

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?

Lena Boucon* and Daniela Jaros†

The Single Supervisory Mechanism (SSM) contains a new and unprecedented feature in EU law: its founding regulation enables a European institution (the ECB) to directly apply national law. This paper examines the theoretical and practical implications of this feature of the SSM through the lens of European integration. It highlights the ways in which the ECB may harmonize national laws, why harmonized administrative procedural rules are necessary in this field and what remedies would be available should a decision of a European institution taken on the basis of national law be challenged before the CJEU. The paper concludes that the SSM may be described as a hybrid mode of European integration since it departs from the traditional models of the execution of EU law, and challenges some of the founding principles of EU law, such as the autonomy of the EU legal order and the principle of non-discrimination.

Keywords: Single Supervisory Mechanism (SSM), European integration, autonomy of the EU legal order, principle of non-discrimination, European Central Bank, direct application, administrative procedural law, remedies

TABLE OF CONTENTS

I. INTRODUCTION.....	156
II. SURVEYING THE NOVEL FEATURES OF THE SSM	162
III. ISSUES ARISING FROM THE DIRECT APPLICATION OF NATIONAL LAW BY THE ECB.....	166

* Lena Boucon, EUI alumna, is an associate with the Paris Office of Orrick, Herrington & Sutcliffe (Europe) LLP. The views presented in this paper are the author's personal opinion and must not be read as reflecting the positions of Orrick, Herrington & Sutcliffe (Europe) LLP.

† Daniela Jaros, EUI alumna, is an employee of the Banking Supervision Department of the Austrian Financial Market Authority (FMA). The views presented in this paper are the author's personal opinion and must not be read as reflecting the positions of the FMA.

1. <i>National Provisions Qualifying for Direct Application by the ECB under Article 4(3) SSM-R</i>	168
2. <i>Uniform Application of Implemented Directives Across the SSM</i>	170
3. <i>Identifying Applicable Procedural Rules in Absence of a Common European Administrative Procedural Law</i>	175
4. <i>Remedies</i>	177
IV. THE SSM AS A HYBRID MODE OF EUROPEAN INTEGRATION	181
1. <i>The SSM as a Hybrid Mode of Execution of EU law</i>	181
2. <i>The SSM in Light of the Founding Principles of EU law</i>	182
A. The Autonomy of the EU Legal Order	183
B. The Principle of Non-Discrimination	184
3. <i>The SSM and the Role of EU Institutions</i>	184
V. CONCLUSION	186

I. INTRODUCTION

European integration is commonly seen as the deepening of links between the European Union (hereafter 'EU' or 'Union') and its Member States, on the one hand, and the links between individual Member States, on the other hand. This is usually achieved by enhancing the powers of the Union over the powers of the individual Member States.

Enhancing European integration is considered necessary in certain areas because the EU is seen as the most appropriate level to deal with issues that go beyond the national sphere. From a legal perspective, integration is subject to three cornerstone constitutional principles of the EU legal order: the conferral principle,¹ the principle of subsidiarity,² and the principle of

¹ Under the conferral principle, the Union shall act only within the limits of the competences conferred upon it the Member States (Article 5(2) Treaty of the European Union (TEU)).

² Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [...] but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5(3) TEU).

proportionality.³ The idea of creating a European Banking Union was no exception to this concept of European integration since it seeks to give the European Central Bank (ECB) certain supervisory tasks over the EU financial system. The global financial crisis that hit the Union and in particular the Eurozone in the late 2000s exposed the deficiencies and systemic risks arising from the existing regulatory and supervisory architecture. A consensus was reached that the banking sector could no longer be governed exclusively at the national level. The way in which banking supervision was to be developed at the European level included several new features.

In the aftermath of the Eurozone crisis, the European Banking Union was set up based on three pillars. The first two, the Single Supervisory Mechanism (SSM)⁴ and Single Resolution Mechanism,⁵ were designed to ensure that all European banks would be subject to uniform supervision, as well as to ensure orderly bank resolutions when necessary. The third pillar, a common European Deposit Insurance Scheme, is still awaiting completion.⁶

³ Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaty (Article 5(4) TEU).

⁴ Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (hereafter 'SSM-R') and Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L141/1 (hereafter 'SSM-FR').

⁵ Regulation (EU) 806/2014 of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ 225/1 with its implementing and delegated acts (the regulation is currently under review). For an overview, see also Karl-Philipp Wojcik 'Bail-in the Banking Union' (2016) 53 *Common Market Law Review* 91, 100-106.

⁶ Directive 2014/49/EU of the European Parliament and the Council of 16 April 2016 on Deposit Guarantee Schemes [2014] OJ L 173/149; European Commission 'Effects Analysis on the European Deposit Insurance Scheme', (2016) <https://ec.europa.eu/info/sites/info/files/161011-edis-effect-analysis_en.pdf> accessed 9 March 2018.

Prior to the creation of the European Banking Union, the integration of the European financial system took place in four steps.⁷ A process of 'integration through harmonisation' occurred from 1973 to 1984, based on the principle of the full harmonisation of national rules while maintaining home-country control and the principle of non-discrimination. Given its rather limited success,⁸ a shift took place from 1985 through 1998. Minimum harmonisation replaced full harmonisation. This shift notably led to the provision of a 'single passport' to financial institutions for the provision of services throughout the then Community.⁹ As noted by Pedro Gustavo Teixeira, Director General of the Secretariat and Secretary to the Decision-making Bodies of the ECB, Member States were required to 'adapt their laws and regulations' but only to meet minimum levels of harmonization in an effort to prevent a 'race to the bottom'.¹⁰ A process of integration through governance followed from 1999 through 2007, characterized by the introduction of a common currency, the Euro, and the transfer of monetary policy from national central banks to the ECB in accordance with the Financial Services Action Plan and the Lamfalussy framework of governance.

The global financial crisis eventually hit Europe, where the financial crisis was followed by the Eurozone crisis. Therefore, from 2008 through 2012,

⁷ Pedro Gustavo Teixeira, 'Europeanising prudential banking supervision – Legal foundations and implications for European integration' (2014) 2/14 Arena Report Series <<http://www.sv.uio.no/arena/english/research/publications/arena-reports/2014/report-2-14.pdf#page=537>> accessed 3 January 2018, 532.

⁸ See European Commission, 'Completing the Internal Market' (1985) White Paper COM(85)310 <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf> accessed 11 March 2018. For an account of the different approaches towards harmonisation, see, for instance, Jacques Pelkmans, 'The new approach to technical harmonization and standardization' (1987) 25/3 *Journal of Common Market Studies* 249.

⁹ See, in particular, Second Council Directive 89/646/EEC of 15 December 1989 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780/EEC, OJ L 386, 30 December 1989.

¹⁰ Pedro Gustavo Teixeira, 'Europeanising prudential banking supervision – Legal foundations and implications for European integration' (2014) 2/14 Arena Report Series <<http://www.sv.uio.no/arena/english/research/publications/arena-reports/2014/report-2-14.pdf#page=537>> accessed 3 January 2018, at 545.

Member States engaged in the fourth integration phase that may be described as 'integration through crisis', during which they implemented unilateral and intergovernmental actions¹¹ primarily aimed at safeguarding their own interests at the expense of the 'EU common interest'. During this period, while the making of banking regulation was divided between the European and the national levels of governance, the organisation of banking supervision, the enforcement of regulatory rules and the resolution of banks resided exclusively within the ambit of the Member States. This institutional framework corresponded to the traditional form of EU integration, described as an indirect or decentralised enforcement of EU law. On the one hand, rules for certain substantive issues were adopted at the EU level, subject to the principles of subsidiarity and proportionality, i.e. the EU would legislate in these fields only to the extent necessary. On the other hand, Member States were the primary enforcers of such rules through their own national supervisory frameworks. They also retained the power to legislate as long as a given action was not viewed as being better achieved at EU level.

This paper aims to analyse the rules enshrined in the SSM Regulation ('SSM-R') and their practical legal implications in order to show to what extent they differ from traditional modes of European integration. In other words, its purpose is to determine whether the SSM's features make it an 'original' or 'new' mode of European integration, thus breaking with the traditional modes of European legal integration.

Admittedly, the concept of European legal integration is a rather loose one.¹² Generally speaking, it is viewed as referring to a process of integration through law: while the law is a product of the European Union, the European

¹¹ Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis* (Cambridge University Press 2014); Thomas Beukers, Claire Kilpatrick and Bruno de Witte (eds), *Constitutional Change through Euro-Crisis-Law* (Cambridge University Press 2017); on the positive aspect of intergovernmentalism see Daniela Jaros, "'The Eurozone Crisis' – A Book Debate In Defence of 'Good Intergovernmentalism'" (Verfassungsblog, 12 April 2014) <<https://verfassungsblog.de/in-defence-of-good-intergovernmentalism-2/>> accessed 9 March 2018;

¹² Hanne Petersen, Anne-Lise. Kjaer, Helle Krunke & Mikael Rask Madsen, 'General introduction: Paradoxes of European legal integration' in Hanne Petersen, Anne-Lise. Kjaer, Helle Krunke & Mikael Rask Madsen (eds) *Paradoxes of European legal integration* (Routledge 2008).

Union is also, to some extent, a creature of the law.¹³ For the purposes of this paper, European legal integration is used to refer to the process through which EU law gradually penetrates into the domestic law of its Member States,¹⁴ or the process according to which EU law 'behaves like an occupying authority on foreign soil, by making use of national procedures and by mobilizing state organs so as to directly incorporate its norms with the national jurisdiction of the EU states'.¹⁵

By 'traditional mode of European integration', we refer to the ways in which EU law has penetrated the national legal orders so far. This pertains partly to the legal tools used by the EU institutions. Basic principles are entrenched in the EU's constitutive treaties, such as the principles of conferral, subsidiarity, proportionality, sincere cooperation, or equal treatment and non-discrimination. In addition, the European legislator has at its disposal different acts of secondary legislation, namely regulations, directives, individual acts or acts of soft law. The Court of Justice of the European Union (CJEU) has recognized additional fundamental concepts, namely the principles of direct effect,¹⁶ and of primacy of EU law.¹⁷ It has also developed defining principles of interpretation with the aim of ensuring consistent application of EU law across the Member States, namely the principle of the autonomy of the EU legal order and of effectiveness of EU law.

In addition, EU law has traditionally penetrated the national orders according to two main patterns. First, the decentralized (or indirect) model of execution of EU law, which is by far the most common within the EU legal order, implies that while substantive law-making takes place at EU level, Member States are entrusted with the task of applying such rules according to their own procedures and through the national state organs. It is in this

¹³ See Mauro Cappelletti, Monica Secombe & Joseph Weiler (eds), *Integration through law: Europe and the American federal experience*, Vol. 1: *Methods, tools and institutions* (Walter de Gruyter and Co. 1986).

¹⁴ Anne-Marie Burley & Walter Mattli, 'Europe before the Court: A political theory of legal integration' (1993) 47/1 *International Organization* 43.

¹⁵ Loïc Azoulay, 'The force and forms of European legal integration' (2011) 6 *EUI Working Paper* 1.

¹⁶ Case 26/62 *Van Gend en Loos* EU:C:1963:1.

¹⁷ Case 6/64 *Costa c. ENEL* EU:C:1964:66.

context that the CJEU has recognized the principle of procedural autonomy of the Member States.¹⁸ Second, the centralized (or direct) model of execution of EU law signifies that the EU institutions are responsible for the application, implementation and enforcement of EU rules. A typical example is competition law, for which the European Commission may impose fines and other sanctions on undertakings infringing the competition provisions of the Treaty on the Functioning of the European Union (TFEU).

Where does the SSM lie against this background? The SSM is intended to create 'an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution' and to ensure 'the consistent application of the single rulebook to credit institutions'.¹⁹ The ECB is its cornerstone. In accordance with Article 127(6) TFEU and Article 4(1) and Article 5(2) of Regulation (EU) 1024/2013 (SSM-R), almost all prudential powers over the Eurozone's largest banks and the power to regulate market access with regard to all banks in the Eurozone have been transferred to the ECB. Moreover, pursuant to Article 6 SSM-R, powers of indirect oversight over national competent authorities with regard to their supervision of smaller banks in the Eurozone have also been assigned to the ECB. Against this background, the SSM comprises several peculiar features. Our survey of these features will demonstrate how and why the SSM constitutes a new mode of European integration. As we will see, the SSM consists in a direct application by a European institution of national (rather than EU) law, thus breaking with the traditional ways in which EU law has so far penetrated the national legal systems (II). The paper then discusses the practical implications and complexities created by this original legal

¹⁸ See, for instance, Case 33/76 *Rewe-Zentralfinanz eG and Rewe Zentral AG v. Landwirtschaftskammer für das Saarland* EU:C:1976:188, 5: '[...] in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature [...] the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect'.

¹⁹ Recital 87 SSM-R.

framework (III) before looking at it in light of the theory of European integration (IV).

II. SURVEYING THE NOVEL FEATURES OF THE SSM

The SSM is based on a fundamental distinction between banking regulation and banking supervision. While the former mostly refers to prudential rules²⁰ applicable to credit institutions, the latter relates to the enforcement of those prudential rules and the structure of the authorities responsible for enforcement.

Systemic risks inherent in the previous system of national supervision of credit institutions operating within an integrated European market were very clearly exposed during the Eurozone crisis. The EU and, in particular, the Member States of the Eurozone realized that the discrepancy between the different supervision of credit institutions across the Eurozone by the national supervisors gave rise to profound deficiencies and put the sustainability of the whole system at risk. Just as the creation of the monetary union was intended to solve the 'impossible trinity'²¹ of fixed exchange rates, free movement of capital and autonomous monetary policy, the creation of the banking union was aimed at solving the 'financial trilemma'²² of financial

²⁰ 'Prudential' means relevant to the stability of the financial markets. Typical 'prudential rules' are therefore capital or liquidity requirements for banks or governance requirements. In addition to 'prudential rules', there are other rules banks must comply with, such as, for example, rules related to consumer protection, which are not prudential as their primary objective differs from that of the stability of the financial markets (what may be best for the protection of consumer interests may not be best in terms of financial stability). In practice, of course, the distinction is not always clear-cut, given that overall compliance with non-prudential rules has an impact on compliance with prudential rules and vice-versa.

²¹ Robert A. Mundell, 'Capital Mobility and Stabilization Policy under Fixed and Flexible Exchange Rates' (1963) 29 *Canada Journal of Economics* 475; Marcus J. Fleming, 'Domestic Financial Policies under Fixed and under Floating Exchange Rates,' (1962) 9 *IMF Staff Papers* 369; Maurice Obstfeld, Jay Shambaugh and Alan Taylor 'The Trilemma in History: Tradeoffs among Exchange Rates, Monetary Policies, and Capital Mobility' (2005) 87 *Review of Economics and Statistics* 423-438.

²² Dirk Schoemaker, 'The Financial Trilemma' (2011) *Economics Letters* 111 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340395> accessed 3 May 2018.

stability, national financial regulation and cross-border banking (financial integration). In order to safeguard financial stability and an integrated banking market, Member States thus decided that action at EU level was necessary, since only further integration of financial regulation across the EU could address the many challenges²³ brought about by the Eurozone crisis. Against this background, the SSM was conceived and the SSM-R and the SSM-FR were adopted in 2013 and 2014 respectively.

As far as the SSM-R is concerned, its recitals stress the need for more European integration and are thus in line with the traditional *méthode communautaire*. The recitals also point to the fragmentation of the financial sector and the threat it poses to other EU policies, namely the single monetary policy and the internal market. This gives rise to a need to intensify the integration of banking supervision, which in turn will bolster the Union, restore financial stability, and ultimately lead to economic recovery.²⁴

As mentioned above, instead of harmonising national substantive prudential laws,²⁵ the SSM-R focuses exclusively on the modes of supervision of credit institutions. In other words, it does not focus on the content of the rules applicable to credit institutions, but on the interplay between supervisors, as well as the tasks and powers of the latter. Below (see Section III.1), we discuss how this plays out in practice and examine the extent to which the ECB does in fact act as a regulator, notwithstanding the supposed deference to national prudential rules, by virtue of its mandate.

²³ It should also be noted that participating in the Banking Union was made a condition for receiving loans from the European Stability Mechanism (ESM) that was set up as a result of crisis to provide emergency loans to Eurozone Member States that have (had) difficulties servicing their sovereign debt obligations. On the conditionality of the 'troika's' loans to Eurozone countries in distress, see also Tuori and Tuori (n 13).

²⁴ See, for instance, Recital 2 of the SSM-R, which provides that: 'The present financial and economic crisis has shown that the integrity of the single currency and the internal market may be *threatened by the fragmentation* of the financial sector. It is therefore *essential to intensify the integration of banking supervision* in order to bolster the Union, restore financial stability and lay the basis for economic recovery' [emphases added].

²⁵ On the harmonisation of prudential rules, see below under 3.2.

In line with other processes that aim to further European integration, the SSM-R centralises banking supervision at the ECB. Supervision of credit institutions, previously within the remit of national authorities, is now the responsibility of the ECB. Given the limits of Article 127(6) TFEU,²⁶ which only provides for the power to confer 'specific tasks' regarding prudential supervision to the ECB, the European legislator could not opt for a total transfer of supervisory tasks to the ECB. Instead, it has set up a complex supervisory architecture, involving both the European and the national levels. While the aim of the SSM-R is to centralise supervision at the ECB, the SSM creates a continuing role for the national authorities, relying on them for expertise, implementation, and, at a more basic level, manpower.²⁷ However, the SSM-R avoided relying on clear-cut criteria to divide the respective competences of the ECB and the national supervisors. Instead, the concept of 'significance' of credit institutions (Article 6(4) SSM-R)²⁸ is at the heart of the SSM-R: the ECB is now the sole institution responsible for the supervision of 'significant institutions', with further responsibility to devise the so-called 'common procedures'²⁹ and to indirectly supervise 'less

²⁶ Article 127(6) TFEU forms the legal basis of the SSM-R, which was thus adopted unanimously by the Member States. It provides that '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'.

²⁷ Gianni Lo Schiavo, 'The Single Supervisory Mechanism: Building a New Top-Down Cooperative Supervisory Governance in Europe' in Federico Fabbrini et al. (eds), *What Form of Government for the European Union and the Eurozone?* (Hart 2015).

²⁸ Significance is determined based on criteria set out in Article 6 (4) SSM-R, the list of supervised credit institutions and financial holding companies, updated in 2017, is available at

<https://www.bankingsupervision.europa.eu/ecb/pub/pdf/list_of_supervised_entities_20160331.en.pdf?54830cfdd60d51025d0fd0716d4376e2> accessed 3 January 2018.

²⁹ 'Common procedures' are: Authorisation of credit institutions and withdrawal of authorisations of credit institutions (Article 4 (1) (a) SSM-R) and as well as the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions (Article 4 (1) (c) SSM-R).

significant institutions'.³⁰ National competent authorities retain certain powers with regard to significant institutions (i.e. anti-money-laundering) and the power to directly supervise less significant institutions.

The SSM has been described as a 'unique and unprecedented juxtaposition of European and national competences', including: (i) exclusive competences of supervision of the ECB; (ii) national competences of supervision; (iii) instruction/oversight competences of the ECB; and (iv) shared and parallel competences among the ECB and national supervisors.³¹ In parallel to this division of competences, the SSM-R has also introduced an 'integrating' organizational set-up through the creation of so-called Joint Supervisory Teams (JSTs).³² Supervisors at the ECB and from national competent authorities work together on a daily basis in JSTs led by JST-coordinators at the ECB. European and national competences are thus deeply intertwined, even though the ECB has the final say about the qualification of a credit institution.

While the SSM-R relies on a dichotomy between banking regulation and banking supervision and primarily deals with the latter, it nonetheless does not ignore the former entirely. Instead, it deals with regulation in an original and somewhat troubling manner, since it relies, to an unprecedented extent, on national substantive laws. It does so according to three distinct schemes.

Firstly, Article 4(3) SSM-R expressly provides that the ECB is to apply 'all relevant Union law' while carrying out the tasks conferred on it by the SSM-R, which may imply applying national laws directly. This may occur in two situations. Where Union law is composed of Directives, the ECB is required to apply 'the national legislation transposing those Directives', which may thus differ from one Member State to another. Alternatively, where Union law is composed of Regulations and where such Regulations grant options for Member States, the ECB is equally required to apply 'the national legislation exercising those options', which similarly is likely to differ across the Member States.

³⁰ 'Guide to Banking Supervision' (ECB) <<https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf>> accessed 3 January 2018.

³¹ Teixeira (n 9) at 554.

³² Recital 79 of the SSM-R; Articles 3-6 SSM-FR.

Secondly, Article 6(5)(a) SSM-R grants the ECB powers through which it shall instruct – through regulations, guidelines or general instructions – national regulators on how they are to perform their supervisory tasks³³ and on how they are to adopt their supervisory decisions. In other words, even when it does not have an exclusive competence, the ECB has been granted the power to instruct national regulators on how to apply their respective national laws.

Thirdly, under the third subparagraph of Article 9(1) SSM-R, when the ECB lacks certain powers to carry out the tasks conferred on it by the SSM-R, the ECB may instruct national regulators to make use of their powers 'under and in accordance with the conditions set out in national law'. In other words, the ECB may require national regulators to fill in when it is itself not entitled to intervene.

Hence, for the first time in the history of EU integration, an EU institution must make direct use of national law while carrying out the tasks conferred on it by EU law. The following sections scrutinize the various practical implications of the aforementioned provisions and show how these provisions ultimately create what can be described as a new form of integration.

III. ISSUES ARISING FROM THE DIRECT APPLICATION OF NATIONAL LAW BY THE ECB

The aforementioned Articles 4(3), 6(5)(a) and 9(1) SSM-R raise difficult questions about the delineation of competences between the ECB and national competent authorities, on the one hand, and the extent to which national laws are applicable, on the other hand. A delineation of competences and a common understanding of the applicable law is, however, necessary to understand: (a) the degree to which integration is intended by the SSM-R and (b) the contexts in which national supervisors (and consequently Member States) remain competent. In the absence of clarity on the distribution of competences, legal certainty and foreseeability are undermined. In this regard, three types of problems can be identified.

³³ Excluding the authorisation of credit institutions, the withdrawal of authorisations of credit institutions (Article 4(1)(a)), and the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions (Article 4 (1) (c)).

First, in many cases, the transposition of directives is deeply embedded in pre-existing national provisions, partly in order to take into account national legislative and regulatory specificities. From the perspective of EU law, the purpose of directives is to harmonize substantive rules and outcomes while leaving it to Member States to choose the means for achieving this goal.³⁴ Therefore, it is often not easy to disentangle a national provision that corresponds to part of an EU directive from other provisions or parts of provisions that do not stem from EU law. However, this question must not be confused with the question of the division of competences between national authorities and the ECB.

Second, national provisions are not only surrounded by other provisions within their national legal settings but may also have to be interpreted or applied in a specific way due to domestic case-law, soft-law instruments or administrative acts or practice. Can the ECB treat national legal provisions as black letter law that it can interpret autonomously, disregarding the national context of these provisions? The SSM-R leaves that question open.

Third (3.3.), in the absence of a harmonized European administrative procedural law, the question of the extent to which the ECB is bound by procedural provisions that are part of national law arises. The SSM-R and the SSM-FR do contain a minimum of general procedural provisions. However, the regulations remain silent about whether national administrative provisions (e.g. deadlines) have to be applied in addition to those general provisions and about what happens when national provisions are more specific while not contradictory to those general provisions set in the regulations.

The following subsections explore these three problem areas, linking them to current case law pending before the CJEU and the ECB's initial positions on these issues to date. In a fourth subsection (III.4), the paper looks at how these practical implications play out in the context of applicable remedies.

³⁴ Article 288(3) TFEU; see further detail in Ulrich Haltern, *Europarecht* (Mohr Siebek UTB 2007) 336.

1. National Provisions Qualifying for Direct Application by the ECB under Article 4(3) SSM-R

For the purpose of banking supervision, the ECB may only apply national law within the limits of the competences transferred to it on the basis of Article 127(6) TFEU, and therefore by Articles 4(1) and 5(2) SSM-R, and not beyond. Essentially, the ECB is competent to exercise all prudential supervisory powers with regard to credit institutions and financial holding companies, while Member States and their authorities remain competent for areas such as anti-money laundering and consumer protection with regard to banks, capital markets and insurance regulation as a whole, as well as for civil and company law issues. In practice, it is often difficult to delineate the competences transferred to the ECB from those remaining within the remit of national competent authorities and other national authorities. It is therefore not surprising that this issue has already given rise to two preliminary references to the CJEU,³⁵ *VTB Bank AG v Österreichische Finanzmarktaufsicht* and *Fininvest and Berlusconi v ECB*, and has been addressed in a statement by the ECB in a letter sent to all supervised banks.³⁶

However, once this delineation is made and it is established that a certain task is within the competence of the ECB, Article 4(3) and Article 9 SSM-R will come into play. As explained above, for the purpose of fulfilling its tasks, the ECB may use directly applicable EU law (regulations), national law transposing EU law (directives) and national law exercising options granted to Member States. According to Article 9(1) Subparagraph 3 SSM-R it also has a third option. If needed for the fulfilment of the tasks assigned to it under Article 4(1) SSM-R, the ECB may instruct national competent authorities to make use of law that is not transposing EU law on behalf of the ECB. This third category can also be described as the ECB's indirect

³⁵ Case C-52/17 *VTB Bank (Austria) AG v Österreichische Finanzmarktaufsicht* EU:C:2018:178, Case C-219/17 *Fininvest and Berlusconi v ECB*, see also Raffaele D'Ambrosio, 'The ECB and NCA liability within the Single Supervisory Mechanism' (2015) *Banca d'Italia Quaderni di Ricerca Giuridica della Consulenza Legale* 78, 79.

³⁶ European Central Bank, 'Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law' <https://www.bankingsupervision.europa.eu/banking/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?abdf436e51b6ba34d4c53334f0197612> accessed 3 January 2018.

competence to make use of national law. In sum, the question whether the ECB can make use of a power assigned to competent authorities by national law has to be answered in a two-step-approach: (i) Is the ECB acting within the remit of Articles 4(1) and 5(2) SSM-R? (ii) If yes, is the provision it is intending to use a transposition of EU law or is it purely a national provision? If the former is the case, the ECB may apply that provision directly. If the latter is the case, it may instruct the relevant national authority to make use of this power on behalf of the ECB. As noted above, it is often difficult to determine whether a provision is 'purely national' or an implementation of EU law, given that laws implementing directives are often embedded into the national context and not so easy to disentangle.

Both issues, the delineation of the ECB's competences from those of national competent authorities and the extent to which national laws apply, are complex. As noted, two requests for a preliminary ruling have been filed so far, each addressing a different aspect of the question. In *VTB v Österreichische Finanzmarktaufsicht*, the compatibility of a national provision with EU law is disputed³⁷ while in *Fininvest and Berlusconi v ECB*, the applicant

³⁷ Case C-52/17 *VTB Bank (Austria) AG v Österreichische Finanzmarktaufsicht* EU:C:2018:178. The relevant question referred is 'Does EU law (in particular, Article 395(1) and (5) of Regulation (EU) No 575/2013 [...] preclude a national provision such as that which was contained in Paragraph 97(1)(4) of the Bankwesengesetz (Law on Banking) [...] where, despite the fact that the conditions for applying the exemption provided for in Article 395(5) are satisfied, (absorption) interest is levied for a breach of Article 395(1)?' Put differently, the question is whether EU law can bar the use of a national provision aimed at economic oversight (which is outside the scope of the SSM-R) if that provision is linked to a breach of a prudential requirement (within the scope of the SSM-R). The advocate general's opinion from 13 March 2018 suggests that it does (para 67-69), arguing that making use of the national provision would distort the prudential provision in question. In its ruling of 7 August 2018, the Court came to the same conclusion as the AG. However, the main point the Court makes is that the national provision is linked to a breach of Article 395(1) CRR (automatically levying an interest) without examining the conditions of Article 395(5) CRR under which a breach of Article 395(1) would be allowed. It therefore concludes that Article 97(1)(4) of the Bankwesengesetz is not compatible with EU law. With regard to the general qualification of the 'absorption of interest' as provided for in Article 97(1)(4), the Court further held that it must be qualified as administrative measures in the sense of Article 65(1) of the CRD IV (therefore 'implementing EU law').

has challenged what it considers to be an inaccurate application of domestic law by the ECB under Article 4(3) SSM-R.³⁸

2. *Uniform Application of Implemented Directives Across the SSM*

The ECB might understandably wish to apply a harmonized set of rules across the 19 SSM Member States, given that the aim of the Banking Union is to level the supervisory playing field. If banking supervision is to be integrated, all banks should be subject to the same set of rules. The opposite is true if banks across Member States are treated differently based on diverging implementations of EU law. Indeed, applying 19 different implementations of the Basel III framework, which has been transposed at EU level in the form of a directive, namely Directive (EU) No 2013/36 (Capital Requirement Directive 'CRD IV'), and Regulation (EU) No 575/2013 (Capital Requirements Regulation 'CRR'), inevitably raises several challenges for the ECB.³⁹

First, the ECB is faced with multiple national laws, which are highly fragmented, partly because the current directives and regulations that set out prudential rules comprise over a hundred options and discretions left to the

³⁸ Case C-219/17 *Fininvest and Berlusconi v ECB*: The applicants raise the issue of the distinction between the question of competence and of the correct application of national law. In a first set of pleas, the applicants have called into question the ECB's expansion of its powers under Article 4(1)(c) and Article 15 of the SSM-R, while, in a second set, they allege that the ECB has violated the principles of lawfulness, legal certainty and the foreseeability of the administrative action in applying Article 4(3) of the SSM-R and the national transposition of the applicable provisions, Article 23(1) and (4) of the CRD IV.

³⁹ The harmonized set of material rules applying to banking regulation in the EU is commonly referred to as the 'Single Rulebook'. It consists of the CRD IV, the CRR and other legal acts such as, in particular, Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) adopted at the level of the European Banking Authority (EBA), as well as Guidelines issued by the EBA. Whether the 'Single Rulebook' provides for a truly harmonized set of rules has been critically challenged. See Valia Babis 'Single Rulebook for Prudential Regulation of Banks – Mission Accomplished?' (2014) University of Cambridge Faculty of Law Research Paper 37/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456642> accessed 4 January 2018 and Angelo Baglioni, *The European Banking Union* (Palgrave MacMillan 2016) 21.

Member States.⁴⁰ Second, the ECB might be put in situations where Member States do not have consistently transposed EU secondary acts of legislation. Furthermore, it is not yet clear what precisely is meant by 'national law' in Article 4(3) SSM-R. It also remains unclear whether the ECB may interpret national provisions implementing the EU law autonomously, as it does by publishing guidance on the interpretation of the underlying CRD IV provisions, or whether it is bound by the national context surrounding national provisions, especially by national case-law.

Therefore, which EU principles and mechanisms may the ECB rely on to ensure a uniform, effective and fair application of EU law and thus overcome the various challenges pointed out above?

First, the SSM-R itself refers to the primacy of EU law in its recital 34. The primacy principle may accordingly constitute a powerful instrument through which the ECB could disapply any national rule that does not comply with EU law. The ECB could make strict use of the primacy principle in such a way as to ultimately apply the same set of rules across all the Member States.

Second, the ECB may invoke the principle of sincere cooperation (Article 4(3) of the Treaty on the European Union ('TEU')), under which 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties' to justify 'favoring' EU law over national law.

Third, it might also be tempting for the ECB to directly apply provisions from the directive, rather than the national provisions implementing this directive. The ability of European institutions, however, to apply directives directly is strictly limited, as set out in the case-law of the CJEU.⁴¹ Briefly put, direct application of directives is confined to situations in which an individual's rights are violated by his/her Member State's failure to implement a directive correctly (or failure to implement it at all) and is subject

⁴⁰ 'Overview of options and discretions set out in Directive 2013/36/EU and Regulation (EU) No 575/2013' (European Banking Authority) <<http://www.eba.europa.eu/supervisory-convergence/supervisory-disclosure/options-and-national-discretions>> accessed 3 January 2018.

⁴¹ Paul Craig and Grainne De Burca, 'EU Law' (6th edition Oxford University Press 2015) at 2008.

to certain conditions, for example that the provision to be directly applied is unconditional and sufficiently precise. This case-law appears to preclude an organ of the European Union from directly applying a directive for the purpose of harmonization, even if the directive has been implemented inconsistently or incompletely. That being said, it may not be inconceivable: the CJEU has traditionally adopted a teleological approach and has sometimes adopted creative interpretations of EU law that are geared towards advancing and furthering European integration and preserving the integrity of the EU legal order. In recent years, the CJEU has notably upheld all challenged measures adopted by EU institutions or organs, such as the Eurogroup, in response to the sovereign debt and financial crises.⁴² On the one hand, it is noteworthy that the CJEU has never expressly precluded an EU institution from relying on the direct effect principle, since this issue has never been raised before. On the other hand, as noted above, it is the first time in the history of European integration that an EU institution has been entrusted with the task of applying national law. Therefore, a creative interpretation of the direct effect principle, coupled with the effectiveness and uniform application of EU law principles, could allow the ECB to directly rely on the EU rules instead of the corresponding domestic rules. In situations where Member States have manifestly transposed EU secondary acts of legislation incorrectly, the ECB could therefore argue that in order to perform the tasks entrusted to it by the SSM-R and to comply with the primacy and effectiveness principles, it has a 'duty' to directly apply the EU provision, notwithstanding the absence of any corresponding national rule. In other words, if the CJEU has paved the way for *individuals* to rely on the direct effect doctrine, why would it not reach a similar conclusion regarding an EU institution charged with applying a coherent set of rules in the Member States in the face of highly fragmented national provisions?

Fourth, the ECB could refer where possible to acts of the European Banking Authority ('EBA'), the common European Banking regulator that has already

⁴² See, in particular: Case C-370/12 *Pringle* EU:C:2012:756 and Case C-62/14 *Gauweiler* EU:C:2015:7. See also, among others, Joined Cases C-105/15 P to C-109/15 P *Konstantinos Mallis and others* EU:C:2016:702 on a 2013 Eurogroup statement concerning the restructuring of the banking sector in Cyprus.

established harmonized rules in this sector.⁴³ The EBA can issue regulatory and implementing technical standards, which can be elevated to the status of an EU regulation if the EBA has been delegated authority to adopt such standards under the relevant secondary law acts. Furthermore, the EBA may also issue guidelines on any matter arising from the legal acts referred to in Article 16(1) of Regulation (EU) No 1093/2010 ('EBA-R'). Such guidelines are not legally binding, but are subject to a 'comply or explain' mechanism under Article 16(3) EBA-R. In this way, supervisory authorities (which now include the ECB) must declare whether they comply with the EBA guidelines or explain why they do not. The EBA must stay within the limits of the applicable secondary law acts when releasing such guidelines. What EBA guidelines do, however, is provide much more detail on secondary law provisions. In this way, they harmonize the interpretation and sometimes even the process surrounding these provisions and they therefore do effectively bind supervisory authorities to interpret national law implementing directives in a particular way. In areas that are primarily regulated by CRD IV, and not by its directly applicable counterpart, the CRR, it is useful for the purpose of applying a uniform set of rules across the Eurozone that the EBA produces guidelines that are as detailed as possible in order to harmonize the understanding of implemented provisions.

While relying on the regulatory products of the EBA, the ECB may, however, also act as a regulator to a limited extent. National supervisory authorities generally do produce soft law such as circulars, guidance or minimum standards. Within a limited mandate that varies from Member State to Member State, they sometimes even produce legally binding regulatory products in order to make supervisory expectations and practice more transparent for market participants and to optimize the supervisory process. The ECB also produces similar soft law instruments through public

⁴³ For a critical examination of the EBA's role see 'European banking supervision taking shape — EBA and its changing context' (European Court of Auditors, 2014) <https://www.eca.europa.eu/Lists/ECADocuments/SR14_05/SR14_05_EN.pdf> accessed 5 January 2018.

consultations,⁴⁴ general communications (letters),⁴⁵ and recommendations, as well as legally binding decisions and regulations.⁴⁶ To elaborate on the nature of these different instruments would go beyond the scope of this paper. However, it is important to note that several of these ECB instruments do attempt to provide a firm interpretation of CRD IV provisions, even if they always contain the disclaimer 'notwithstanding national law'. Areas of prudential banking regulation such as internal governance, suitability requirements for members of the management bodies of credit institutions and remuneration policies within banks are solely regulated by the CRD IV and not by the CRR as they are generally closely linked to national company law, which is not harmonized across the EU. If the ECB creates a guide on the relevant CRD IV provisions,⁴⁷ the question is how these guides interact with the national provisions implementing these CRD IV provisions and how they relate to national case law, soft law instruments or administrative practice.

One may question how far the ECB's mandate to regulate may be stretched: when does the task of the legislator end and where does administrative practice start? It is known from national contexts that the line between legislative and executive levels of government may not always be easily drawn. Within the SSM, the difficulty of separating the legislative from the executive is ultimately closely linked with the political questions of (i) how

⁴⁴ 'Public Consultations' (ECB)

<<https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/index.en.html>> accessed 3 January 2018.

⁴⁵ 'Letters to Banks' (ECB)

<<https://www.bankingsupervision.europa.eu/banking/letterstobanks/html/index.en.html>> accessed 3 January 2018.

⁴⁶ 'General Framework' (ECB)

<<https://www.bankingsupervision.europa.eu/legalframework/ecblegal/framework/html/index.en.html>> accessed 3 January 2018.

⁴⁷ For example, with regard to the suitability assessment of members of the management body of credit institutions, the ECB has published a 'Guide to Fit & Proper Assessments'

<https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705.en.pdf?de3bbbd9ecadd9cd2d75889d39effaaf> accessed 3 January 2018; it has also published a Recommendation ECB/2016/44 on dividend distribution policies [2016] OJ 481/I.

much integration was intended through the SSM-R and (ii) whether the ECB has received a mandate to 'harmonize' national law implementing directives through a common administrative practice across all SSM Member States.

The simplest solution to many of the problems raised in this subsection would be to merge the two-fold CRR/CRD IV regulatory regime into one or two directly applicable regulations. In that way, the possibility given to the ECB to use national law based on Article 4(3) SSM-R would practically become obsolete as almost all relevant prudential law for banks would be directly applicable. However, the European legislator has not chosen this path. Instead, it seems to maintain the division between the CRR and CRD IV as it is foreseen now, at least as far as the Commission's proposals for the CRR 2 and CRD V are concerned.⁴⁸

3. Identifying Applicable Procedural Rules in Absence of a Common European Administrative Procedural Law

The third problem arising from the direct application of national law under Article 4(3) SSM-R is the issue of the applicable procedural law. The EU does not have a harmonized body of law regulating administrative procedure; in fact, the CJEU has long recognized the principle of national procedural autonomy. While this is not a problem as long as national institutions have a national administrative law at their disposal, it becomes an issue when an EU institution is required to apply substantive national law (implementing an EU directive) without being bound by national administrative rules. Substantive and procedural rules cannot always be properly disentangled and there is a risk of distorting national provisions when applying them in a void without reference to their proper procedural framework. However, pursuant to

⁴⁸ Proposal COM(2016) 854 final for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures [2016]; Proposal COM(2016) 850 final for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012 [2016].

Article 6 of the European Convention of Human Rights (hereafter 'ECHR') and Article 47 of the Charter of Fundamental Rights of the European Union (hereafter 'CFR'), as well as the corresponding case-law of the European Court of Human Rights⁴⁹ and the CJEU,⁵⁰ there are a number of supra-national principles of fair trial and due process which have emerged in cases relating to criminal proceedings, and which can and have been extended to administrative procedures through the case-law of the respective courts.⁵¹ These principles are access to independent courts, the right to a legal remedy and the principle of *ne bis in idem*. For the purpose of the SSM, the SSM-FR contains its own general due process provisions for adopting ECB supervisory decisions in its Title 2 (Articles 25 – 35 SSM-FR), including the right to be heard (Article 31 SSM-FR), the right to have access to files in the ECB supervisory procedures (Article 32 SSM-FR), the obligation for the ECB to state the reason (material facts and legal reasons) for any supervisory decision (Article 33 SSM-FR), as well as on the notification of ECB supervisory decisions (Article 35 SSM-FR).

However, national administrative laws often contain more detailed procedural rules, such as deadlines, specific notification obligations or specific requirements with regard to form. Furthermore, each Member State draws a different line between substantive and procedural provisions – sometimes material provisions applying to the supervision of banks are stipulated in a separate set of rules from procedural provisions, such as deadlines, notification obligations, sanctions, the right to be heard or the right to appeal. Sometimes, these procedural provisions are integrated into the material provisions. The question that arises is to which extent the ECB can be bound by national procedural law: how far are the procedural elements

⁴⁹ *Engel et al v The Netherlands* App no. 5100/71 (ECtHR, 23 November 1976)

⁵⁰ E.g. C-489/10 *Bonda* ECLI:EU:C:2012:319; C-617/10 *Åklagaren v Akerberg Fransson* EU:C:2013:105.

⁵¹ Christoph Grabenwarter and Anna Katharina, 'Justiz- und Verfahrensgrundrechte' in Dirk Ehlers (ed) *Europäische Grundrechte und Grundfreiheiten* (De Gruyter 2014); Jörg Gundel, 'Justiz- und Verfahrensgrundrechte' in, Dirk Ehlers (ed) *Europäische Grundrechte und Grundfreiheiten* (De Gruyter 2014); Peter Jedlicka, 'Vewaltungsgeldbußen im SSM – Steht der gewährte Rechtsschutz für Kreditinstitute im Einklang mit der Rechtssprechung von EGMR und EuGH?' (2016) *Zeitschrift für Finanzmarktrecht* 481.

of certain material provisions stemming from implementation of the CRD IV part of that implementation and when are they purely national administrative law?⁵²

One practical way to answer this question is to say that procedural provisions may only be applied by the ECB insofar as they clearly stem from EU law. For example, the CRD IV does contain some procedural provisions, such as Article 22 CRD IV on the assessment of qualifying holdings in a credit institution, which stipulates in its paragraph 2 that competent authorities shall have a maximum period of 60 working days from the day they are notified of an intended acquisition. In these cases, this deadline will have to be applied by the ECB as implemented. However, there are less clear-cut examples of procedural provisions in the CRD IV, such as the assessment of suitability of members of the management body or key function holders. Here, the CRD IV only stipulates the material criteria that these persons have to fulfil, leaving it open to supervisory authorities to determine the process for assessing these criteria. Is this process then part of the implemented EU law that has to be applied by the ECB or can the ECB develop its own process, being bound only to ensure that the relevant persons fulfil the material suitability criteria as implemented? In practice, this problem has been solved with a compromise: the ECB has developed its own rather high-level assessment process through its Fit & Proper Guide,⁵³ while national law may add more specific procedural provisions.

4. Remedies

From the credit institutions' perspective, the direct application of national law raises the question of what kind of remedies are available against supervisory decisions⁵⁴ taken by the ECB or national authorities.

⁵² Klaus Lackhoff, 'Single Supervisory Mechanism – A practitioner's guide' (Beck 2017).

⁵³ ECB (n 49).

⁵⁴ With regard to 'decisions' taken by the ECB, within the meaning of administrative acts as defined in Article 288 TFEU, it is important to distinguish between the following: simple supervisory decisions (e.g. granting a license, approving a qualifying holding, approving a reduction of own funds, an application of a waiver, or the suitability of a member of a management body); supervisory measures (Article 16 SSM-R based on Article 104 CRD IV), which are meant to reinstate legal compliance

Supervisory action generally takes the form 'decisions'. It is important to determine whether the ECB or the national competent authority ultimately issues a supervisory decision containing a supervisory measure or imposing a sanction, as this determines the remedies available to the addressee of the decision. Decisions issued as decisions of the ECB ('on ECB paper') may only be reviewed at the ECB-internal administrative board of review (Article 24 SSM-R) or before the CJEU. Decisions issued by national competent authorities may be challenged before national administrative courts. In terms of European integration, this makes a big difference, especially as national courts have different bodies of case-law to refer to as compared to the CJEU, which has yet to develop its own case-law on this subject-matter and is limited to reviews pursuant to actions for annulment under Article 263 TFEU (recital 60 to the SSM-R). Thus, no actions based on Article 261 TFEU can be brought.⁵⁵ Such actions could have been relevant for remedies against pecuniary penalties imposed directly by the ECB (Article 18(1) SSM-R).

Another complication arises from the fact that national competent authorities maintain far-reaching powers in areas for which the ECB is ultimately competent. In many cases, they prepare draft decisions that are then adopted by the ECB according to its decision-making procedure (see e.g. Article 14 or 15 of the SSM-R). In procedures pursuant to Article 15, national competent authorities assess a proposed acquisition (based on their implementation of Articles 22 and 23 CRD IV) and submit a draft decision to the ECB to either oppose or not oppose the acquisition. The *Consiglio di Stato* recently referred an interesting question arising from such a situation to the CJEU in a request for a preliminary ruling⁵⁶ about the legal nature of draft decisions submitted by national authorities to the ECB and the basis on which the ECB makes its decisions. The status of these draft decisions is very relevant for present purposes as these decisions can be characterized as an

(e.g. by imposing additional own fund or liquidity requirements, by limiting variable remuneration, or by restricting business); and administrative sanctions (Article 18 SSM-R), which generally consist of pecuniary penalties imposed for breaches of applicable prudential provisions.

⁵⁵ Jedlicka (n 51); Gijbert ter Kuile, Laura Wissink and Willem Bovenschen, 'Tailor-made Accountability within the Single Supervisory Mechanism' (2015) 52 *Common Market Law Review* 155.

⁵⁶ Case C-219/17 *Berlusconi and Fininvest v Banca d'Italia*.

instance of 'the ECB applying national law': while national authorities draft the decision, with their expertise and knowledge of the national particularities, they are ultimately adopted by the ECB. The Court can deal with the question of whether an action for annulment against a decision of the ECB is sufficient if the decision is based on a draft proposal of a national competent authority, in particular if the decision of the national competent authority is solely based on national law and, in this case, national case-law. The Court can also say something about the legal nature of national competent authorities' draft decisions submitted to the ECB, especially as the ECB is not bound by them.

In the national context, the problem could be turned around in cases where national competent authorities act upon instructions of the ECB (Article 9(1) SSM-R). In these cases too, the question can be asked whether the credit institution has a sufficient remedy in being able to appeal only against the national competent authorities' decision and not the underlying instruction of the ECB.

To summarize, the supervision model set up by the SSM-R gives rise to many challenges with regard to the availability of effective remedies. The first issue that arises is that of the competent authority to supervise credit institutions. Identifying the competent authority is complicated by the fact that the SSM-R does not comprise sufficiently clear-cut criteria to determine whether the ECB or the national authorities are competent.

The second issue relates to the fact that it is extremely difficult to assess and characterize the nature of decisions taken by the ECB and the national authorities. The scenario which raises the fewest difficulties involves decisions taken by the ECB on the sole basis of EU law (e.g. application of provisions that do not involve national rules). Provided that the ECB is competent to exercise its supervision powers, the CJEU then has sole jurisdiction to review its decision. However, given the complexity of the mechanism, it is likely that other scenarios will arise. First, what happens when the ECB applies (and thus interprets) national law? The CJEU will have jurisdiction since the decision at stake has been taken by an EU institution, but it does not have jurisdiction to review national law. The CJEU would be faced with an unprecedented challenge, since the Treaties do not provide for any mechanism allowing the Court to refer questions of interpretation of

national law back to national courts. Second, how will national courts deal with cases where applicants challenge a decision adopted by a national authority that has done so on the basis of the ECB's instructions? Will applicants have to challenge both the 'national' decision before national courts and the ECB's instructions before the CJEU? How will the CJEU qualify the ECB's instructions? As decisions or as preliminary acts, which, as such, may not be challenged? What about the cases where a national authority acts on the basis of the ECB's instructions but misinterprets these instructions? How will national courts and the CJEU cooperate in a manner that does not undermine the EU primacy principle and ensure that EU law is applied consistently and uniformly across Member States?⁵⁷

Third, what happens when national authorities impose penalties in respect of breaches of national provisions transposing the SSM-R and Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms? The CJEU has very recently ruled that such decisions are not governed by national law but rather by Article 65(1) of Directive 2013/36, i.e. by EU law.⁵⁸ The second and third issues also give rise to a risk of lengthy procedures, especially when decisions are being simultaneously challenged at national and EU levels, such as replies to requests for preliminary rulings. Overall, there is a risk that the remedy regime as set up does not satisfy the due process requirements of Article 6 ECHR and Article 51 CFR nor Article 13 ECHR on effective remedies. Further analysis is, however, beyond the scope of this paper.

Overall, as far as the availability of remedies is concerned, the SSM-R thus raises more issues than it solves.

⁵⁷ Some of these questions are discussed by Andreas Magliari, 'Il *Single Supervisory Mechanism*' e l'applicazione dei diritti nazionali da parte della banca central europea,' (2016) <https://dottoratoblog.files.wordpress.com/2016/01/magliari_il-ssm-e-lapplicazione-dei-diritti-nazionali-da-parte-della-bce.pdf> accessed 3 January 2018, at 32.

⁵⁸ Case C-52/17 *VTB Bank (Austria) v. FMA* at 41.

IV. THE SSM AS A HYBRID MODE OF EUROPEAN INTEGRATION

It follows from the discussion above that not only are EU and national competences intricately intertwined, but so are EU and national laws. Nothing new so far, some could be tempted to say. The EU, like other federal polities, has indeed traditionally been characterized by a complex division of competences in many areas, where it is difficult to delineate the EU and national levels of governance and where EU and national laws are therefore deeply intertwined. However, the above discussion reveals that the specific features of the SSM-R, including the application of national law by an EU institution for the first time in the history of European integration, imply a new mode of European integration. This new way for EU law to penetrate into the national legal orders relates to three important aspects of the theory of European integration, as defined in the introduction: the mode of execution of EU law, the founding principles of EU law, and the role of EU institutions. These three aspects are discussed in turn below.

1. The SSM as a Hybrid Mode of Execution of EU law

The SSM represents a unique way to further European integration. On the one hand, it combines features of traditional forms of European integration, including: (i) situations where the ECB applies EU law i.e. instances of direct administration/enforcement of EU law; (ii) situations where national supervisors apply EU law, i.e. instances of indirect administration/enforcement of EU law; and (iii) situations where the ECB may instruct national supervisors, i.e. other instances of indirect administration. Such instances may already be found in other areas, in particular the law of state aid, when national authorities are required to recover an incompatible aid.⁵⁹

On the other hand, the application of national law by the ECB is an undeniably novel feature. From a European integration theory perspective, this means that an EU institution must draw on national law to carry out the tasks entrusted to it by EU law. This model does not correspond to any

⁵⁹ Andreas Witte, 'The application of national banking supervision law by the ECB: Three parallel modes of executing EU law?' (2014) 21/1 Maastricht Journal of European and Comparative Law 89' at 97s.

traditional scheme of execution of EU law. It does not involve direct enforcement of EU law. If the ECB does directly supervise credit institutions, it not only applies rules adopted at EU level, but also applies national rules that are intended to implement EU acts of secondary legislation. However, this situation is distinct from the indirect enforcement of EU law model, since the supervision is operated at EU level and not at national level.

Instead, the governance model set up by the SSM-R consists of the EU legislator adopting rules that are subsequently transposed into national legal systems before being applied by an EU institution in decisions about national credit institutions.⁶⁰ Thus, rules move back and forth from the EU legal order to national legal orders. This is coupled with a mix of direct execution of EU law, an EU institution enforcing a set of rules vis-à-vis individuals or legal persons, and a hybrid mode of execution of EU law, an EU institution applying EU rules as transformed by national authorities.

Thus, it may be concluded that the SSM breaks with traditional modes of European integration, and constitutes a hybrid mode of execution of EU law in the sense that: (i) it furthers European integration to the extent that supervision *per se* has been centralized in the hands of the ECB, but (ii) it limits European integration to the extent that it still leaves it up to the Member States to decide on *how* to supervise the credit institutions covered by the SSM-R.

Through this unique interplay between EU and national supervisory competences and prudential laws, the operation of the SSM may have deep implications for the founding principles of EU law.

2. The SSM in Light of the Founding Principles of EU law

The SSM has substantial implications for two main principles of EU law, namely the overarching principle of the autonomy of the EU legal order and the substantive principle of non-discrimination, which mirrors that of equal treatment.

⁶⁰ Magliari (n 59) describes it as a 'circular movement', at 26-30.

A. The Autonomy of the EU Legal Order

Regarding the autonomy of the EU legal order, there is little doubt that having an EU institution apply national laws is a real challenge for the principles of effectiveness, consistency, uniformity, direct effect, and primacy.

One might indeed wonder whether the complex supervisory architecture described above complies with the principle of effectiveness of EU law by creating a situation that could lead to an ineffective supervision of credit institutions.⁶¹ How can the ECB possibly pursue effective supervision while applying more than a dozen national laws? Is the ECB able to deal with the particularities and nuances of the national legal orders? In addition, as seen above, the many complexities of the SSM-R are likely to be exposed to litigation, not only on the rules on supervision themselves but also on the respective jurisdictions of the CJEU and of the national courts.

In the same vein, having an EU institution apply national law, which itself transposes EU acts of secondary legislation, might undermine the principles of consistency and uniformity, which are central to the application of EU law, since the ECB could be led to apply the same provisions of EU law differently across the Member States.

Finally, the SSM-R also raises the issue of the primacy principle, which is crucial for the preservation of the autonomy of the EU legal order. Admittedly, Recital 34 provides that the application of national law by the ECB 'is without prejudice to the principle of the primacy of Union law.' Such application must therefore be carried out to the extent that it does not breach this founding principle. But determining the extent to which a national rule complies with EU law is an extremely difficult task, especially because the

⁶¹ See Eddy Wymeersch, 'The Single Supervisory Mechanism or "SSM", part one of the Banking Union' (2014) European Corporate Governance Institute (ECGI) - Law Working Paper 240/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397800&rec=1&srcabs=2403859&alg=1&pos=5> accessed 3 January 2018, at 5: 'As long as regulation and supervision were national, these differences did not create internal tensions, but led to significant cross-border friction [...]. In the future the opposite is likely to occur, which will affect the effectiveness of supervision, as the single supervisor will be obliged to act on the basis of divergent 'underlying' national regulations in different Member States.'

relevant EU acts of secondary legislation leave many options open to the Member States.

B. The Principle of Non-Discrimination

Turning now to the substantive principles of non-discrimination and equal treatment, the application of national law by the ECB to the significant institutions alongside the tasks carried out by national supervisors vis-à-vis less significant institutions might entail two sets of implications.

Firstly, significant banks might be supervised differently across Member States. If Member State A has more stringent rules than Member State B, the ECB will apply more stringent rules to credit institution A than to credit institution B. As a result, significant credit institutions might be discriminated against on the basis of their place of residence. The SSM therefore does not solve the issue that supervision may still be more or less stringent across Member States.

Secondly, there is a risk that the ECB, when supervising a significant institution in Member State A, could interpret and apply a national rule in a manner that is inconsistent with the interpretation of the national supervising authority that has retained the competence to supervise less significant institutions. Once again, this is likely to give rise to litigation and raise issues as to which of the EU or national courts has jurisdiction to settle the disputes.

3 The SSM and the Role of EU Institutions

From a broader perspective, the SSM-R raises doubts about the functions that can be properly performed by EU institutions. It should be recalled, in this respect, that one of the main purposes of the European Union is to create 'an ever-closer union among the peoples of Europe', which necessarily requires going beyond, and sometimes even conflicting with, national interests. This can be compared to the tasks carried out by the Member States at the national level which seek to pursue the national public interest, which in turn subsumes the interests of the individual members of their polity.

In this regard, the CJEU has already described the Community (now Union) system as being 'designed to ensure that the general interest of the Community [Union] would be protected'⁶² against national interests which, if they were to prevail, could jeopardize the sustainability of the whole system. In other words, it has drawn a clear distinction between the respective interests of the Member States and the Union.⁶³ The EU institutions are therefore logically under an obligation to pursue, develop, and preserve the Union's general interest. The Commission, which 'shall promote the *general interest of the Union*',⁶⁴ is the institution which embodies this general interest to the greatest extent. As the General Court has put it, the Commission 'exercises its functions entirely independently from the Member States in the general interest of the Community [Union]'.⁶⁵ The same goes for the Council, even if it is, admittedly, a platform where Member States may raise their 'national voices'. The Court has stressed that, when adopting new uniform rules at EU level, the Council is 'required to take account not of the special interests of the various Member States, but of the general interest of the Community [Union] as a whole'.⁶⁶ As a result, the EU secondary acts of legislation also necessarily embody the Union's general interest.⁶⁷

Where does the ECB, to the extent that it applies national laws while carrying out its supervisory tasks, lie? The SSM-R is the result of tough negotiations between Member States, which have ultimately consented to a more centralized supervision of their credit institutions without agreeing to a uniform way of supervising them. Two situations should be distinguished.

⁶² Case 231/78 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* EU:C:1979:101 at 15.

⁶³ See, for instance, Case 2/60 *Niederrheinische Bergwerks - Aktiengesellschaft and Unternehmensverband des Aachener Steinkohlenbergbaues v High Authority of the European Coal and Steel Community* EU:C:1961:15 at 145.

⁶⁴ Article 17 TEU [emphasis added].

⁶⁵ Case T-41/98 *Nederlandse Antillen v. Commission* EU:T:2000:36 at 59.

⁶⁶ Case C-150/94 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* EU:C:1998:547 at 62. See also, in the same vein: Case 46/76 *W. J. G. Baubuis v The Netherlands* EU:C:1977:6 at 29.

⁶⁷ See, for instance, Case C-128/89 *Commission v. Italy* EU:C:1990:311 at 14 and Case C-282/90 *Vreugdenhil v. Commission* EU/C/1992/124 at 24.

When the ECB applies regulations and directives that do not leave the Member States with any leeway, it can be argued that it promotes, like any other EU institution, the general interest of the Union. However, the same cannot be said of situations where it applies national laws through which Member States have exercised the options made available to them by the EU secondary acts of legislation. Indeed, such national laws constitute a means for the Member States to protect their own individual interests and thus to preserve their own policy choices. As a result, the ECB is no longer safeguarding the EU common interest, but also necessarily individual national interests, which may sometimes be at odds with the sustainability of the whole system. This aspect clearly breaks with the traditional modes of European integration: the ECB is now an EU institution which does not solely embody the Union's interests, intended to subsume national ones, but also preserves national particularities.

V. CONCLUSION

This paper has discussed the peculiar features of the SSM in light of the theory of European integration and has argued that the ECB's application of national laws while supervising significant credit institutions breaks in several regards with the traditional modes of European integration.

The SSM-R comprises several unique features relating to the division of competences between the ECB and national supervisors and the relationship between EU and national laws. The application of national laws by the ECB has significant practical implications, including the identification of the national provisions which qualify for direct application, the necessity of applying supervisory rules uniformly across Member States, the application of procedural rules in the absence of common European rules, and finally remedies. Overall, this paper claims that the SSM may be described as a hybrid mode of European integration.

The issues that stem from the new supervision regime are, for the most part, not entirely new (for example, the division of competences between the EU and national levels and the separation of EU and national laws), but they have become more pressing. It is likely that they will give rise to unprecedented complexity in cases that will with increasing frequency be brought before EU and national courts.

It remains to be seen, in practice, whether the system set up by the SSM-R is sustainable and ultimately allows for better and more efficient supervision of credit institutions, which eliminates or at least substantially mitigates the systemic risks that were identified during the global financial crisis and during the Eurozone crisis.

It equally remains to be seen whether the ECB and the national supervisors, on the one hand, and EU and national courts, on the other, will depart from the traditional ways of furthering European integration to the extent that the SSM-R invites them. Indeed, as shown earlier, it is likely that the ECB will rely as much as possible on EU law when exercising its supervisory powers. This approach, while perhaps blurring the variation in national implementations of EU law and the options and discretion left to Member States, would nevertheless allow for more clarity, and thus legal certainty, and would be more consistent with the principles of non-discrimination and equal treatment. The sustainability of the system also strongly depends on how the ECB will apply these rules in practice and how national supervisors cooperate with them. Similarly, the EU and national courts will play a significant role: it remains for them to establish a clear path to the otherwise complicated system of judicial review stemming from the SSM-R, for example through broad interpretation of the competence conferred to the ECB or broad application of the direct effect principle. In other words, it remains to be seen to what extent the various actors involved will make use of the tools traditionally used to further European integration. Provided that supervisors and courts cooperate, it is possible that, in practice, the SSM will ultimately share more features with the direct execution of EU law model than it does under a literal interpretation of the applicable legal provisions.