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Limitations on supervisory powers based upon fundamental rights and SSM distribution of enforcement competences

A foreword

1.- After the insightful and comprehensive presentation of Prof. Van Bockel, my first imperative is to avoid any unnecessary duplication, for a "bis in idem" would be quite ironical in the circumstances. I take thus a step back from the "ne bis in idem" and *a broader view on the coexistence of national and EU law within the SSM and its interplay with fundamental rights and other constitutional limitations* on supervisory powers arising out of the vertical European/national distribution of competences. In this vein, I will also touch on the "ne bis in idem", but in a wider perspective, trying to explore some of the institutional concerns associated with coexistent or alternative European and national levels within the SSM. Here, many fundamental rights are called to action (from due process and data protection, to double jeopardy and fair trial, but to mention a few), but I will mostly focus – alongside the reasoning of the ECtHR *Franzo Grande Stevens* decision – on fair trial and, to a lesser extent to avoid duplications, "ne bis in idem".

2.- In my view, a good starting point for the discussion of the coexistence of national and EU law levels within the SSM and of its implications on the ways supervisory, administrative and punitive measures must be adopted and subject to proper judicial control to ensure consistency with overarching constitutional principles lies on four *just exemplary* but certainly problematic areas. They revolve around: a) The vertical distribution of *regulatory* competences (Articles 4(3) and 9 SSM Regulation); b) ECB role of guidelines, recommendations or general instructions to NCAs for the performance of supervisory tasks and the adoption of NCAs decisions; c) ECB enforcement of national legislation implementing EU law (article 4(3) SSM Regulation); d) the distribution of sanctioning powers between the ECB and NCAs (Article 18 SSM Regulation).

ECB regulatory powers: limits from the constitutional mandates and fundamental rights

3.- Starting from the question on the ECB regulatory powers, I find that it is neatly showing that: (a) the constitutional distribution of competences within the SSM is likely to be more ambiguous than necessary; (b) despite the somehow clearer horizontal distribution of regulatory competences between the EBA and the ECB, ECB supervisory powers are possibly extending beyond direct and indirect oversight to embrace also secondary regulation where Union law is conceived as incomplete and grants "competent authority" options and discretions. This is highly consequential because the line between ECB and NCAs regulatory competences is quite uncertain and this materializes a risk of overlaps and conflicts of attributions; (c) fair trial and other fundamental rights come into play not only in respect to the exercise of prudential supervisory tasks but also with regard to regulatory supervision.

4.- To make short a quite long and controversial story on this point, it is sufficient to say that on the ECB regulatory powers in respect to the options and discretions granted to competent authorities by CRD IV/CRR, two conflicting readings of the SSM regulation are possible and witnessed in the literature. Failing a say of the CJEU so far, there are good reasons for both.

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5.- A first line of reasoning points out that, except for the regulations to be issued in the framework of indirect supervision under Article 6, Article 4(3) expressly reserves to the ECB the exclusive possibility of adopting regulations "*only to the extent* necessary to organize or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation". This is read as confining the regulatory role of ECB only on purely organizational matters. The arguments used to support this conclusion are two-fold. One f*ormal:* Article 9(1) extends to the ECB the powers granted to national competent authorities "*unless otherwise provided for by this Regulation*". Article 4(3) would in fact "provide otherwise" limiting regulatory powers only to organizational matters. One s*ubstantive:* if the ECB were empowered to exercise NCAs' options, it is argued that this would be done for significant credit institutions only and "this would jeopardize the level playing field" in each Member State because the ECB and the NCA could exercise the options and discretions differently for significant and less significant credit institutions".

6.- A second line of reasoning, that we are inclined to follow, suggests that Article 4(3) can be read as limiting the scope of ECB regulation where Union law (herein included national legislations exercising Member States options) is already a complete body of primary and secondary rules which needs only to be enforced (and here the ECB regulatory scope shall be mainly organizational, in a broad sense of the expression, though). The ECB regulatory power under Article 132 TFEU and 34 of the Statute retains however a role, *within the limits of the tasks conferred on it* and with the functional scope of implementing them (and "*to the extent necessary to it*"), where Union law is incomplete and where in particular it defers regulatory choices to competent authorities. According to this view, Article 132 TFEU and Article 34 and 25(2) of the ECB Statute must be read in conjunction with the SSM Regulation and the interpretation of Articles 4(3) and 9 of the SSM Regulation should be done in light of recital (34).

7. There are, to my mind, literal and legislative history arguments supporting one such a conclusion.

a) Article 132 TFEU and Article 34 and 25(2) of the ECB Statute must be read in conjunction with the SSM Regulation. The former expressly stipulate that the ECB is granted a *general* power "to make regulations *to the extent necessary to implement its tasks*". Both Treaty and Statute enabling provisions, albeit adopted once the ECB was vested only with monetary policy functions and primarily set out with a view to the monetary functions conferred upon the ECB, are also made applicable to the prudential tasks that could be extended to the ECB under Article 127(6) TFEU, as made clear by Article 25(2) of the ECB Statute. It is worth noting, moreover, that both Article 132 TFEU and Article 34 of the Statute provide that, to the extent necessary to implement the tasks conferred on it, "the ECB *shall* make regulations". In this way both provisions could even suggest that the attribution of implementing regulatory powers could be an automatic effect of the conferral of the specific prudential tasks conferred to the ECB without the need of any complementary specification by the Council regulation conferring them under Article 127(6) TFEU. This would militate against any reading of SSM Regulation conducive to an excessive limitation of the ECB implementing regulatory powers, and in particular against a restrictive interpretation of Article 4(3) suggesting a strict reading of that provision. One could object, though, that, whilst Article 132 TFEU and Article 25 of the ECB Statute make reference to these regulatory powers as part of the ECB "constitutional" endowment in the matters deferred to it, Article 127(6) specifies that "the Council *may* confer specific tasks" and therefore that the Council, in its political discretion, could also decide to confer prudential tasks strictly confined to supervision with express exclusion of regulatory powers in respect to the same matters. In the same vein, the first period of Article 25(2) of the ECB Statute could be interpreted so as to emphasize that the conferral of the specific tasks is in any event "in accordance with any decision of the Council under Article 127(6)". However, it could also be argued to the contrary, that, in principle the Treaty is willing to confer on the ECB regulatory powers aligned with the specific supervisory tasks attributed to it under Article

127(6) due to the "to some extent illusory"[1] distinction between these two functions. Whatever the preference for the constitutional argument based on the Treaty, one should be careful, therefore, in construing the SSM Regulation in a way that would deprive the ECB of its general power to make regulations "*to the extent necessary to implement* the tasks defined in Article 25(2)".

This reading could be supported, on one count, by a better consideration of the relationship existing between Article 4(3), paragraph 1, and Article 4(3), paragraph 2. It is quite apparent, indeed, that these two paragraphs are strictly related (the *incipit* of paragraph 2 makes explicit reference "to the effect" of paragraph 1) and that they cover only situations (that are the vast majority) that are already *fully regulated* by Union law (herein included national legislation implementing Directives and exercising national discretions). In this context, Article 4(3) is aimed at preventing the ECB from adding additional regulatory requirements. This is true in principle, although the expression "organize or specify arrangements for the carrying out of the tasks" leaves some leeway for intervention. However, these two paragraphs do not consider in any way how the ECB could exercise its specific tasks where Union law is incomplete and in particular where Union law simply defers a regulatory role to competent authority in order to complete the regulatory framework for supervisory purposes. In this domain, it is our understanding that the ECB can make regulations to the extent necessary to implement the specific tasks conferred on it.

This seems further confirmed by the wording of recitals (32), (34) and (45) of the Regulation itself. Indeed these recitals would likely be inconsistent with a restrictive reading of the Regulation, whilst they seem to be fully aligned with the idea that the rule making power under Article 132 TFEU is still available to the ECB (recital 32), that competent authority options within the SSM shall be exercised by the ECB, making use of its general regulatory empowerment (recital 34) and that the powers that "Union law on the prudential supervision of credit supervision confers on competent authorities" should be conferred on the ECB "to the extent that those powers fall within the scope of the supervisory tasks conferred on the ECB", because "for participating Member States the ECB should be considered the competent authority and should have the powers conferred on competent authorities by Union law" (recital 45). It is good interpretative practice to interpret directives and regulations in light of their recitals and to read legislative statements (albeit inserted solely within the reasoning of the legislative act) in such a way that they make sense in their context rather than in ways difficult to reconcile with the text. Indeed, the fifth period of recital (34) seems to address specifically the issue of the national options and discretions granted by the CRD IV/CRR compact and stipulates that "(CRDIV/CRR) *options should be construed as excluding options available only to competent or designated authorities*". This wording seems to suggest that, since after the entry into force of the SSM the ECB has taken over the role of competent authority in the participating Member States, the ECB also replaced the national competent authorities as sole entity within the Euro area vested with the power to exercise such competent authority options. In other terms, recital (34) seems to suggest that in its supervisory action the ECB, whilst still subject to *national legislative options*, should not encounter (nor pay any deference to) national discretions embedded in the CRD IV/CRR compact and qualified herein as national competent authorities options. This is so because such options relate to prudential tasks conferred to the ECB by the SSM Regulation and for such tasks the ECB is the competent authority.

b) Legislative history, in turn, offers some useful insights. The original wording of Article 4(3) in the 2012 Commission proposal (COM(2012) 511 final) was as follows: "Subject to and in compliance with any relevant Union law rule and in particular any legislative and non-legislative act, the ECB may adopt *regulations* and recommendations and take decisions to implement or apply Union law, *to the extent necessary to carry out the tasks conferred upon it by this Regulation*". Current recital (34) was not present in the original proposal whereas current recital (32) was already contemplated as recital (26) and current recital

[1] Ignazio Angeloni, "Rethinking banking supervision and the SSM perspective", speech delivered at the conference on "The new financial architecture in the Eurozone", European University Institute, Fiesole, 23 April 2015, accessibile at www.bankingsupervisio.europa.eu/press/speeches

(45) was already contemplated as recital (30). The explanatory report confirmed, at paragraph 4.1.3, the ECB regulatory competences under Article 132 TFEU. The EP Committee on Constitutional Affairs opinion of 27 November 2012 (2012/0242-CNS) proposed an amendment to Article 4(3) and namely that the ECB may adopt regulations to the extent necessary to carry out the tasks conferred upon it by the Regulation "*and only where those Union acts do not deal with certain aspects necessary for the proper exercise of the ECB's tasks or do not deal with them in sufficient detail*". This proposal was adopted by the Thyssen Report tabling the amendments to the Commission proposal on behalf of the EP Committee on Economic and Monetary Affairs of 3 December 2012 (A7-0392/2012). It was only with the second round of EP amendments adopted on 22 May 2013 that the original Article 4(3) was modified and adopted in its current text and, at the same time, was inserted a new recital (26b), expressly providing that options provided for in Union law "should be construed as excluding options available only to competent or designated authorities" (as currently set out in recital 34). The intention of the drafters might have well been, thus, to state that Article 4(3) could limit the extent of the powers to make regulations conferred to the ECB because this limitation was confined to situations where Union law was complete and recital (34) clarified that, where this was not the case, as it was precisely where Union law granted competent authority options, the ECB would have exercised such options (to that end making full use of its regulatory powers).

c) Also a functional interpretation could support this conclusion. Competent authority options and discretions granted by the CRD IV/CRR compact are given to the supervisory authority because of its special position and in particular taking into account the informational advantages associated with supervisory activity. This special position, within the SSM, has been transferred, at least in respect to significant banks, to the ECB and, consistently, also the power to exercise competent authority options should follow the same principle of attribution of competence. If one accepts this conclusion, a final question arises on whether the ECB empowerment to exercise competent authority options and discretions for participating Member States is general or confined to prudential options for significant banks only. In the latter case - that is to say, if NCAs would retain the power to exercise national options and discretions in respect to non significant banks – the allocation of rule making within the SSM for the exercise of competent authorities options and discretions would be conducive, as suggested in the literature by those advocating the first reading on limited ECB regulatory powers to a disparity of requirements for significant and less significant banks, with a uniform exercise of the options limited to significant banks. This is something that, functionally, is widely believed quite undesirable. We note, however, that Article 4(1) stipulates that "within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be *exclusively competent* to carry out, *for prudential supervisory purposes*, the following tasks in relation to *all* credit institutions established in the participating Member States (…)". This suggests that the attribution of competence to the ECB, whilst limited to the special tasks granted for prudential supervisory purposes, is *exclusive* and extends to *all* banks. The ECB could thus qualify as "competent authority" for the purposes of the exercise of competent authority options and discretions also for less significant banks. The basic principle of ECB exclusive responsibility for the tasks conferred on it was a cornerstone of the Commission proposal and was considered as such throughout the legislative process, although, as a compromise solution in the distribution of tasks within the SSM, the Regulation provides under Article 6(4) that responsibility for the direct exercise of some of the tasks conferred on the ECB are attributed to NCAs in the spirit of the subsidiarity principle. But also within this peculiar legislative allocation of (certain) responsibilities the ECB retains, in substance, a right of final say over the prudential tasks conferred on it by SSM Regulation also for less significant banks, as shown by the possibility granted to it to "issue regulations, guidelines or general instructions to NCAs" (Article 6(5)(a) of the SSM Regulation) and to "exercise directly itself all the relevant powers" for one or more less significant credit institutions "when necessary to ensure consistent application of high supervisory standards" (Article 6(5)(b) of the SSM Regulation). In other terms, it is certainly true that the attribution of exclusive competence set out in Article 4(1) must be read in conjunction with the provisions of Article 6, that stipulates that both NCAs and the ECB exercise competences with regard to less significant institutions. We note,

nonetheless, that the cooperation framework set out by Article 6 was basically tailored as a *legislative* attribution to the NCAs of the direct exercise of (most *but not all*) prudential supervisory responsibilities of the ECB with regard to less significant banks. In this way, national supervisors are *also* made competent authorities to some effects, without depriving however the ECB of the role of *primary* competent authority also for less significant banks (as witnessed by Article 6(5) of the SSM Regulation). In conclusion, if one accepts that the exercise of competent authority options and discretions granted by the CRDIV/CRR compact (a) is essential for the performance of the prudential tasks conferred upon the ECB by Article 4(1) and strictly related thereto, (b) is expression of *regulatory* supervision consistent with the ECB rule making empowerment set out in Article 132 TFEU and (c) falls therefore within the ECB remit as competent authority for directly supervised significant bank in compliance with Article 9, expressly extending to the ECB "all the powers (…) which the competent authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation", this could also support the conclusion that the same holds true also for less significant banks, because the ECB is also their *primary* competent authority. In this way the functional argument militating against the balkanization of the exercise of competent authority options and discretions for significant and less significant banks would fade away. In turn, this would make the best of the wording of recital (34) of the Regulation, because it would confirm that within the SSM competent authority options and discretion are no longer the remit of national supervisors.

8.- Despite our preferences, these conclusions are however still provisional and need to be validated by the CJEU. Lacking one such a final say of the CJEU, it seems safe to say that the unsettled interpretation of the SSM Regulation on this point reflects a constitutional ambiguity that fatally features a *de facto* limitation on the smooth exercise of regulatory powers within the SSM with at least two likely implications relevant for the purposes of our inquiry.

a) First, *this opens an unchartered territory to private litigation* to test both the ECB v national allocation of regulatory competences from a constitutional point of view and the principle of effective judicial protection enshrined in the Charter of Fundamental Rights. Supervised credit institutions could potentially use conflicts over vertical distribution of competences under the SSM Regulation to defend themselves from intrusive acts from the SSM supervisors.[2] One such situation will evidently arise where the ECB exercises a competence that it does not hold, or where the exercise of a recognised competence goes beyond its legal scope (i.e. the ECB acts *ultra vires*).

b) Second, we expect that, *from an institutional perspective, this could lead to political compromise and light touch, cooperative, solutions rather than heavy handed unilateral action or judicial claims of conflict of attributions*. In the face of the uncertainties surrounding the allocation of the competent authorities options and discretions, a pragmatic and reasonable response (proportionate but still not completely safe, for it could be considered somehow elusive of the problem) could be indeed the use of ECB guidelines and recommendations to national competent authorities under Article 4(3) for the exercise of such options and discretions. This, in turn, makes it relevant to explore how fundamental rights protection would react to such a course of action and in particular to what extent they would have legal effects and how they would interact with the principle of effective judicial protection.

ECB guidelines, recommendations and instructions to NCAs and right to an effective judicial remedy

[2] In the event of a conflict over the vertical distribution of competences within the SSM, any action initiated by the affected credit institution would not exclude the initiation of other court proceedings. For example, if the ECB were to adopt an act under a competence thought to fall under the scope of a NCA's powers, the latter could request the relevant Member State to institute proceedings against the ECB before the CJEU pursuant to article 263 of the TFEU, first and second paragraphs, to seek annulment of the relevant act. If a NCA were to adopt an act under a competence thought to fall under the scope of the ECB's powers, the latter could institute proceedings against the former before the relevant national courts to seek the annulment of the relevant act.

9.- This takes us to our second example of the interplay between coexistence of EU and national levels and fundamental rights, and in particular the right to an effective judicial protection. Since the ECB can adopt guidelines and recommendations subject to and in compliance with relevant Union law (Article 4(3)) and issue "[regulations], guidelines or general instructions to NCAs" for the performance of supervisory tasks and the adoption of NCAs decisions on less significant credit institutions (Article 6(5)(a) SSM Regulation), 3 questions arise that are relevant to our purposes:

a) First, do they have legal effect and are they reviewable? GCEU decision of 4 march 2015, in case T-496/11, *United Kingdom and Ireland v ECB* confirmed they could depending on the circumstances[3]. *But how often will these circumstances occur (or be held to occur)?*

b) Second, how does the right to an effective judicial protection react to the strict requirements on standing to challenge and admissibility set by the CJEU in respect of act of general application? Indeed, in such cases the act by the ECB will be subject to the legality control of the annulment decisions (pursuant to article 263 TFEU) but, unlike decisions directly addressed by the ECB to a financial entity, the standing of the latter to challenge the act is problematic, because the act needs to be "of direct and individual concern" to the person, or, in case of a regulatory act, "of direct concern", and "does not entail implementing measures".[4] These provisions have been subject to a quite narrow interpretation by EU courts: ever since the *Plauman* decision[5] the courts have granted standing to private parties only if (a) the measure affects the applicant's legal position directly and leaves no discretion to the addressees of the measure who are entrusted with its implementation, i.e. if there is a direct link between the challenged measure and the loss or damage (direct concern[6]); and (b) the measure *"affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".*[7] These criteria (especially the second) have resulted in the exclusion of standing of private parties in cases of EU acts not directly addressed to them in almost all cases. In *Inuit Tapiriit Kanatami* the CJEU also provided a restrictive interpretation for the case of annulment of regulatory acts (where only "direct", but no "individual" concern is required).[8] In practice, this poses a significant challenge, since EU Courts seem more concerned about procedural expediency and the risk of EU courts being flooded with complaints, than about the protection of due process rights. In practice this will mean that general instructions addressed to NCAs by the ECB (typically, for the supervision of less significant entities) cannot be challenged unless the supervised entity can show that it is differently affected than the other potential addressees of the measure; while, even in case of specific supervisory measures, the addressee would have to demonstrate that the instructions leave no discretion to the NCA. Even if the ECB is a bulwark of integrity, the combination of this doctrine with the SSM is a breeding ground for concern: if the ECB were to tailor its instructions, by giving them a formal degree of generality, or giving the NCA formal discretion with regard to implementation, it could well avoid the scrutiny of the CJEU pursuant to the annulment procedure. Challenges based on a purportedly unequal

[3] The Court held indeed that "*case-law is intended specifically to prevent the form or designation given to an act by its author from resulting in its escaping assessment of its legality in an action for annulment, even though it in fact has legal effects". "In the light of case-law, in order to determine whether an act is capable of having legal effects and, therefore, whether an action […] can be brought against it, it is necessary to examine its wording and context. If the act is perceived as only proposing a course of conduct and, therefore, as being similar to a mere recommendation within the meaning of Article 288 TFEU or, in the case of the ECB, Article 132(1) TFEU, it should be concluded that the act does not have legal effects that are such as to render an action for annulment brought against it inadmissible. On the other hand, that examination may reveal that the parties concerned will perceive the contested act as an act which they must comply with, despite the form or designation favored by its author".*

[4] Article 263 TFEU para. 4.

[5] Case 5/62 *Plaumann v. Commission* (1963) ECR-95.

[6] See e.g. Cases 41-44/70, *International Fruit Company BV v. Commission* (1971) ECR 411 (standing was denied on the basis that the approval of a merger by the Commission would not be a direct cause of the loss of jobs in the merged company).

[7] Case 5/62 *Plaumann v. Commission* (1963) ECR-95 at 107.

[8] Case C-583/11 P *Inuit Tapiriit Kanatami and others v European Parliament and Council*, Judgment of 3 October 2013. The General Court has also made a similar interpretation. See Case T-96/10 *Rütgers Germany GmbH v ECHA*, Judgment of 7 March 2013.

exercise of supervisory powers (e.g. the failure to issue similar instructions with regard to entities in a similar position) would be almost impossible in practice.[9]

c) Third, once the decision is subject to implementation by NCAs, it will be certainly subject to challenge before national courts, but can these courts be reasonably expected not to be too deferential in respect of national decisions implementing ECB directions? Sure, if within the procedure the matter of the legality of the previous instructions by the ECB arises, domestic courts should stay the proceedings, and make a preliminary reference to the CJEU, and later decide on the basis of the CJE decision about the legality of the ECB measure. How episodical will it be in practice? We expect that this only viable avenue to challenge the legality of instructions by the ECB to NCAs will prove to be quite exceptional.

The ECB as enforcer of national law and the right to an effective judicial remedy

10.- A third example of the problematic coexistence of national and EU law and fair trial protection is offered by Article 4(4) of the SSM Regulation. Under this Article, "the ECB shall apply (…) where this Union law is composed 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".* No doubt that the CJEU retains the competence for the judicial review of these ECB decisions based upon national legislation. But how does it work in practice? Two options seem to be available.

a) One possibility would be to read the provision as meaning that national law remains national law, and that the ECB only applies it as a result of a specific mandate. In that case, at least in theory, the national court could issue an authoritative interpretation of the national rule exercising the options granted by the EU Directive, or even annul the national rule. It could not, however, annul the ECB acts in application of that national law, for which it would have to make a preliminary reference. The CJEU would have to validate the decision by the national court. In so doing, however, it would have to review that the annulment of the rule or the corrective interpretation issued by the national court does not step over the boundaries of the specific choice granted by the Directive to Member States, and that it does not invade the ECB's supervisory competences, an act for which a determination of the application of national law would be a necessary step.

b) Another possibility would be to read the provisions as meaning that, through the application of the ECB, national law becomes EU law. In such case the CJEU would be entitled to make the authoritative interpretation, and could well answer the preliminary reference without having to make the balancing act of all the superimposed layers of competences. However, this would put under stress the express language of the provision, which refers to "national law"; it would also put the CJEU in the extremely uncomfortable position of having to determine the authoritative interpretation of domestic law, something that the Court was extremely unlikely to do and careful in avoiding so far.

11.- Thus, the first possibility could appear more likely, but its mind-boggling complexity makes it desirable that either the CJEU, by relaxing its *Plaumann* test in the context of banking rules, or the ECB, by relying on acts specifically directed to financial entities (or directed to NCAs, but with a content specifically addressed to a financial entity, and leaving no discretion) provide a channel for a direct review of legality.[10] Though more cumbersome at the initial stage, it would help provide a sounder footing for ECB action, and assess the potential impact of fundamental rights of due process.

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[9] Case T-95/98 *Gestevisión Telecinco S.A. v. Commission* (1998) ECR II-3407, para. 58, which holds that procedures for failure to act are subject to the *Plaumann* test.

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

The distribution of sanctioning competences

12.- A final example is given by the distribution of sanctioning powers within the SSM with the 3 distinct competences of Article 18 of the SSM Regulation:

a) First, those of Article 18(1) for breaches of direct applicable Union law, a competence that in turn could be read either as "bifurcated" under Article 6 and granted in principle to the ECB only for significant banks (this is prevailing view also within the ECB) or as independent from Article 6 and thus granted to the ECB for all banks. It all depends on the reading of the incipit "for the purposes of carrying out the tasks conferred on it by this Regulation";

b) Second, those of Article 18(5) for breaches "in cases not covered by paragraph 1 of Article 18", and in particular: (i) for breaches of national law transposing relevant Directives and (ii) administrative penalties and measures to be imposed on members of the management board;

c) Third, those of Article 18(7) and namely sanctions in accordance with Regulation (EC) 2532/98, in case of a breach of ECB regulations or decisions.

I will expand on the implications of this tripartite system for fundamental rights protection below, after having briefly discussed some overarching questions on the scope of application of the instruments granting fundamental rights.

The ambiguities in the scope of application of the instruments granting fundamental rights

13.- The picture is indeed made even more complex by ambiguities in the scope of application of the instruments granting fundamental rights. Four broad questions arise.

a) To what extent the Charter and the Convention grant equivalent rights? In principle, under Article 52(3) of the Charter, corresponding rights in the Charter should have the same meaning as in the Convention. Will it be so in practice under the CJEU case law or will differences in interpretation weaken the effect utile of one such a principle?

b) To what extent are MS and NCAs subject to the Charter? This is especially pressing, since both SSM and SRM envisage a combination of regulatory and supervisory actions from both EU institutions (the ECB) and national institutions (NCAs and NRAs). Article 51 states that: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law"***.** The answer seems quite clear with regard to the ECB, which is an EU institution. But are NCA to be considered part of an institution of the Union when they are legislatively delegated under Article 6(4) of the SSM Regulation some responsibilities in the performance of micro-prudential tasks on less significant credit institutions? We are inclined to believe they are not, but that they are nonetheless implementing Union law. In turn, are Member States considered to be "implementing Union law" when the distribution of legislative competences envisaged in the CRD IV/CRR Compact contemplates the possibility of Member States exercising choices in the determination of certain prudential measures? To be true, case law by the CJEU is ambiguous in this regard. In *McB* it held that the assessment of the compatibility with the Charter had to be made exclusively in relation with EU provisions (in the case, Regulation 2201/2003, on the recognition and enforcement of foreign judgments in matrimonial matters and matters of parental responsibility), not the national provisions (in the case, the Irish law, which, according to the EU rules, was the one regulating the acquisition of custody rights), thus rejecting the possibility that, in determining custody rights, national law was "implementing EU

law".[11] Similarly, in *Magatte Gueye* the CJEU required a substantive connection between national law and EU Law (the case concerned the relationship of Spanish substantive law on domestic violence, and EU decisions on the standing of victims in such context).[12] Yet, the CJEU has given an ample scope to the language of article 51 in cases where the subject matter was closer to the subject matter of our interest here (i.e. the relationship of EU and national regulatory provisions between themselves, and with enforcement provisions), and where the different provisions are more closely connected by a similar purpose (and the national interests at stake are less obvious). In *Fransson*, it considered sufficient the connection between proceedings for the imposition of administrative penalties and criminal sanctions, and the breach of (EU-regulated) VAT, plus the broad obligation of Member States to *take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion*, to conclude that, when pursuing domestic proceedings based on domestic law to impose penalties, State authorities were "implementing EU law".[13] The contrary opinion of the Advocate General Villalón,[14] which was not followed by the Court, has stirred up controversy,[15] but so far the Court's case law supports the understanding that States are subject to the Charter *when they apply domestic law that has the purpose to enforce EU provisions*. The connection is even closer in the case of the SSM and SRM, where the provisions in the EU rules make reference to the recourse by domestic authorities to inspections and sanctions. The case is even stronger when NCAs apply domestic rules in exercise of discretions granted by EU law. In *NS v Secretary of State for the Home Department* the CJEU clearly stated that, in such instances, State authorities are subject to the Charter.[16]

c) An interesting situation could arise if the SSM and SRM mechanism happens to operate under the aegis of the European Stability Mechanism. Would the Charter apply in this context? In *Pringle* the CJEU held that the Charter was considered inapplicable when Member States take collaborative action outside the EU legal order.[17] The question could arise, however, if a specific supervisory action (or an action with the content of intervention and resolution) is initiated as part of the package of measures indicated by the ESM (e.g. if the bailout is limited to a State's banking sector). In that case, the Charter would be applicable to the ECB actions. To my mind, there would also be a strong argument to apply the Charter if, in executing the Memorandum of Understanding, the NCA concerned makes use of the collaborative structures envisaged in the SSM and SRM (e.g. the "close collaboration" with non-euro States). However, this is a bit of uncharted territory. The CJEU was probably more concerned about the side effects that a full-blown application of EU law to the more flexible structure created with the ESM would have, but surely *Pringle* is not (nor should it be) the last word on the applicability of the EU Charter to collaborative structures outside, yet closely connected, to EU law.

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[11] The mother removed the children from Ireland to Britain after Mr McB had initiated proceedings before the Irish courts to obtain an order securing custody rights, but before the process was completed. Article 2(11)(a) of regulation 2201/2003 stipulated that rights of custody were to be acquired (and, thus, subject to recognition and enforcement) "by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention". The CJEU held that Article 2(11)(a) could not be considered incompatible with the Charter or the ECHR (the case law of the ECtHR on article 8 of the ECHR was used to integrate the meaning of article 7 of the Charter on private and family life). See Case C-400/10 PPU *McB* (2010) ECR I-8965.

[12] In this case the compatibility of a mandatory stay away injunction set forth in Spanish law against offenders in crimes of violence within the family was examined in light of Council Framework decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. The Court held that this was a matter of domestic law, and that the Council Decision did not intend to harmonize the substantive laws in respect of the forms and levels of criminal penalties. See Joined cases C-483/09 and C-1/10 *Magatte Gueye* (2011) ECR I-8263.

[13] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* Judgment of 26 February 2013, at 25-27.

[14] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* AG Opinion.

[15] See e.g. the decision of the German Federal Constitutional Court 1 BvR 1215/07, Judgment of 24 April 2013, where the Court, deciding on a case about the compatibility of German counter-terrorism database with German Basic Law, stated that this was a purely internal matter, and that the distribution of competences between EU and domestic authorities had not been altered by the *Fransson* ruling. See also UK House of Commons European Scrutiny Committee *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion* Forty-third Report of Session 2013–14, 43-49.

[16] Joined cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* Judgment of 21 December 2011.

[17] Case C-370/12 *Thomas Pringle v Government of Ireland* Judgment of 27 November 2012.

d) Having addressed the question with respect to the EU Charter, it is necessary to do the same with the ECHR, which poses challenges of its own. The ECHR is not formally part of EU law, though specific references are made in article 52(3) of the EU Charter, and article 6(2) and (3) TEU. Articles 6(3) and 52(3) indicate the relevance of the ECHR for the purpose of EU law, while article 6(2) contemplates the accession of the EU to the ECHR. A draft accession treaty was negotiated in 2013,[18] but, then, the CJEU held, in 2014, that such treaty (and parts of the ECHR) was incompatible with EU law,[19] mainly because the new powers of the ECtHR would impinge upon the powers of the CJEU.[20] Therefore, up to this point the ECHR does not apply, nor can the ECtHR decide, on actions by EU institutions (including the ECB). However, the ECHR applies to actions by Member States, and, in the past, the ECtHR has held that its jurisdiction to decide on a violation of Convention rights cannot be excluded solely because a State was, simply, giving effect to EU law.[21] Having said that, in most cases where the ECtHR had to decide on the violation of the ECHR by a State giving effect to EU law, the complaint was manifestly unfounded,[22] or Member States had been granted a wide margin of appreciation in implementing EU measures (which means that the action could be easily attributed to the State, and not the EU).[23] This could likely be the case of national legislative options and discretions granted by the CRDIV/CRR compact. Finally, in cases where the State had little margin of discretion, so that the potential violation of the ECHR was (if such violation existed) a direct consequence of the implementation of EU law, the ECtHR was willing to grant an unprecedented breathing space to EU law and EU institutions, by *presuming* that the EU grants an equivalent level of protection to that under the Convention.[24] In its decision of *Bosphorus Airways v Ireland* the ECtHR for the first time examined the merits of a case where domestic authorities were implementing EU law without exercising discretion.[25] The ECtHR was ready to assume that the fact that the State interfered with the property (an aircraft) to comply with its obligations under EU law constituted, in itself, a legitimate interest.[26] It then established that the system of protection of fundamental rights within the EU, albeit providing for limited access to individuals, created a presumption of Convention compliance for acts by a State that gave effect to EU measures.[27] Finally the ECtHR held that the presumption had not been rebutted in the case at hand.[28] One can only emphasize that the ECtHR even failed to undertake the proportionality assessment, which it normally does, even when the interference with property rights (or fundamental rights in general) is based on a legitimate interest. This is the current context. However, it is a context in flux. If the EU accession to the ECHR is

[18] <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf>

[19] Opinion 2/13 of the Court, 18 December 2014.

[20] Some objections had to do with the incompatibility of article 53 of the ECHR, which permits Member States to dispense a greater protection to fundamental rights than the ECHR does, whereas the CJEU had ruled in *Melloni* that Member States could not do that if EU law had fully harmonized the matter, and also with the absence in the draft agreement of the "mutual trust" clause in justice and home affairs, which applies in EU law. But most objections were related to the new powers the ECtHR would gain, such as the applicability of Protocol 16, which permits Member States' courts to send questions to the ECtHR, which could rule on matters of EU law (thereby circumventing the preliminary reference procedure), the implicit possibility that the ECtHR could rule on inter-State disputes (which, by article 344 TFEU are reserved to the CJEU); and the co-respondent system, where both the EU and a Member State could be sued in proceedings before the ECtHR (as, the CJEU held, the ECtHR should not have the power to allocate responsibility between them). See Opinion 2/13 of the Court, 18 December 2014.

[21] Commission Decision Application 11123/84 *Tete v France* Decision of 9 December 1987; Application 17862/91 *Cantoni v France*, Decision of 11 November 1996; Application no. 45036/98 *Bosphorus Airways v Ireland* Decision of 20 June 2005.

[22] E.g. Commission Decision Application 11123/84 *Tete v France* Decision of 9 December 1987.

[23] E.g. in Application 17862/91 *Cantoni v France*, Judgment of 11 November 1996. The ECtHR has reviewed the States' exercise of discretion when giving effect to EU law in light of Convention rights in numerous occasions. See *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288; *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326; *Cantoni and Hornsby*, both cited above; *Pafitis and Others v. Greece*, judgment of 26 February 1998, Reports 1998-I; *Matthews*, cited above; *S.A. Dangeville v. France*, no. 36677/97, ECHR 2002-III; and *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III.

[24] Commission Decision Application no. 13258/87 *M & Co. v. Federal Republic of Germany* Decision of 9 January 1990.

[25] Application no. 45036/98 *Bosphorus Airways v Ireland* Decision of 20 June 2015, 143-148.

[26] *Ibid* at 150.

[27] *Ibid* 159-165.

[28] *Ibid* at 166.

delayed, or even frustrated, the ECtHR could find that its patience has been tested too far, and adopt a less accommodating stance towards the EU.

*Two provisional conclusions on effective judicial protection and "*ne bis in idem"

14.- We can now try to draw from the foregoing two tentative conclusions on the interplay between coexistence of EU and national law within the SSM and fundamental rights, having specific regard to fair trial and effective judicial protection and "ne bis in idem" alongside the reasoning of the ECtHR *Franzo Grande Stevens* decision.

15.- The fundamental right of fair trial seems to require that supervisory powers "severely" (according to the *Engels* test) affecting fundamental freedoms are subject to effective judicial protection and possibly full jurisdiction. A parallel is often instituted in this regard with competition cases. This is right in principle, although I would also recommend a note of caution. It is worth recalling, indeed, that the CJEU found that, in competition cases, the "review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, satisfies the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights of the European Union"[29]. However, it should also be considered that in that field, fines are the major, if not the only, way entities are "severely" affected in their fundamental rights, whereas in this context many supervisory, administrative and punitive measures are highly afflictive (and possess a "coloration pénale" according to the standards of the ECtHR) and are therefore similar in their effect on the recipients to fines in the antitrust sector, thereby requiring that an effective judicial protection be duly warranted. EU courts only review, in principle, *legality*, pursuant to article 263 TFEU, but do not have full jurisdiction (except for what provided in application of Article 261). Moreover, there are significant complexities reflected in the effectiveness of the judicial remedy where the supervisory process under the SSM features a composite co-administration. If the decision is adopted by the NCAs in the context of a composite procedure, where both the ECB and NCAs adopt certain acts, the financial entity is only granted for sure the action to seek annulment of the decision by the NCA (according to differentiated national standards of review), whereas the action to annul the act by the ECB is subject to the extremely restrictive *Plauman* standard. A similar, though even more complex, scenario arises in case the ECB applies national law. It is difficult to see these guarantees as meeting the requirements of effective judicial protection under article 6 ECtHR and 47 of the Charter.

16.- The most desirable, in my view, would be for EU courts to show that, without the need to replace judicial second guessing to complex technical assessments, they can develop a case law of acceptably robust review of administrative decisions. There are arguments to suggest that the standard of the review of the CJEU has evolved over time (the *Remia* decision[30] is often said to have marked a turning point) and that EU courts have grown bolder and more willing to elaborate the criteria of manifest error and excess of power, to grant themselves a sufficient leeway for effective and robust judicial control. They should go even further on the same line.

17.- In the context of fines, it is desirable that full jurisdiction be clearly in place. The reference to Council Regulation 2532/98, whose article 5 introduced full CJEU jurisdiction for sanctions (in conformity with Article 261 TFEU), is currently somehow equivocal. In case of penalties imposed for breach of directly applicable Union law (Article 18(1) of the SSM Regulation), sanctions shall be imposed with respect to the 2532/98 Regulation's "procedure", and "as appropriate". Only in case of sanctions imposed for a breach of ECB regulations and decisions, sanctions *may be* imposed "in accordance with Regulation 2532/98", and

[29] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, "EU Procedural Law", OUP, Oxford, 2014, p. 394 and ECJ, case C-272/09 *P KME Germany* and case C-199/11, *Otis*

[30] Case 42/84 *Remia BV v Commission* [1985] ECR I-2566

SSM rules will be complementary. The same full jurisdiction is due in the review of NCAs' sanctions under Article 6 EuCHR in the wake of the ECtHR *Franzo Grande Stevens* judgment.

18.- Finally, the application of the "ne bis in idem". To my mind, the attribution of decision-making competences to the ECB, the system of instructions to NCAs, and the possibility to instruct on the imposition of penalties in cases where the ECB lacks the competence make the overlapping of sanctions less plausible and can be further mitigated through the development not only of a coordinated investigatory practice, but also the coordinated imposition of penalties. It remains to be seen, however, to what extent the same conduct can give rise to both administrative and criminal penalties (in *Fransson*, the CJEU confirmed its adherence to the approach by the ECtHR, and held that criminal and administrative penalties could be accumulated only provided administrative penalties were truly administrative, i.e. they did not disguise a criminal sanction in nature, a matter that it left the national court to decide), considering that criminal law is highly fragmented along national lines also in the banking sector. And deplorably so.