adopted under the direct administration model are subject to the exclusive jurisdiction of the Court. This well-established division of labour between the EU and the national courts is challenged by the model of centralised application of national law. As becomes clear from the answer to the second plea, the General Court must not only carry out its typical responsibilities in an action for annulment, but also assume some of the responsibilities of national

90 T Tridimas, 'The Constitutional Dimension of Banking Union' in S Grundmann, HW Micklitz (eds), *The European Banking Union and Constitution. Beacon for Advanced Integration or Death-Knell for Democracy?* (Hart 2019) 25, 35; see also O Voordeckers (n 62) 33 and A Witte, 'The application of national banking supervision law by the ECB: Three parallel modes of executing EU law?' (2014) 21 Maastricht Journal 89.

91 For a comprehensive overview of the two models, see, for example, P Craig, *EU Administrative Law* (OUP 2006) 31 *et seq*; E Chiti, 'The administrative implementation of European Union law: a taxonomy and its implications' in HCH Hofmann, AH Türk, *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Elgar 2009) 9, 13–27; J Schwarze, *European Administrative Law* (Sweet and Maxwell 2006) 25–26. Furthermore, 'composite decision-making' has become an increasingly popular form of administrative cooperation between Union and national administrative authorities and constitutes, arguably, a separate model of implementation of Union law. For an overview of the various forms of cooperation, see M Eliantonio, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures' (2014) 7 Review of European Administrative Law 65.

courts, such as the responsibility to solve conflicts between EU and national law and even to interpret and apply national law.

In addition to that, the present case also touches upon the responsibilities of the ECB in interpreting and applying national law in compliance with EU law. The Court of Justice is expected to provide more clarity on the scope of these responsibilities in the appeal in the above mentioned *Corneli* case.[92]

Finally, it should be noted that the *BAWAG* judgment has implications beyond the SSM, as the model of centralised application of national law gains traction.[93] For instance, the European Public Prosecutor's Office established in 2017 must rely on national legislation transposing Directive 2017/1371 in its fight against fraud to the Union's financial interests.[94] Moreover, on 1 July this year, the new EU Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA) will become operational.[95] The AMLA will, *inter alia*, have the power to adopt decisions aimed at enforcing compliance by financial institutions with EU rules fighting money laundering and terrorist financing.[96] Article 5(6) of the AMLA Regulation copies *verbatim* the wording of the first subparagraph of Article 4(3) of the SSM Regulation, which means that the AMLA will rely, for instance, on national legislation transposing the Anti-Money Laundering Directives.[97] The AMLA will thus likely face similar challenges concerning the interpretation and application of national law as the ECB within the SSM.

92 Joined Cases C-777/22 P and C-789/22 P *Corneli,* appeal pending.

93 Apart from the AMLA, see also the slightly different mandate of the European Public Prosecutor's office to apply national law,

94 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283/1, art 22. However, note that according to Regulation 2017/1939, art 4, the Prosecutor's Office undertakes investigations, carries out acts of prosecution and exercises the functions of a national prosecutor before the competent *national* courts.

95 Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 [2024] OJ L 2024/1620, recital 86.

96 ibid.

97 For instance, Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L 141/73.