



BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

The ECB and NCA liability
within the Single Supervisory Mechanism

Raffaele D'Ambrosio

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The economic and technical analysis that forms the basis of the Bank of Italy's central banking and supervisory activity is accompanied, with increasing attention, by legal research into credit and monetary phenomena and, more generally, into the institutional aspects of economic activity.

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FOREWORD

Mads Andenas (*)

It is a pleasure to write a foreword to this important study by Raffaele D'Ambrosio, lawyer in the Legal Services Directorate of the Bank of Italy. He has made important contributions to legal scholarship over the years, and I am particularly familiar with his work on institutional issues regarding central banking, including the liability of banking supervisors. We have exchanged views in our writings, in seminars and during the time he spent at Nuffield College in the University of Oxford. Raffaele D'Ambrosio has taken part in the scholarly discussion at European level for a long time, and is well placed to assist in sorting out the issues now facing us.

European law has gradually moved from the background to centre stage, finally with the Single Supervisory Mechanism making European law more of a primary source than before. The Single Supervisory Mechanism (SSM) is the name for the mechanism which has granted the European Central Bank (ECB) the supervisory responsibility for banks based in participating Member States, starting from November 2014. Eurozone States are obliged to participate, while Member States of the European Union outside the eurozone can participate on a voluntary basis. The ECB will conduct the direct and day-to-day supervision of significant banks. Direct supervision of less significant banking groups will still be carried out by the relevant national competent authorities (NCAs) on a day-to-day basis, but with regular reporting to the ECB.

What is the liability of the ECB and the NCAs within the SSM? The liability of banking supervisors and central banks has been discussed in most Member States. Remedies for savers and investors for lack of supervision have been hotly contested in many countries, and courts and legislators have even limited the liability for unlawful acts to supervised institutions. The complex interaction between general principles of national and EU law, legislation and institutional issues are well illustrated in the judgment of the Court of Justice of the European Union (CJEU) in *Peter Paul and Others v Bundesrepublik Deutschland* [2004] ECR I-09425 where the CJEU took a cautious approach and did not extend liability beyond the limitations imposed in domestic legislation. In *Peter Paul* the CJEU did not address the issue of liability for European institutions. It restricted the rights of savers and investors under the EU banking directives, and thus avoided having to clarify the law on the liability of banking supervisors. The SSM has created a new institutional framework, and the law on liability for the ECB and NCAs now needs addressing, as Raffaele D'Ambrosio has set out to do.

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As a supervisory authority the liability of the European Central Bank can be based on the Single Supervisory Mechanism Regulation (SSMR). Recital 61 of the SSMR (Council Regulation No 1024/2013) refers to the common liability regime provided for under Article 340 of the Treaty on the Functioning of the European Union (TFEU). Raffaele D'Ambrosio tests this approach against the 2012 Basel Core Principles for Effective Banking Supervision and the principles of a single and unitary SSM. He argues that a general liability under Article 340 TFEU is not only unjustified in the light of the Basel Principles but is also inconsistent with a single and unitary SSM.

Within the SSM, the ECB and the NCAs are vested with the same supervisory powers, allocated according to the criteria laid down in the SSMR. Raffaele D'Ambrosio argues that it follows that both the ECB and the NCAs should be made subject to the same liability regime. Moreover, he argues that no limitation of the ECB's liability can induce the ECB to over-rely on the NCAs enjoying a greater degree of legal protection in their respective jurisdictions, and this, in turn, may distort the practical allocation of supervisory powers and responsibilities within the SSM.

Against this background, Raffaele D'Ambrosio argues, a limitation of the ECB's liability should be inferred from the Member States' legislation on the legal protections of supervisors and from the case law of the Court of Justice of the European Union and the "sufficiently serious violation" criterion.

Raffaele D'Ambrosio has developed his case in a clear and convincing manner. He takes it further in identifying different ways to develop the possibility for the CJEU to find a common criterion based on both the gradually more liberal approach of common law courts to the mental requirement of misfeasance in public office (recklessness) and the parallel development of the strict interpretation of *faute lourde* in the French Conseil d'Etat case law. The ways the courts apply the two criteria in the UK and in France, now approach one another. For the CJEU's development of a "sufficiently serious violation" criterion, the multiplicity of interests protected by substantive EU banking law will obviously have an influence on the seriousness of the violation. Also under the jurisprudence of the General Court of the European Union, see *Comafrika and Dole Fresh Fruit Europe v Commission* [2005] II-00409, the complexity of the questions involved and the time constraints to which the supervisor is subject may lead to a limitation of the ECB's liability.

Any limitation of the ECB's liability would follow from the CJEU reading down or restricting Article 360 TFEU. Raffaele D'Ambrosio has provided materials and arguments that raise doubts as to whether this would be sufficient for the IMF to assess the SSM's compliance with the Basel Core Principles, since the latter require a specific rule to be in place on the legal protection for supervisors. Another route could be to change the Basel Core Principles methodology to take account of the jurisprudence on the rules on liability.

Raffaele D'Ambrosio makes a strong case that the ECB's liability is without prejudice to that of the NCAs. The allocation of liability within the SSM basically depends upon the allocation of supervisory tasks and powers. There are cases where the allocation of tasks and powers to the ECB and the NCAs is not crystal clear, even in the light of ECB Regulation No 468/2014, which establishes a framework for cooperation within the SSM (the SSM Framework Regulation). These cases include the day-to-day verification of credit institutions, the adoption of reparatory measures, and ensuring that credit institutions have organisational arrangements in place aimed at attaining a high level of consumer protection.

In other cases, the ECB is still the competent authority, but only the NCAs have the power to act under their relevant national laws. In such cases, where the ECB has the power to give NCAs mandatory instructions, responsibility lies with the ECB and not with the NCAs. Nevertheless, consistently with CJEU case law, the liability of the NCAs cannot be excluded where these enjoy a certain margin of manoeuvre.

An important point is the attempt to make use of domestic courts' case law to assess the ECB's liability in cases of the granting or refusal of banking licences and on-going supervision, which Raffaele D'Ambrosio addresses in parts II, §§ 8.1 and 8.2 of this publication. Uncertainty about the allocation of liability may lead claimants to bring actions against both the ECB and NCAs in the EU and the national courts. In such a case the jurisprudence of the CJEU requires the applicant to first exhaust the remedies for alleged damages under national law and then seek damages against the EU. National courts may in turn consider the need to require the CJEU to give a preliminary ruling on the interpretation of an ECB act under Article 267 TFEU.

A further point concerns the application by the ECB of national banking law, see Article 4(3) SSMR. It is not obvious to me what liability rules should apply in this case, or how the CJEU will assess a failure by the ECB to comply with national law. The CJEU will need to establish criteria to follow in the interpretation of national law, and decide what importance to accord to decisions by national superior courts and how to assess the extent to which national law complies with the relevant directives.

The ECB shall make good any damage caused to third parties by its staff and the members of its bodies. It is still unclear whether the ECB should also be liable for damages caused by other persons acting on its behalf, such as the national members of the Joint Supervisory Teams established and regulated under ECB Regulation No 468/2014 on the Framework for Cooperation within the Single Supervisory Mechanism.

Both the members of the ECB's bodies and the ECB's staff enjoy the immunities under Protocol 7 on the privileges and immunities of the EU, as annexed to the EU Treaties. Consequently, they are basically not liable towards injured third parties. As a rule, only the ECB is liable. Nevertheless, the members of the ECB's bodies and the ECB's staff may be sued for damages by the ECB

to recover amounts it has to pay to third parties. In such cases there is a need to ascertain how liability is allocated among the ECB's organs.

Since the Governing Council is the decision-making body of the ECB, it cannot avoid its liability. Nevertheless, the assignment of the planning of the ECB's supervisory tasks to the Supervisory Board and the negative decision-making technique provided for under Article 26(8) SSMR for the adoption of the ECB's supervisory decisions, in practice leave the decision-making power in the field of micro-prudential supervision to the Supervisory Board. To the extent that the Supervisory Board contributes to the ECB's final supervisory decisions this body could be concurrently liable. Whilst not vested with supervisory powers, the Executive Board is still the ECB's top administrative body responsible for its internal organisation and staff. It may therefore be liable where an alleged failure to act by the ECB caused damage to third parties and was the result of an inadequate internal allocation of staff, resources or information.

The present publication makes an immensely important contribution to clarifying the law on the liability of the ECB and the NCAs within the SSM. Raffaele D'Ambrosio also identifies the uncertainties and proposes sensible solutions to the problems ahead. He has made available his insights and put to good use the tools he has developed as a legal adviser in the Bank of Italy and European institutions and also as an academic contributor of high standing in the scholarly discussion at European level.

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LIST OF ABBREVIATIONS

ABoR	Administrative Board of Review
BRRD	Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CRAs	Credit Rating Agencies
CRD IV	Directive 36/2013/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
CRR	Regulation No 575/2013 on prudential requirements for credit institutions and investment firms
DGSD	Directive 2014/49/EU on deposit guarantee schemes
EBA	European Banking Authority
ECB	European Central Bank
ECB RoP	ECB Rules of Procedure
ECJ	European Court of Justice
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EIB	European Investment Bank
EIOPA	European Insurance and Occupational Pensions Authority
EMIR	Regulation No 648/2012 on OTC derivatives, central counterparties and trade repositories
ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority
ESAs	European Supervisory Authorities
ESRB	European Systemic Risk Board
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ICSD	Directive 97/9/EC on investor-compensation schemes

JSTs	Joint Supervisory Teams
MIFID1	Directive 2004/39/EC on markets in financial instruments
MIFID2	Directive 2014/65/EU on markets in financial instruments
MIFIR	Regulation No 600/2014/EU on markets in financial instruments
NCA	National Competent Authorities
SRB	Single Resolution Board
SRMR	The Single Resolution Mechanism and Single Resolution Fund Regulation (Regulation No 806/2014)
SSM	Single Supervisory Mechanism
SSMFR	SSM Framework Regulation (ECB Regulation No 468/2014)
SSMR	SSM Regulation (Council Regulation No 1024/2013)
TFEU	Treaty on the Functioning of the European Union
UCITS IV	Directive 2009/65/EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

I
INFERRING THE LIMITATION OF THE ECB'S LIABILITY
FROM THE MEMBER STATES' LAWS ON THE LEGAL PROTECTION OF SUPERVISORS
AND THE COURT OF JUSTICE OF THE EUROPEAN UNION'S
SUFFICIENTLY SERIOUS VIOLATION CRITERION (*)

1. Outlook

In its opinion of 27 November 2012 on the draft Regulation on the Single Supervisory Mechanism (CON/2012/96) the ECB pleaded for the limitation of its liability in the performance of its supervisory tasks to some form of qualified unlawfulness.¹

This notwithstanding, Recital No 61 of Council Regulation No 1024/2013 (hereinafter SSMR) continues to subject the ECB, in its new role of supervisory authority, to the common liability regime provided for all EU Institutions under Article 340 TFEU.²

(*) The author is grateful to Mads Andenas for invaluable discussions and exchanges of views on this topic. The author gratefully acknowledges suggestions from Marco Giornetti.

1 The ECB's suggestion for the limitation of its liability in the performance of its supervisory tasks was grounded on a set of arguments laid down in § 1.7 of its opinion: "Another related aspect of the Core Principles to ensure the effectiveness of the supervision is adequate legal protection of supervisors for the exercise of their function to protect the general interest. In this regard, the ECB notes a normative trend and case law in several Member States and at global level that tends towards limiting supervisors' liability. The ECB considers that the liability of the ECB, the national competent authorities and their respective officials should only be incurred in cases of intentional misconduct or gross negligence. First, this limitation would reflect the common principles in national banking supervisory legislation in an increasing number of Member States as well as in various important financial centers of the world, that tend to limit supervisory liability. Second, it would be consistent with the case-law of the Court of Justice of the European Union finding liability only in case of qualified unlawfulness. Third, this provision would align the Union with the global consensus achieved with the Core Principles, according to which supervisory laws must protect the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith and for the costs of defending such actions and/or omissions, so as to further enhance the position of the supervisory authority vis-à-vis the supervised entities. Fourth, such global consensus is based on the complexity of supervisory tasks. Supervisory authorities are under an obligation to protect the plurality of interests in a well-functioning banking system and the financial system as a whole. Furthermore, supervisory authorities need to operate, in particular in crisis times, under tight time constraints. Fifth, clarifying the liability regime within a SSM operating in a multi-jurisdictional environment would contribute to: (i) a harmonised liability regime within the SSM; (ii) preserving the integrity of the SSM's capacity to act, since a too stringent and diversified liability regime within the SSM's complex structure could weaken a SSM supervisory authority's resolve to take the necessary action; and (iii) limiting speculative legal proceedings based on alleged liability for an action or omission of an SSM authority".

2 The reason why the SSMR maintains for the ECB in its new vest of supervisory authority the common liability regime of the other EU Institutions contained in Article 340 TFEU has been explained in the literature with the reduction of supervisors' liability flowing from the case law of some jurisdictions: see WYMEERSCH, E., "The Single Supervisory Mechanism or SSM, Part One of the Banking Union", Financial Law Institute Working Paper Series, 2014-01, Ghent University, January 2014, pp. 61-62.

The same general rule applies to the ECB in its role of central bank. See in the literature PERASSI, M., "Banca Centrale Europea", in *Enciclopedia del diritto*, Annali, IV, Milan, 2011, p. 162, ZILIOI, C., and SELMAYR, M., *The Law of the European Central Bank*, Oxford/Portland Oregon, 2001, p. 125. TRIDIMAS, T., *The General Principles of EU Law*, Oxford, 2009, underlines (at p. 478, footnote No 4) that "in relation

Under this regime EU institutions, including the ECB in its capacity as supervisory authority, do not expressly enjoy any legal protection for anything done or omitted in the discharge of their functions.

The same is true for the European Supervisory Authorities (hereinafter ESAs) under their respective regulations and for the Single Resolution Board (hereinafter SR Board) under the Single Resolution Mechanism Regulation (hereinafter SRMR).³

As regards the ECB's supervisory tasks under the SSMR, this approach is not justified with regard to either the 2012 Basel Core Principles for Effective Banking Supervision or most of the main Member States' national legislations providing for legal protection for supervisors.

The absence of any limitation of the ECB's liability is also inconsistent with the singleness and unitariness of the SSM. Under the SSM, the ECB and the NCAs are required to perform the same supervisory duties allocated according to the criteria laid down under the SSMR. In accordance with the above it is expected that both the ECB and the NCAs will be subject to the same liability regime so as to ensure consistency in the performance of supervision within the SSM.

Moreover, no limitation of the ECB's liability can induce it to over-rely on the NCAs enjoying a greater degree of legal protection in their respective national legal frameworks, and this, in turn, may de facto distort the allocation of supervisory powers and responsibilities within the SSM.

Furthermore, distortions in the allocation of supervisory powers may trigger unintended side effects with regard to other aspects of the SSM architecture as they may, for example, affect the allocation of accountability obligations towards the EU or national Parliaments.

to the liability of the ECB the EC Treaty requires rather than simply permits a higher standard of liability than that provided by national law. Member States generally make their central banks immune from liability actions in relation to monetary decisions”.

It is worth noting that monetary policy decisions are basically deemed non-justiciable in case law. See the Italian Corte di Cassazione, SS.UU. decision No 16751 of 2006 on seigniorage. Under the Court's ruling “the citizen's claim to obtain a proportional share of the monetary seigniorage falls outside the scope of the jurisdiction of both the ordinary and the administrative courts, since they are not competent to pass judgment on how the State carries out its sovereign functions, which undoubtedly include those concerned with monetary policy” (unofficial translation). See also the United States Court of Appeals Eighth Circuit's decision on the case *Horne v. Federal Reserve Bank of Minneapolis* 344 F. 2d 725, 1965.

See in the literature D'AMBROSIO, R., *La Banca d'Italia*, in *Le autorità amministrative indipendenti* edited by Cirillo, G.P. and Chieppa, R., *Trattato di diritto amministrativo* edited by Santaniello, Padova, 2010, p. 254 and BLAIR, W., “Liability of Central Banks and Supervisory Authorities”, text of the paper presented at the BIS Legal Experts' Symposium, 19 October 2000, p.1.

³ See Regulation No 806/2014 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.

It is the aim of this part of the paper to show how a limitation of the ECB's liability, though not clearly resulting from the wording of Article 340 TFEU, could be inferred (i) from the principles of supervisors' liability common to the EU national legislations referred to above or, alternatively, (ii) from the case law of the Court of Justice of the European Union (hereinafter the CJEU) on the liability of EU Institutions and Member States and the "sufficiently serious violation" criterion therein.

Nevertheless, the finding of this assessment should not be considered as conclusive, in view of the novelty of the subject and the still uncertain case law.

2. The SSM liability regime under Recital No 61 of the SSM Regulation and that of the European Supervisory Authorities and the Single Resolution Board: a comparison

Recital No 61 of the SSMR reads as follows: "in accordance with Article 340 TFEU, the ECB should, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties. This should be without prejudice to the liability of national competent authorities to make good any damage caused by them or by their servants in the performance of their duties in accordance with national legislation".⁴

As already mentioned, from the wording of the first part of Recital 61, the liability of the ECB as supervisory authority appears to be subject to the rule laid down under Article 340 of the TFEU for all other EU Institutions.

Similar liability regimes are provided for under the European Supervisory Authorities (ESAs) Regulations with regard to EBA, ESMA and EIOPA respectively.

Under Article 67 of the EBA Regulation⁵ (but the same is true for the ESMA and EIOPA Regulations) "in the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damages caused by it or by its staff in the performance of their duties".

⁴ Similarly, Article 35(3) of the ESCB and ECB Statute stipulates that: "the ECB shall be subject to the liability regime provided for in Article 340 of the Treaty on the Functioning of the European Union. The national central banks shall be liable according to their respective national laws".

⁵ Regulation No 1093/2010 as amended by Regulation No 1022/2013.

Nevertheless, apart from ESMA's responsibilities with regard to Credit Rating Agencies (CRAs)⁶ and a few other cases where ESMA⁷ and the other ESAs are vested with specific powers over financial institutions,⁸ ESAs essentially do not enjoy direct supervisory powers.

But even where ESAs are exceptionally vested with specific supervisory powers, the need to limit their liability is not so imperious.

ESAs basically lack discretionary power in the performance of their statutory duties and they are not called on to arbitrate on conflicting public interests,⁹ which is in line with the "Meroni doctrine" as developed in CJEU case law.¹⁰

6 See Regulation No 1060/2009 as amended by Regulation 513/2011 and by Regulation 462/2013. On the supervision of CRAs see, in the literature, NEOMISIO, S., "La vigilanza sulle agenzie di rating e le innovazioni introdotte dalle recenti modifiche al regolamento europeo", in *Le agenzie di rating*, edited by Principe, A., Milan, 2014, pp. 373 ff.; see also PERASSI, M., "Verso una vigilanza europea. La supervisione sulle agenzie di rating", in *Analisi Giuridica dell'Economia*, 2012, 2, pp. 407 ff.

7 See Regulation No 648/2012 on OTC derivatives, central counterparties and trade repositories (Articles 54 ff.), Regulation No 236/2012 on short selling and certain aspects of credit default swaps (Article 28), and Regulation No 600/2014 (so-called MIFIR) on markets in financial instruments and amending Regulation (EU) No 648/2012 (Articles 46-49).

8 See Articles 9(5), 17(3), 18(4) and 19(4) of the EBA Regulation and the corresponding provisions of the other ESAs Regulations. With particular regard to ESAs temporary intervention powers see, besides Article 9(5) of the ESAs Regulations: (i) Articles 40-41 of Regulation No 600/2014 on ESMA and EBA temporary intervention powers on financial instruments and structured deposits respectively; (ii) Article 45 of the above-mentioned Regulation on ESMA's powers with regard to positions or exposures in derivatives.

As underlined in the Commission staff working document accompanying the document "Report from the European Commission to the European Parliament and Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)", Brussels, 8 August 2014, "the founding Regulations confer a limited set of binding decision-making powers on the ESAs, in particular in the case of national authorities incorrectly applying EU law (breach of law, Article 17), in emergency situations declared by the Council (Article 18), and in the event of disagreement between national authorities (binding mediation, Articles 19 and 20). In addition, where provided in Union law the ESAs may also take temporary action under Article 9(5) of the ESAs Regulations" (pp. 11-12). This notwithstanding, the document merely concludes (p. 13) that "according to stakeholders, there is a need to preserve these powers, and to examine further the conditions for their use to ensure that there are no undue obstacles preventing the ESAs from having recourse to these powers".

9 See CRAIG, P., *EU Administrative Law*, Oxford, 2012, 150: "The official rationale for according this type of decisional power is that in these areas a single public interest predominates and the agency is not called on to arbitrate on conflicting public interests, exercise any powers of political appraisal or conduct complex economic assessment".

10 Under the so-called "Meroni doctrine" a delegation involving "discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy" would imply an illegal transfer of responsibility by replacing the choices of the delegator with those of the delegate and by altering the balance of powers, thus doing away with the guarantee granted by the Treaty to undertakings. See CJEU, judgments *Meroni*, C-9/56, *Romano*, C-98/80, *Alliance for Natural Health*, joined cases C-154/04 and C-155/04. The *Meroni* judgment was issued in the context of the European Coal and Steel Community (ECSC) Treaty (not in force any more) and concerned the validity of decisions of bodies established under Belgian private law adopted on the basis of a conferral of powers by the ECSC High Authority.

See more recently ECJ, *United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, C-270/1222, January 2014, §§ 44 to 54: "44. As to the powers vested in ESMA under Article 28 of Regulation No 236/2012, it should be noted first of all that that provision does not confer any autonomous power on that entity that goes beyond the bounds of the regulatory framework established by the ESMA Regulation. 45. Next, it should be noted that, unlike the case of the powers

delegated to the bodies concerned in *Meroni v High Authority*, the exercise of the powers under Article 28 of Regulation No 236/2012 is circumscribed by various conditions and criteria which limit ESMA's discretion. 46. First of all, ESMA can adopt measures under Article 28(1) of Regulation No 236/2012 only if, as provided for in Article 28(2), such measures address a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are cross-border implications. Moreover, all ESMA measures are subject to the condition that either no competent national authority has taken measures to address the threat or one or more of those authorities have taken measures which have proven not to address the threat adequately. 47. Second, when taking measures under Article 28(1) of Regulation No 236/2012, ESMA is required to take into account, in accordance with Article 28(3), the extent to which the measure significantly addresses the threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union or significantly improves the ability of the competent national authorities to monitor the threat in question, does not create a risk of regulatory arbitrage and does not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants, which is disproportionate to the benefits of the measure. 48. It follows from this that, before taking any decision, ESMA must examine a significant number of factors set out in Article 28(2) and (3) of Regulation No 236/2012 and the conditions imposed are cumulative. 49. Moreover, the two kinds of measure which ESMA may take under Article 28(1) of Regulation No 236/2012 are strictly confined to those set out in Article 9(5) of the ESMA Regulation. 50. Lastly, ESMA is required under Articles 28(4) and (5) of Regulation No 236/2012 to consult ESRB and, if necessary, other relevant bodies and must notify the competent national authorities concerned of the measure it proposes to take, including the details of the proposed measure and the evidence supporting the reasons why it must be adopted. ESMA is also required to review the measure at appropriate intervals, at least every 3 months. Thus, ESMA's margin of discretion is circumscribed by both the consultation requirement referred to above and the temporary nature of the measures authorised, which, established on the basis of best current practice in the field of supervision and sufficient information, are taken to address a threat calling for intervention at EU level. 51. The detailed delineation of the powers of intervention available to ESMA is also set out clearly in Article 30 of Regulation No 236/2012, which provides that the Commission is empowered to adopt delegated acts, in accordance with Article 42 of the regulation, specifying criteria and factors to be taken into account by the competent authorities and by ESMA in determining in which cases certain adverse events or developments and the threats referred to in point (a) of Article 28(2) of the regulation arise. 52. In that connection, Article 24 of Regulation No 918/2012 places even greater emphasis on the technical factual assessment that must be carried out by ESMA. Article 24(3) of that regulation restricts ESMA's powers of intervention to exceptional circumstances, in particular by specifying the type of threat which may justify intervention by ESMA on financial markets. 53. It follows from all the foregoing considerations that the powers available to ESMA under Article 28 of Regulation No 236/2012 are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority. Accordingly, those powers comply with the requirements laid down in *Meroni v High Authority*. 54. Contrary to the applicant's claims, those powers do not, therefore, imply that ESMA is vested with a 'very large measure of discretion' that is incompatible with the FEU Treaty for the purpose of that judgment".

On the "restraint delegation" of powers to the ESAs due to the "Meroni doctrine" see in the literature LAFARGE, F., "Les autorités européennes de surveillance, la régulation financière et l'union bancaire européennes", *Annales de la régulation de Paris 1*, n° 3, April 2013, pp. 10 ff.

The powers conferred on the EBA under Article 94(2) of the CRD IV to elaborate draft technical regulatory standards "with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on the institution's risk profile as referred to in Article 92(2)" are in line with the "Meroni doctrine" since the "strategic and political choices have been taken in the basic legislative act": Opinion of the Advocate General Jääskinen in Case C-507/13, *United Kingdom v European parliament and the Council*, § 62.

As underlined in the literature, the "Meroni doctrine" could be justified only in the light of the former ECSC system. Since this "was characterised by strong powers conferred on the Commission by the Treaty (which were, however, narrowly defined by the Treaty), the strict test for permissible delegation was justified because if the Commission were to transfer its powers to other bodies this would be tantamount to a carte blanche delegation": McDONNELL, A., KAPTEYEN, P.J.G., MORTELMANS, K., and TIMMERMANS C. W.A., *The Law of the European Union and the European Communities*, 2008, 228. Not surprisingly, the delegation of discretionary powers could jeopardise, in the Court's view, the principle of the balance of powers characteristic of the institutional structure of the Treaty. Scholars also criticise the strict application of the "Meroni doctrine" to the system of checks and balances of the EU framework. Obstacles to the delegation of discretionary powers to EU agencies were subject to criticism on the

Indeed, one of the main reasons invoked in order to limit supervisors' liability is the need to preserve their discretionary powers.

As ESAs are, as a rule, not vested with decision-making powers vis-à-vis financial intermediaries¹¹ and, even where exceptionally they do enjoy such powers,¹² they have no margin of manoeuvre in their supervisory decisions, there is no need to shelter them from a flood of specious lawsuits.

The same is true with regard to the SR Board under the provisions contained in the SRMR. Since the SR Board – in the light of the “Meroni doctrine” referred to above - does not fundamentally enjoy discretionary powers (SRMR contains great details on resolution tools and processes; resolution plans are subject to Commission endorsement), Article 87(3) makes it subject to the common liability regime applicable to ESAs.

Article 87(3) SRMR, which mimics Article 67 of the EBA Regulation, reads as follows: “in the case of non-contractual liability, the Board shall, in accordance with the general principles common to the laws concerning the liability of public authorities of the Member States, make good any damage caused by it or by its staff in the performance of their duties, in particular their resolution functions, including acts and omissions in support of foreign resolution proceedings”.

The case of the ECB and NCAs is therefore apparently different from that of ESAs and the SR Board, since the former are entrusted within the SSM with broad discretionary decision-making powers in the performance of their supervisory tasks towards credit institutions.

This is also the case in the field of administrative penalties and reparatory measures,¹³ where in the light of the principle of legality¹⁴ the need to stick

basis of the re-balancing of powers, in terms of accountability and judicial control, between the agencies and the existing EU Institutions: Vos, E., “Reforming the European Commission: What Role to Play for EU Agencies” (2000), *CML Rew.*, 1124. See also CHITI, M.P., and GRECO, G., *Trattato di diritto amministrativo europeo*, Parte generale, vol. 2, Milan, 2007, p. 445 and LENAERTS, K., “Regulating the Regulatory Process: ‘Delegation of Powers’ in the European Community”, in *European Law Review*, 1993, pp. 23 ff..

11 The EBA regulation (but the same is true of the ESMA and EIOPA regulations) basically grants the authority the powers to issue Binding Technical Standards to be adopted by the Commission (Articles 10 and 15) as well as guidelines and recommendations addressed to competent authorities or financial institutions (Article 16).

12 See footnotes 6, 7 and 8.

13 In the CJEU's view (cases *Kaserei Champignon Hofmeister*, C-210/00, § 41, and *Bonda*, C-489/10, § 40), the character of “administrative measures” and that of “administrative penalties” is to be defined on the basis of their respective purposes: (i) the aim of administrative measures is to repair the interest harmed by the offender; (ii) the aim of administrative penalties is to punish the latter. Thus, where the instrument adopted by the competent authority goes further than the mere aim of restoring the interest protected by the law, it may be considered as having a punitive aim and therefore as a penalty. For the distinction between administrative penalties and reparatory measures under EU financial law see D'AMBROSIO, R., “Due process and safeguards of the persons subject to the SSM supervisory and sanctioning powers”, *Quaderni di ricerca giuridica della Consulenza legale della Banca d'Italia*, No 74, December 2013, pp. 17-18 and 24-26.

14 It is nonetheless questionable in CJEU case law whether the principle of legality and, as the case may be, the connected rule of *lex mitior*, apply both to administrative penalties and to administrative

to the provisions conferring such powers would have been much more imperious.¹⁵

The need to avoid specious lawsuits so as to preserve the ECB's and the NCAs' margin of manoeuvre is all the more stringent considering the multiplicity of interests that both the EU and national supervisors have to counterbalance in their decisions.

The second part of Recital 61 maintains the liability of NCAs in accordance with their respective national legislations.¹⁶

As will be better shown below, consistently with Principle No 2 of the 2012 Basel Core Principles for Effective Banking Supervision,¹⁷ there is a clear trend towards the limitation of supervisors' liability within the EU Member States, due to the need to grant them discretion.¹⁸

Based on this trend and considering the multiplicity of interests that supervisors have to counterbalance in the performance of their duties, the CJEU may find some principles common to the supervisors' liability regimes within the EU Member States with the aim of ensuring a form of legal protection for the ECB too.

It is the author's view that, in its work of finding these principles common to the laws of the Member States, the CJEU could reach a fair compromise between the common law liability regimes for supervisors, based on the bad faith criterion,¹⁹ and the civil law liability regimes, based on the gross negligence criterion.²⁰

This compromise would be made possible thanks on the one hand to the more liberal approach followed by the common law courts after the BCCI case

reparatory measures or only to the former. See D'AMBROSIO, R., "Due process and safeguards of the persons subject to the SSM supervisory and sanctioning powers", *Ibid.*, pp. 62-63.

15 When comparing the wording of the rules conferring sanctioning powers on the ECB (Article 18 SSMR) and the ESMA (Article 23e CRA Regulation), we notice that the former "may" whilst the latter "shall" apply administrative penalties to the entities subject to their supervision.

16 For the allocation of liability to the ECB and the NCAs within the SSM, see Part II of this paper.

17 See § 3 of this part.

18 On limitations of supervisors' liability within Member States see: NOLAN, D., "The Liability of Financial Supervisory Authorities", in *Journal of European Tort Law*, 2013, 4, 2; DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union", in *Journal of European Tort Law*, 2012, 3; ATHANASSIOU, P., "Financial Sector Supervisors' Accountability: A European Perspective", ECB Legal Working Paper Series, 12, August 2011; D'AMBROSIO, R., "La responsabilità delle autorità di vigilanza: disciplina nazionale e analisi comparatistica", *Diritto delle banche e degli intermediari finanziari* edited by Galanti E., Padua, 2008, pp. 249 ff.; TISON, M., "Challenging the Prudential Supervisor: Liability versus Regulatory Immunity", Financial Law Institute Working Paper Series, 2004-11 Ghent University, April 2003; ANDENAS, M., "Depositor Protection, European Law and Compensation from Regulators", *Diritto bancario comunitario* edited by Alpa G. and Capriglione F., Turin, 2002, pp. 411 ff.; ANDENAS, M. and FAIRGRIEVE D., "Sufficiently serious? Judicial Restraint in Tortious Liability for Public Authorities", *English Public Law and the Common Law of Europe*, edited by Andenas M., London, 1998, 285 ff.

19 See § 5.2 of this part.

20 See § 5.3 of this part.

to the mental requirement of misfeasance in public office tort and the requisite of recklessness therein²¹ and on the other hand to the strict interpretation of the gross negligence requirement in the French *Conseil d'Etat* case law.

3. Principle No 2 of the 2012 Basel Core Principles for Effective Banking Supervision and legal protection for supervisors

Whilst a certain measure of liability would be defensible in order to preserve public confidence in supervisors' accountability,²² a certain limitation of such liability would be acceptable in order to preserve their discretionary powers²³ and their independence.

Not surprisingly, Principle No 2 of the 2012 Basel Core Principles for Effective Banking Supervision is titled "Independence, accountability, resourcing and legal protection for supervisors".

Moreover, as can be seen from the overall wording of its essential criteria, principle No 2 seems to be grounded on the need to preserve supervisors' discretion.²⁴

21 See § 8 of this part.

22 See ATHANASSIOU, P., "Financial Sector Supervisors' Accountability: A European perspective", p. 32 ff. According to the author, the arguments in favour of supervisors' liability can be summarized as follows: (i) keeping supervisors accountable for their acts and omissions and giving them incentives to act in the public interest; (ii) equal treatment of the officers and directors of private companies; (iii) rule of law: it is difficult to accept that individuals can be denied the right to receive compensation for their financial losses from those who are deemed to have caused them through wrongful acts. ROSSI, F., "Tort Liability of Financial Regulator: A Comparative Study of Italian and English Law in a European Contest", in *European Business Law Review*, 2003, p. 670 grounds the imposition of a liability on regulators on the following arguments: (i) consumer protection; (ii) EC Law and ECHR; (iii) information asymmetry.

23 See ATHANASSIOU, P., "Financial Sector Supervisors' Accountability: A European Perspective", p. 35 ff., singles out the following arguments in favour of a limitation of supervisor's liability: (i) the inhibition argument: the threat of liability can inhibit supervisors from freely exercising their discretionary powers/supervisory authorities should enjoy the necessary margin of manoeuvre for the effective performance of their statutory duties; (ii) the legal protection of supervisors also preserves their independence; (iii) the existence of deposit/investor guarantee schemes; (iv) it is unfair to allow claims against the secondary 'responsible' (supervisors) only because they have deeper pockets; (v) floodgates argument (risk to opening floodgates to litigation); (vi) more far-reaching reputational impact for central banks; (vii) difficult to accept that courts should be allowed to substitute their judgment to the one of supervisors. As regards the arguments under (i), (iii) and (v) see Rossi, F., "Tort Liability of Financial Regulator: A Comparative Study of Italian and English Law in a European Contest", pp. 669-670 (to the arguments mentioned above the author adds the moral hazard argument). As regards the argument under (iii) see HADJEMMANUIL, C., *Banking Regulation and the Bank of England*, London, 1996, pp. 336 ff.. In case law, besides the cases already quoted in ATHANASSIOU, P., "Financial Sector Supervisors' Accountability: A European perspective", p. 35, note no. 144, see SC, *Unites States v. Gaubert*, 1999, which grounds the limitation of supervisors' liability on the need to grant them a necessary margin of manoeuvre. For policy factors used by the courts to avoid the imposition of a duty of care on public authorities see MARKESINIS, B.S., AUBY, J-B., COESTER-WALTJEN, D. and DEAKIN, S.F., *Tortious Liability of Statutory Bodies: a Comparative and Economic Analysis of Five English Cases*, Oxford, 1999.

24 Indeed, essential criterion No 2 requires the supervisor having "full discretion to take any supervisory actions or decisions on banks and banking groups under its supervision". The following

The principle stipulates that “the legal framework for banking supervision includes legal protection for the supervisor”.

Essential criterion No 5 specifies, in turn, that (i) “laws provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith” and that (ii) “the supervisor and its staff are adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith”.

In the same vein, a report for the World Bank on legal protection for banking supervisors concludes that: “[T]o the extent that there is a political consensus which often occurs during a banking crisis that banking laws should be amended to provide greater authority for central banks and regulatory agencies, there may also be an opportunity to include legal protections for banking supervisors as part of any such legislation... There are a number of models on which [such protections] may be based, but care should be taken to ensure that the widest possible coverage for banking supervisors is enacted into law”.²⁵

The IOSCO Principles for Securities Regulation underline at § 6.2 (titled “Clear Responsibility”) that “the capacity of the regulator to act responsibly, fairly and effectively will be assisted by: ... adequate legal protection for regulators and their staff acting in the bona fide discharge of their functions and powers”.

4. The Court of Justice of the European Union’s task of finding some principles limiting the liability of the ECB and the multiplicity of interests safeguarded by EU banking law

The legal protection of supervisors is not only advocated by the Basel Core Principles for Effective Banking Supervision but is also laid down in several EU and non-EU jurisdictions.²⁶ There is therefore a clear trend towards the limitation

essential criterion No 5 on the legal protection for supervisors seems therefore to be the logical consequence of criterion No 2.

25 DELSTON, R. S., “Statutory Protections for Banking Supervisors”, 1999, <http://www1.worldbank.org/finance/html/statutory_protection.html>

26 See the Conclusions sous Conseil d’Etat, Assemblée, 30 November 2001, n° 219562, *Ministre de l’économie et des finances c/ M. Kechichian et autres par Alain Seban, Maître des Requêtes au Conseil d’Etat, Le juge administratif doit-il retenir une faute lourde ou une faute simple pour engager la responsabilité de l’Etat à raison de la surveillance exercée par la Commission bancaire sur les établissements de crédit?*

“Par nature, l’activité de banque comporte des risques puisqu’elle consiste à prêter de l’argent à des gens dont on n’est jamais certain qu’ils seront en mesure de rembourser. Les faillites bancaires, si elles sont moins fréquentes que par le passé, sont une réalité: dans les années 1980, environ 200 établissements ont fait faillite chaque année aux États-Unis; au plan international, on se souvient des défaillances du Banco Ambrosiano en Italie, des institutions de prévoyance de l’Ohio et du Maryland en 1985, de la banque Barings en 1995, etc. ; en France, nous avons vu, dans les années récentes, les faillites de la Lebanese Arab Bank (1989), de la BCCI (1991), de la Banque Majorel (1992), de la Banque commerciale privée (1994), de la Banque Pallas-Stern (1995), de la Compagnie du BTP, et du Crédit Martiniquais (1999).

Malgré cela l’activité bancaire suppose la confiance du public, car la banque ne peut consentir des crédits que pour autant que le public lui donne de l’argent en dépôt. Pour tenter de concilier ces deux

of supervisors' liability. Based on this trend the CJEU is expected to find some rules and principles specifically applicable to supervisors' liability in the different Member States with the aim of ensuring a form of legal protection for the ECB too.

On the contrary reference to the general principles common to the tort or administrative law of Member States is less helpful than it appears. Indeed, "save for very general principles which themselves offer little guidance to judicial inquiry, there is in fact no common corpus of rules governing the non-contractual liability of public authorities in national laws".²⁷

Not surprisingly, "far from looking for the lowest common denominator, the ECJ has approached the interpretation of Article 288(2) [of the Treaty establishing the European Community, now Article 340 TFEU] creatively".²⁸

antagonistes que sont le risque et la confiance, il existe un peu partout des systèmes de contrôle public des établissements de crédit. Mais l'existence de ces mécanismes n'implique pas pour autant que l'État accepte d'en garantir la solvabilité; c'est pourquoi l'on observe que, la plupart du temps, la responsabilité publique à raison des défaillances de ce contrôle est strictement limitée.

Aux États-Unis, à la suite de la grave crise financière de 1907, le Congrès a organisé la supervision de l'activité bancaire sous l'égide de la Réserve Fédérale (*Federal Reserve Bank*) (loi du 23 décembre 1913). La responsabilité de l'État fédéral à raison de cette activité est soumise aux dispositions du *Federal Tort Claims Act* dont l'Article 2680 écarte toute responsabilité lorsque l'autorité de contrôle agit dans le cadre d'un « pouvoir discrétionnaire ». Or, la Cour suprême des États-Unis a estimé dans l'arrêt *United States vs Gaubert* de 1991 que la surveillance du système bancaire se rattachait à un pouvoir discrétionnaire, ce qui exclut en principe la possibilité de rechercher directement la responsabilité de la Réserve Fédérale à cet égard.

En Angleterre, la Banque d'Angleterre (*Bank of England*), créée en 1694 et nationalisée en 1946, joue un rôle similaire, formellement inscrit dans le droit positif depuis le Banking Act de 1979. La responsabilité de la 'vieille dame de Threadneedle Street' est puissamment limitée par des dispositions législatives au cas de '*misfeasance*', c'est-à-dire de faute intentionnelle. Les juridictions anglaises semblent aujourd'hui s'orienter vers un assouplissement mesuré de cette notion, à la suite d'un arrêt de la Chambre des Lords du 22 mars 2001 *Three Rivers District Council vs Bank of England*.

En Allemagne, l'Office fédéral de contrôle des banques (*Bundesaufsichtsamt für das Kreditwesen*) supervise le système bancaire en liaison étroite avec la Banque fédérale (*Bundesbank*). La conception allemande de la responsabilité administrative est en principe large, en vertu de l'Article 19 (4) de la loi fondamentale du 23 mai 1949, mais elle suppose toutefois que la faute invoquée ait causé au demandeur un préjudice qui lui est propre. Deux arrêts du Tribunal administratif fédéral de 1979 '*Wetterstein*' et '*Herstatt*' ont jugé que les déposants d'une banque peuvent faire valoir un droit propre, mais le législateur a rapidement réagi en disposant, en 1984, que la surveillance du système bancaire tend à la protection du public en général, ce qui vise clairement à exclure la possibilité d'une action en responsabilité des déposants contre l'Autorité de contrôle des banques et la Bundesbank.

Comme on peut le constater, en dépit de la différence des traditions juridiques et administratives, les mêmes traits se retrouvent : l'existence d'une institution administrative chargée de la surveillance du système bancaire; une limitation draconienne des conditions dans lesquelles la responsabilité de cette institution peut être engagée".

27 See TRIDIMAS, T., *The General Principles of EU Law*, p. 478.

28 See TRIDIMAS, T., *The General Principles of EU Law*, *ibid.*; see also in the literature: BARATTA, R., "Articolo 340 TFUE", in *Trattati dell'Unione Europea* edited by Tizzano, A., Milan, 2014, pp. 2473-2474; GILDORF, P. and NIEJAHR, M., "Artikel 288 EG—Vertrag", in *Von der Groeben/Schwarze Kommentar zum EU—/EG—Vertrag* (6th edition); GAJA, G., "Principi del diritto (dir. internaz.)", *Enciclopedia del diritto*, vol. XXXV, Milan, 1986, 542-544. In the same vein see the opinion of the Advocate-General Gand in Joined Cases 5, 7 and 13 to 24/66, *Firma Kampffmeyer and other v. Commission*, § II.1:

Though the national rules on the legal protection of supervisors subject them to different liability regimes, these are all aimed at preserving the supervisor's necessary margin of manoeuvre to counterbalance the several public interests it is charged with protecting.

This assumption is the starting point of this part of the paper and is supported by the following further arguments.

The CJEU's task of finding some principles applicable to the ECB's liability stemming from the specific regimes applicable to the supervisory authorities in the Member States should not necessarily be aimed at ensuring the best possible protection for claimants.²⁹ In other words, liability regimes should not necessarily be regarded only through the lens of the protection of individual rights.

This is all the more true in the fields of banking and financial supervision, where, besides the protection of depositors' and investors' rights, there are other primary public interests safeguarded by EU and national legislators, such as those of preserving the sound and prudent management of credit and other financial institutions as well as the overall stability of the financial system.³⁰

"The applications which have been made to you are based on the second paragraph of Article 215 of the Treaty which provides that in the case of non contractual liability the Community shall, in accordance with the general principles common to the law of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. This wording is clearly less explicit than that of Article 40 of the ECSC Treaty, which links the concept of reparation to that of 'a wrongful act or omission'. It is particularly so to the extent to which it refers to common general principles, whilst the laws of the Member States in respect of the liability of public authorities are far from being identical. It is sufficient to recall that, depending on the country, this liability is distinguished by the application or the transposition in the case of public authorities of the rules of private law, and is brought into play before the courts; in France on the contrary different rules of jurisdiction and of substantive law are applied, because it is the administrative courts which have developed an independent and subtle concept of administrative liability, based in general upon a wrongful act or omission of the public service and, exceptionally, on risk. In truth the differences bear perhaps more on the legal technique employed than on the results which follow in practice. The principle of the liability of the administration is recognized in all the States—it is at least a general common principle—and in different ways the sphere of this liability tends to increase everywhere.

It remains to be said, however, what should be in Community law. During the oral procedure one of the advocates for the applicants warned you in a pressing manner against what he called the 'minimum theory', which consists in accepting the right to compensation only when the law of each of the six Member States, taken individually, provides for it; it is not in fact to the 'law' but to the 'general principles' that the second paragraph of Article 215 refers you. For by employing such a wide expression it is upon you in the final analysis that the authors of the Treaty have conferred the task of settling the system of extracontractual liability; it is a task of comparison and of creation such as you have already had to carry out in other spheres. The directive which for example Article 40 of the ECSC Treaty gave you by mentioning an 'unlawful act or omission' did not exempt you from defining in a more precise manner the content of this concept of Community law, without your being obliged in every case to accept the meaning lent to it by national law. Many of the decisions which you have already made are necessarily to be found in the system which you have defined because the purpose and the organization of the Communities have too many common points not to give identical solutions to problems which give rise to their functioning. But, as in any legal work, theory can be built only by successive strokes and emerges from the reconciliation of judgments; it is a culmination".

²⁹ See also GILDORF, P. and NIEJAHR, M., "Artikel 288 EG—Vertrag".

³⁰ With regards to the Italian legal framework, see Article 5 of the 1993 Banking Law (Purpose and scope of supervision), which reads as follows:

As already underlined in the literature, “the trend towards greater legal protection [of supervisors] must be understood in the context of a long-term re-evaluation of the purposes of financial supervision which has been given added impetus by the financial crisis. According to the preambles to the UK’s Banking Acts of 1979 and 1987, the primary objective of banking supervision was the protection of depositors. However, more recent financial services legislation relegates consumer protection to one of a number of ‘regulatory objectives’, including maintaining market confidence in the UK financial system, contributing to the protection and enhancement of the stability of the UK financial system, and reducing financial crime. Furthermore, contemporary academic commentary on the objectives of financial supervision emphasizes systemic risk – the danger that the failure of one financial institution will produce a ‘domino’ effect on others, thereby threatening the stability of the financial system as a whole – which is said to ‘loom] large’ in this context. There is therefore plenty of evidence to support the contention of Mads Andenas and Duncan Fairgrieve that over time the aim of banking supervision has been redefined from depositor protection to ensuring the soundness of the financial system, and that the focus of the new ideology of banking supervision is on ‘the solidity of financial institutions and payments systems’. According to this ‘new ideology’, litigation by depositors against supervisory authorities has the potential to undermine the regulatory framework

“1. The credit authorities shall exercise the powers of supervision conferred on them by this Legislative Decree having regard to the sound and prudent management of the persons subject to supervision, to the overall stability, efficiency and competitiveness of the financial system and to compliance with provisions concerning credit.

2. Supervision shall be exercised over banks, banking groups, financial intermediaries, electronic money institutions and payment institutions.

3. The credit authorities shall also exercise the other powers conferred on them by law”.

See also, with regard to financial intermediaries, Article 5, paragraphs 1 to 3, of the 1998 Italian Consolidated Law on Finance, which reads as follows:

“1. The objectives of supervisory activities indicated in this section shall be:

- a) the safeguarding of faith in the financial system;
- b) the protection of investors;
- c) the stability and correct operation of the financial system;
- d) competitiveness of the financial system;
- e) the observance of financial provisions.

2. For the pursuance of objectives indicated in subsection 1, the Bank of Italy shall be responsible for risk containment, asset stability and the sound and prudent management of intermediaries.

3. For the pursuance of objectives indicated in subsection 1, Consob [the Italian Commission on the Stock Exchange] shall be responsible for the transparency and correctness of conduct”.

Moreover, with regard to the supervision of markets, Article 74(1) of the 1998 Italian Consolidated Law on Finance stipulates that “Consob shall supervise regulated markets with the aim of ensuring the transparency of the market, the orderly conduct of trading and the protection of investors, and may adopt any measure to guarantee observance of the obligations envisaged in this Chapter”.

Differently from what is provided for under the 1993 Italian Banking Law, the SSMR does not contain any specific rule on the goals of banking supervision. See CLARICH, M., “I poteri di vigilanza della Banca Centrale Europea”, in *L’ordinamento italiano del mercato finanziario tra continuità e innovazioni*, edited by Calandra Bonaura, M., Bartolacelli, A. and Rossi, F., Milan, 2014, p. 119. Nevertheless, in the author’s view, these goals clearly emerge from Recitals No 5, 6 and 15 SSMR.

by distorting priorities and distracting supervisors from their core function of promoting the stability of the financial system”.³¹

Apart from the specific role of the European Systemic Risk Board (hereinafter ESRB), set up following the recommendations of the de Larosière Report,³² the inclusion among the overarching goals of banking and financial supervision of the task of ensuring the overall stability of the financial system also emerges from the 2012 Basel Core Principles for Effective Banking Supervision,³³ the tasks of the ESAs,³⁴ and the tools provided for under the CRD IV/CRR package³⁵ expressly devoted to countering macro-prudential risks,³⁶ as well as from the goals of the ECB’s responsibilities while performing its supervisory activity.³⁷

31 See NOLAN, D., “The Liability of Financial Supervisory Authorities”, pp. 195-196. The author refers to ANDENAS, M. and FAIRGRIEVE, D., “To Supervise or to Compensate? A Comparative Study of State Liability for Negligent Banking Supervision”, in Andenas, M. and Fairgrieve, D. (eds), *Judicial Review in International Perspective* (2000) 338.

32 See the *Report of the High-Level Group on Financial Supervision in the EU* chaired by Jaques de Larosière, Brussels, 25 February 2009, §§ 173-182 and recommendations 16 and 17, the Communication from the Commission of 27 May 2009, § 3 and finally Regulation (EU) No 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board. See also FSA, *The Turner Review. A regulatory response to the global banking crisis*, London, March 2009, pp. 51 ff.

33 See §§ 20 and 21 of the Executive Summary of the Principles, which read as follows: “20. The recent crisis highlighted the interface between, and the complementary nature of, the macroprudential and microprudential elements of effective supervision. In their application of a risk-based supervisory approach, supervisors and other authorities need to assess risk in a broader context than that of the balance sheet of individual banks. For example, the prevailing macroeconomic environment, business trends, and the build-up and concentration of risk across the banking sector and, indeed, outside of it, inevitably impact the risk exposure of individual banks. Bank-specific supervision should therefore consider this macro perspective. Individual bank data, where appropriate, data at sector level and aggregate trend data collected by supervisors should be incorporated into the deliberations of authorities relevant for financial stability purposes (whether part of, or separate from, the supervisor) to assist in identification and analysis of systemic risk. The relevant authorities should have the ability to take pre-emptive action to address systemic risks. Supervisors should have access to relevant financial stability analyses or assessments conducted by other authorities that affect the banking system. 21. This broad financial system perspective is integral to many of the Core Principles. For this reason, the Committee has not included a specific stand-alone Core Principle on macroprudential issues”.

34 See Articles 1(5), third subparagraph, 8(1)(i), 9(5), 22(1) and (3), and 23(1) and (2) of the regulation establishing the EBA (but the same is true for the ESMA and EIOPA regulations). It is worth noting that ESMA’s and EBA’s temporary intervention powers under Articles 40-41 of Regulation 600/2014/EU on markets in financial instruments (see footnote No 8) address not only a significant investor protection concern but also a threat to the orderly functioning and integrity of financial markets and commodity markets and to the stability of the whole or part of the financial system in the Union. For further details see NAPOLETANO, G., “Legal aspects of macroprudential policy in the United States and in the European Union”, *Quaderni di ricerca giuridica della Consulenza Legale della Banca d’Italia*, Rome, No 76, June 2014, pp. 93-97.

35 See Directive 36/2013/UE on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and Regulation 575/2013 on prudential requirements for credit institutions and investment firms.

36 See, among others, the instruments regulated under Articles 128 ff. of the CRD IV and Article 458 of the CRR (on the so-called “flexibility clause”). For a deep analysis of the macro-prudential tools contained and regulated under the CRD IV/CRR package see NAPOLETANO, G., “Legal aspects of macroprudential policy in the United States and in the European Union”, pp. 160 ff.

37 See, besides the ones quoted in footnote No 30, Recital No 30 SSMR, which expressly mentions among the ECB’s goals that of ensuring “the stability of the financial system”.

The corporate governance policies and processes also need to be commensurate, in the new macro-prudential approach, “with the risk profile and systemic importance of the bank”.³⁸

The fight against money laundering is a primary objective of banking supervision. Not surprisingly, it is encompassed among the tasks of both the ESAs and the NCAs. The ECB is also expected, under Recital No 29 SSMR, to cooperate with the NCAs to support the fight against money laundering.

Besides the EU anti-money-laundering legislative acts, EU banking law does not, as a rule, entrust (or oblige MS to entrust) supervisory authorities with investigating powers in order to search for possible financial crimes, including the illicit taking-up of banking activities by non-authorized firms.

Nevertheless, under Article 66(1), (a) and (b) of the CRD IV, NCAs may be vested with administrative sanctioning powers in respect of conduct such as “carrying out the business of taking deposits or other repayable funds without being a credit institution” or “commencing activities as a credit institution without obtaining authorization”.

The power to investigate whether a person or a company qualifies as a credit institution is expressly granted to the supervisor under German banking law,³⁹ whilst in other EU jurisdictions (such as Italy) it is debated whether the supervisor enjoys the power to order (or ask the competent resolution authority to order) the compulsory administrative liquidation of non-authorized banks.⁴⁰

38 See Principle No 14 of the 2012 Basel Core Principles for Effective Banking Supervision and the 2010 Basel Principles for Enhancing Corporate Governance, §§ 13 and 15: “13. Effective corporate governance practices are essential to achieving and maintaining public trust and confidence in the banking system, which are critical to the proper functioning of the banking sector and economy as a whole. Poor corporate governance can contribute to bank failures, which can in turn pose significant public costs and consequences due to their potential impact on any applicable deposit insurance system and the possibility of broader macroeconomic implications, such as contagion risk and impact on payment systems. This has been illustrated in the financial crisis that began in mid-2007. In addition, poor corporate governance can lead markets to lose confidence in the ability of a bank to properly manage its assets and liabilities, including deposits, which could in turn trigger a bank run or liquidity crisis. Indeed, in addition to their responsibilities to shareholders, banks also have a responsibility to their depositors and to other recognised stakeholders. The legal and regulatory system in a country determines the formal responsibilities a bank has to its shareholders, depositors and other relevant stakeholders.... 15... Moreover, governance weaknesses at banks that play a significant role in the financial system, including systemically important clearing and settlement systems, can result in the transmission of problems across the banking sector”. For further details see: D’AMBROSIO, R. and PERASSI, M., “Il governo societario delle banche” in *Le società commerciali a dieci anni dalla riforma* edited by M. Vietti, Turin, 2014, pp. 219-222; WYMEERSCH, E., “Corporate Governance and Financial Stability”, Financial Law Institute Working Paper Series, WP 2008-11, Ghent University, October 2008.

39 See § 44c of the German *Kreditwesengesetz*.

40 As regards Italy see COSTI, R., *L’ordinamento bancario italiano*, Bologna, 2012, p. 847. The author’s view is that “in definitiva, sembra coerente con il sistema espellere dal mercato creditizio un’impresa che, sfuggendo al controllo delle autorità creditizie, espone a sicuro pericolo tutti gli interessi tutelati dall’ordinamento bancario, anche quando la stessa non versi in stato di insolvenza; così come sembra coerente con i principi fissati dall’art. 80 del T.U. consentire che le autorità creditizie si facciano direttamente o indirettamente carico della tutela del risparmio raccolto dall’ente di credito non autorizzato, escludendosi che, a tal fine, siano sufficienti gli strumenti di diritto comune; strumenti che del resto potrebbero intervenire solo in caso di conclamata insolvenza dell’ente”. In the same vein see BONFATTI, S., *La liquidazione coatta delle banche e degli intermediari in strumenti finanziari*, Milan, 1998, pp. 24 ff.; SANDULLI, M., “La liquidazione coatta delle

Against this backdrop, the so-called supervisor's dilemma (counterbalancing a multiplicity of primary public interests) should not be made worse by the fear of liability resulting from decisions which have to be taken under extreme time pressure, the only problem being rather that of deciding where to strike the balance between the legal protection of supervisors and the safeguarding of depositors' or other stakeholders' competing rights.⁴¹

As already mentioned and as will be better explained below, it is the author's view that, despite the divergences between the different EU jurisdictions, the CJEU could limit the ECB's liability to a some form of qualified unlawfulness by reaching a fair compromise between the common law liability regimes based on the bad faith criterion and the civil law regimes based on the gross negligence criterion.

It is the goal of Sections 5 to 8 to demonstrate this assumption.

5. The trend towards the limitation of supervisors' liability

5.1. The German-based liability regimes and the immunity of supervisors vis-à-vis depositors and investors

In the German literature supervision of financial institution was traditionally undertaken in the interest of the public at large and not to protect individuals.

The underlying idea - the so-called *Schutznormtheorie* - is that liability is to be denied where a particular claimant is not among those whom a specific legal rule is intended to protect or where the legal rule is intended to protect the interest of the public at large rather than those of any private individual.⁴²

Consequently, depositors and investors cannot have any tort claims against supervisors.

banche tra diritto comune e diritto speciale: il rinvio alla legge fallimentare", in *Banca, borsa e tit. cred.*, 1997, I, pp. 447 ff.. In case law see Cass. S.U., 13 March 1965, no. 425, in *Banca Borsa Tit. Cred.*, 1965, II, pp. 1 ff.

Contra, see TUSINI COTTAFANI, V., "La liquidazione coatta amministrativa", in *La crisi dell'impresa bancaria* edited by Boccuzzi, G., Milan, 1998, pp. 245 ff.; PANZANI, L., "Banca di fatto e fallimento", in *Il Fallimento*, 1996, pp. 321 ff.; SANTORO, V., *Le banche non autorizzate*, in *Società*, 1994, pp. 1676 ff.. In case law, see Tribunal of Rome 20 February 1992, *Banca Borsa Tit. Cred.*, 1993, II, pp. 69 ff. and several other subsequent judgments.

For the state of the art of case law, see D'AMBROSIO, R., "Credito (ordinamento amministrativo del)" in *Digesto on line*, portals *Pluris* and *Leggi d'Italia*, Wolters Kluwer Italia, 2011, p. 38, footnotes 106 and 107.

Moreover, it is worth noting that under Article 132-bis of the Italian Banking Law (titled "Report to the public prosecutor and the court"), "where there is a well-founded suspicion that a company engages in fund-raising, banking, the issue of electronic money, the provision of payment services or financial activity in violation of Articles 130, 131, 131-bis, 131-ter and 132 [without being duly authorized], the Bank of Italy... may file a report with the public prosecutor for the purposes of the adoption of the measures provided for in Article 2409 of the Civil Code [Report to the Court] or may ask the court to adopt the same measures...".

41 If a credit institution becomes insolvent, it should be allowed to exit the market. Nevertheless this exit may undermine public confidence in the stability of the financial system. Here any supervisor's behaviour may be challenged for intervention that is both too early (by the shareholders for fear of losing the value of their investments) and too late (by the depositors for fear of losing the DSG guarantee). See ECtHR, *Dennis Grainger and others v. UK*, 1 August 2012, (Application No. 34940/10).

42 ANGELETTI, A., "Responsabilità della pubblica amministrazione in diritto comparato", in *Dig. Disc. Pubbl.*, XIII, 223 ff.

As will be shown below,⁴³ the requirement of sufficient proximity between the claimant and the wrongdoer is, in common law, tantamount to the German *Schutznormtheorie*.⁴⁴

The immunity of supervisors vis-à-vis investors was premised upon a decision of the German Supreme Court in a case concerning the supervision of insurance companies.⁴⁵

Nevertheless, in two decisions handed down in 1979⁴⁶ concerning the supervision of banks the Court departed from this doctrine. According to these Court rulings, individual bank creditors and depositors represented a protected interest. In other words, banking supervision was also undertaken in the interest of individuals.

In response to this case law, the 1984 legislation on credit institutions (amended in 1988) stated that banking supervision had to be undertaken exclusively in the public interest and was therefore intended to exclude claims from individuals.⁴⁷

The German financial legislation of 2002 confirmed this view. Section 4(4) of the 2002 Law on the Federal Institution for the Supervision of Financial Services corresponds to the provision of the 1984 Law as amended in 1988.⁴⁸ Moreover the above-mentioned provision of the 2002 Law applied not only to the supervision of banks but also to the supervision of other financial institutions.⁴⁹

43 See § 5.2 of this part.

44 See PC, *Yuen Ku Yeu v. Attorney General of Hong Kong*, 1987, in *WLR*, 1987, pp. 777 ff., and Supreme Court of Canada, *Cooper v. Hobart*, 2001, in [2001] 3 S.C.R. 537, 2001 SCC 79.

45 See ANDENAS, M., “Depositor Protection, European Law and Compensation from Regulators”, p. 525, footnote No 136.

46 See cases *Wetterstein* and *Herstatt*, in *BGHZ*, 74, pp. 144 ff., and 75, pp. 120 ff. In both cases, creditors sued the State claiming that the Federal Banking Supervisory Authority failed to comply with its supervisory obligations thereby breaching its obligations vis-à-vis depositors. See HÜPKES, E.H.G., *The legal aspects of bank insolvency: a comparative analysis of Western Europe, the United States, and Canada*, Kluwer Law International, The Hague, 2000, pp. 123-138.

47 The reason for the introduction of a law expressly stating that banking supervision is exclusively in the interest of the public is clearly explained in ANDENAS, M. and FAIRGRIEVE, D., “Misfeasance in public office, Governmental Liability and European Influence”, in VV.AA., *Tort Liability of Public Authorities in Comparative Perspective*, edited by Fairgrieve, D., Andenas, M., and Bell, J., *The British Institute of International and Comparative Law*, 2002. According to the authors (p. 13), “in response to these cases [*Wetterstein* and *Herstatt*], new legislation was introduced in 1984, stating expressly that banking supervision is undertaken exclusively in the public interest. This was intended to exclude claims from individuals. A statutory immunity directly barring tort claims would be unconstitutional as Article 34 of the German Constitution prohibits such immunities. The only way open to the legislator was to limit the purpose of banking supervision”.

48 Section 4(4) stipulates that “Die Bundesanstalt nimmt ihre Aufgaben und Befugnisse nur im öffentlichen Interesse wahr” (“the Federal Financial Services Authority exercises its tasks and competences only in the public interest”).

49 The new legislation has been criticised by commentators as both unconstitutional and contrary to EU Law. The limitation of liability provided for by the 2002 Law is actually consistent not only with the German civil code (§ 839.1) but also with the German Basic Law (Article 34) both of which stipulate that, for liability of public officials or the State to arise, a breach of a duty against a third party had to be committed. In other words, Article 34 of the German Basic Law bars legislation that qualifies the degree of fault required for liability but not legislation that stipulates when a compensation right arises. For the latter purpose the German Law requires a specific duty of care towards a third party. See RUFNER, W., “Basic elements of German law on State liability”, in BELL, J. and BRADLEY, A.W., “Governmental liability”, *UKNCCL*, 1991. Consequently, the limitation of liability of the German supervisory authority only bars claims raised by investors as they

The case of Austria seems to be similar.

Though under Austrian legislation the supervisor is also liable for simple negligence,⁵⁰ injured third persons, such as depositors, do not enjoy a right to be awarded damages.⁵¹

The same seems to be true for Greece.

are considered as public at large, but it cannot impede claims raised by banks and other financial institutions as they are directly affected by unlawful administrative acts on the part of the supervisor. See POTO, M. “La responsabilità degli organi di vigilanza nel sistema tedesco”, in *Resp. civ. prev.*, 2006, pp. 189 ff..

50 Under a federal statute, the *Amtshaftungsgesetz* (the Public Liability Act: AHG), liability for damage caused in the course of supervision by the Austrian supervisory body lies with the federal government. This is underscored by section 3 of the Act on the Financial Markets Supervisory Authority, which reads as follows:

“(1) The Federation Government shall be liable pursuant to the provisions of the *Amtshaftungsgesetz* (AHG; Public Liability Act), Federal Law Gazette no. 20/1949, for damage caused by the *FMA*’s bodies and employees in the enforcement of the federal acts specified under section 2. Damage as defined in the present provision is such that was directly caused to the legal entity subject to supervision pursuant to this federal act. The *FMA* as well as its employees and bodies shall not be liable towards the injured party.

(2) In its activities, the *FMA* shall take any and all supervisory measures that are necessary, expedient and appropriate in each case after a due assessment of the circumstances. To this end, it shall take care to maintain financial market stability. In the performance of its duties, it may use the audit reports of the statutory auditors and bodies of the companies subject to its supervision as well as the audit reports of the *Oesterreichische Nationalbank (OeNB)* within the scope of its statutory auditing powers pursuant to the *BWG*, unless it has reasonable doubts about the correctness or completeness of said audit reports or about the professional knowhow or diligence of the auditors or should have had such doubts if it had shown adequate diligence. The same shall apply to the audit reports of the auditors commissioned by the *FMA* itself with regard to the auditing activities pursuant to the federal acts specified under section 2.

(3) If the Federal Government made good the damage to the injured party pursuant to Article 1, it shall be entitled to demand reimbursement from the *FMA*’s bodies or employees according to the provisions of the *AHG*.

(4) The *FMA* shall support the Federal Government in public liability and reimbursement proceedings pursuant to paras 1 and 2 in any appropriate way. In particular, it shall provide any information and documents which concern the public liability and reimbursement proceedings and ensure that the Federal Government can make use of the know-how and knowledge of the *FMA*’s bodies and employees about the supervisory measures pertaining to the proceedings.

(5) The statutory auditors appointed by the companies subject to supervision shall not be deemed bodies within the meaning of Article 1 para 1 *AHG*, unless they perform audits pursuant to the federal acts specified under section 2 for the *FMA* upon its separate order. The same shall apply to the auditing bodies of legally competent auditing institutions.”

51 Section 1(1) of the *Amtshaftungsgesetz* reads as follows: “§ 1. (1) Der Bund, die Länder, die Bezirke, die Gemeinden, sonstige Körperschaften des öffentlichen Rechts und die Träger der Sozialversicherung – im folgenden Rechtsträger genannt - haften nach den Bestimmungen des bürgerlichen Rechts für den Schaden am Vermögen oder an der Person, den die als ihre Organe handelnden Personen in Vollziehung der Gesetze durch ein rechtswidriges Verhalten wem immer schuldhaft zugefügt haben; dem Geschädigten haftet das Organ nicht. Der Schaden ist nur in Geld zu ersetzen.” (“The Federation, the constituent regions, the municipalities, other public bodies and the bodies entrusted with social security (hereafter: carriers of rights) are liable in accordance with the provisions of civil law for any monetary damage and personal damage that persons acting as their organs may have caused by fault in their conduct in violation of the law; towards the injured person no such liability exists. Damages are to be compensated for in money only”).

In the literature See DIJKSTRA, R.J., “Liability of Financial Supervisory Authorities in the European Union”, p. 350. The author underlines that “the provision that states that only damage suffered by the legal entities to be supervised by the *FMA* will be considered as ‘damage’ [Section 3 of the Act on the Financial Markets Supervisory Authority] was added by the Austrian legislator during the global financial crisis in 2008. As a result, third-party liability of the Austrian Federation as well as of the *FMA* is excluded (immunity)”.

Though there is no special immunity for supervisors, according to Article 105 of the Introductory Law to the Greek Civil Code, neither civil servants nor the State can be held liable for acts or omissions based on a provision of public interest.⁵²

In the light of the above, to some extent the Central Bank of Greece appears to enjoy an immunity regime. Damage caused by action taken in the public interest is basically not to be repaired.⁵³

In Poland a specific rule is in force conferring immunity to supervisors where their conduct is compliant with their statutory regulations.⁵⁴

5.2. The English-based liability regimes and the limitation of liability to bad faith

In the UK, liability of financial supervisors is confined to bad faith.

The statutory limitation from liability for damages was introduced in the UK under the 1987 Banking Act⁵⁵ and was then confirmed by the 2000 Financial

52 Article 105 of Greek Law 2783/1941 states that: "The State shall be liable and shall pay compensation for illegal acts or omissions of State bodies in the course of exercise of state authority appointed to them, unless the act or omission was in breach of a provision intended to benefit common interest. Without prejudice to special provisions regarding the liability of ministers, the liable natural persons serving in the State bodies shall be liable jointly and severally with the State".

53 See ATHANASSIOU, P., "Financial Sector Supervisors' Accountability: A European Perspective", p. 13, footnote 42. *Contra* DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union", p. 355: "Based on art. 105 [of Greek Law 2783/1941], it would appear that the applicable criterion to establish third-party liability is an illegal act or omission in the course of exercise of state authority, in our case, financial supervision. The criterion 'illegal act or omission' falls under the category of no-fault liability".

54 See NOLAN, D., "The Liability of Financial Supervisory Authorities", 199; DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union", p. 360. Article 33(6) of the Act of Financial Market Supervision of 26 July 2006 amended the Act on the National Bank of Poland (August 1997) as follows:

<<Art. 133.4 shall read as follows: The Financial Supervision Authority, the National Bank of Poland and the persons responsible for carrying out banking supervision activities shall have no liability whatsoever for damages resulting from any action or omission connected with the exercise of supervision by the Financial Supervision Authority over the activities of banks, branches and representative offices of foreign banks, branches of credit institutions and the exercise of supervision, pursuant to the provisions of the Electronic Payment Instruments Act of September 12th 2002, over electronic money institutions and branches of foreign electronic money institutions, where such action or omission is compliant with statutory regulations>>.

55 Under the Banking Act of 1979 the Bank of England enjoyed no limitation of liability.

Services and Market Act,⁵⁶ on the ground that the “public interest is better served by an uninhibited watchdog than by a legally responsible one”.⁵⁷

A similar provision is now to be found in the Financial Services Act of 2012,⁵⁸ which charges the Prudential Regulation Authority, a subsidiary of the Bank of England, with prudential tasks instead of the Financial Supervisory Authority.

Regardless of the statutory provisions, supervisors have always been well protected in common law.⁵⁹

⁵⁶ See Section 19, Exemption from liability in damages:

“19.—(1) Neither the [Financial Services] Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority’s functions.

(2) Neither the investigator appointed under paragraph 7 nor a person appointed to conduct an investigation on his behalf under paragraph 8(8) is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of his functions in relation to the investigation of a complaint.

Subparagraph 19(1) does not apply—

(a) if the act or omission is shown to have been in bad faith; or

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998”.

⁵⁷ See McLEAN, H., “Negligent regulatory authorities and the duty of care” (1998) 8 *O.J.L.S.*, p. 442. See also, in case law, *Yuen Ku Yeu v. Attorney General of Hong Kong*, 1987, where it is underlined that “if the Commissioner were to be held to owe actual or potential depositors a duty of care in negligence, there would be reason to apprehend that the prospect of claims would be a serious inhibiting effect on the work of his department”.

⁵⁸ See Schedule 1ZA – The Prudential Regulation Authority - Section 30 – Exemption from liability in damages

“(1) None of the following is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the PRA’s functions—

(a) the PRA;

(b) any person (“P”) who is, or is acting as, an officer of, or member of the staff of, the PRA or a member of its governing body;

(c) any person who could be held vicariously liable for things done or omitted by P, but only in so far as the liability relates to P’s conduct.

(2) Subparagraph (1) does not apply—

(a) if the act or omission is shown to have been in bad faith, or

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998”.

⁵⁹ See ROSSI, F., “Tort Liability of Financial Regulator: A Comparative Study of Italian and English Law Tort Liability of Financial Regulator: A Comparative Study of Italian and English Law in a European Contest”, pp. 650-651:

“Under English law the liability of public bodies is governed both by the ordinary rules of tort law and certain special tort regimes which apply only to administrative activities of the public authorities (e.g. the tort of misfeasance in public office). Public authorities receive an additional degree of protection from the common law. In cases involving tort liability in negligence of the public authorities the courts have developed several public law hurdles which, adding further elements to the ordinary rules of negligence, make really unlikely the imposition of a duty of care over public authorities. First, the policy/operational dichotomy, applied by English courts since the case of *Anns v Merton London Borough Council* and developed in successive judgments. Separating justiciable decisions from the ones which are not, suggests that it is inappropriate for certain administrative decisions to be adjudicated upon negligence actions. The rationale lying behind this scenario is that the recognition of private rights of action in the context of policy decisions by public authorities “can have the perverse effect of shifting the focus of the decision-making process from consideration of public interest towards common-law duties of care owed to private parties” [the quotation is from HADJEMMANUIL, C., *Banking regulation and the Bank of England*, pp. 353]. Furthermore, even in the

Even in the absence of a specific rule, the Courts exclude any duty of care falling upon supervisors on the basis of the following arguments:

(i) no proximity between the supervisor and investors, since supervision is exclusively in the public interest;⁶⁰

(ii) the need to grant the supervisory authority discretionary powers;⁶¹

case of a decision being justiciable according to the policy/operational dichotomy, a further burden on the plaintiff is provided by the condition for liability that the public authority's action was *ultra vires*.

In cases dealing with regulator liability, the issue of establishing a duty of care for public authorities presents two further obstacles. First, in all these cases the plaintiff suffers a pure economic loss. Secondly, in the field of regulators' liability for damages suffered by members of the public as a consequence of negligent supervision, the act or omission of the regulator is not an immediate cause of the damage suffered by the plaintiff. In these cases 'the imposition of liabilities in these situations implies that the defendant, even though he has not been himself the source of the fresh damage to the plaintiff, was nevertheless under a responsibility to come to latter's rescue' [the quotation is from Hadjiemmanuil, C., Banking Regulation and the Bank of England, mentioned under footnote No 23].

The restrictive approach adopted by the English courts in cases involving the imposition of a duty of care of public authorities is confirmed in the field of regulatory supervision".

60 See *Yuen Ku Yeu v. Attorney General of Hong Kong*, 1987, *WLR*, 1987, pp. 785-787: "the primary and all-important matter for consideration is whether in all the circumstances of this case there existed between the commissioner and would-be depositors with the company such close and direct relations as to place the commissioner, in the exercise of his functions under the Ordinance, under a duty of care towards would-be depositors... No doubt it was reasonably foreseeable by the commissioner that if an uncreditworthy company were placed on or allowed to remain on the register, persons who might in the future deposit money with it would be at risk of losing that money. But mere foreseeability of harm does not create a duty, and future would-be depositors cannot be regarded as the only persons whom the commissioner should properly have in contemplation ... no special relationship existed between the commissioner and those unascertained members of the public who might in future become exposed to risk of financial loss through depositing money with the company ... Accordingly ... there was no such close and direct relations between the commissioner and the plaintiffs as to give rise the duty of care desiderated".

See also *Cooper v. Hobart*, 2001, §§ 42-44: "42...The plaintiffs must also show proximity — that the Registrar was in a close and direct relationship to them making it just to impose a duty of care upon him toward the plaintiffs. In addition to showing foreseeability, the plaintiffs must point to factors arising from the circumstances of the relationship that impose a duty. 43. In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute. 44. In this case, the statute does not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public".

61 See *United States v. Gaubert*, 1991: "1. The discretionary function exception covers acts involving an element of judgment or choice if they are based on considerations of public policy. It is the nature of the conduct rather than the status of the actor that governs whether the exception applies. In addition to protecting policymaking or planning functions and the promulgation of regulations to carry out programs, the exception also protects Government agents' actions involving the necessary element of choice and grounded in the social, economic, or political goals of a statute and regulations. If an employee obeys the direction of a mandatory regulation, the Government will be protected because the action will be deemed in furtherance of the policies which led to the regulation's promulgation; and if an employee violates a mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, there is a strong presumption that the agent's acts are grounded in policy when exercising that discretion. Pp. 5-8.

2. The Court of Appeals erred in holding that the discretionary function exception does not reach decisions made at the operational or management level of IASA. There is nothing in the description of a

(iii) the need to impede a flood of claims against supervisors.⁶²

As the immunity provided for under the 2000 Financial Services and Market Act (now under the Financial Services Act of 2012) is not applicable to acts undertaken in bad faith, claims against the supervisory authority are mainly based on the wilful tort of misfeasance in public office, which is the only traditional public law tort in English law.⁶³

Besides the remedies under EU law,⁶⁴ in the BCCI case (*Three Rivers District Council and others v. Governor and Company of the Bank of England*,

discretionary act that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs regularly requires judgment as to which of a range of permissive courses is the wisest. Neither *Dalehite v. United States*, 346 U.S. 15, *Indian Towing*, supra, nor *Berkovitz v. United States*, 468 U.S. 531, supports Gaubert's and the Court of Appeals' position that there is a dichotomy between discretionary functions and operational activities. Pp. 9-10.

3. The Court of Appeals erred in holding that some of the acts alleged in Gaubert's Amended Complaint were not discretionary acts within the meaning of 2680(a). The challenged actions did not go beyond "normal regulatory activity." They were discretionary, since there were no formal regulations governing the conduct in question, and since the relevant statutory provisions left to the agency's judgment when to institute proceedings against a financial institution and which mechanism to use. Although the statutes provided only for formal proceedings, they did not prevent regulators from supervising IASA by informal means, a view held by the FHLBB, FHLBB Resolution No. 82-381. Gaubert's argument that the actions fall outside the exception because they involved the mere application of technical skills and business expertise was rejected when the rationale of the Court of Appeals' decision was disapproved. The FHLBB's Resolution, coupled with the relevant statutory provisions, established governmental policy which is presumed to have been furthered when the regulators undertook day-to-day operational decisions. Each of the regulators' actions was based on public policy considerations related either to the protection of the FSLIC's insurance fund or to federal oversight of the thrift industry. Although the regulators used the power of persuasion to accomplish their goals, neither the pervasiveness of their presence nor the forcefulness of their recommendations is sufficient to alter their actions' supervisory nature. Pp. 10-17".

See also *Yuen Ku Yeu v. Attorney General of Hong Kong*, *WLR*, 1987, p. 786: "in considering the question of removal from the register, the immediate and probably disastrous effect on existing depositors would be a very relevant factor. It might be a very delicate choice whether the best course was deregister a company forthwith or to allow it to continue in business with some hope that, after appropriate measures by the management, its financial position would improve. It must not be overlooked that the power to refuse registration, and to revoke or suspend it, is quasi-judicial in character".

In *Davis and other v. Radcliffe*, 1990, in *All.E.R.*, 1990, p. 536, it is held that supervisory functions are "typical functions of modern government, to be exercised in the general public interest. These functions are ... of the broadest kind ... In circumstances such as these, competing considerations have to be carefully weighed and balanced in the public interest, and, in some circumstances ... it may for example be more in the public interest to attempt to nurse an ailing bank back to health than to hasten its collapse. The making of decisions such as these is a characteristic task of modern regulatory agencies; and the very nature of the task, with its emphasis on the broader public interest, is one which militates strongly against the imposition of a duty of care being imposed on such an agency in favour of any particular section of the public".

62 See *Davis and other v. Radcliffe*, 1990, in *All.E.R.*, 1990, p. 536: "yet another consideration militating against the existence of the alleged duty of care in the present case is that it is said to be owed to an unlimited class of persons, including not only the depositors of money with SIB [Saving and Investment Bank] but also those considering whether to deposit their money with SIB".

63 See RIDE, C.T. "Damages for deliberate abuse of power", 1988 *S.L.T.* 121; ID., "Deliberate Misuse of Powers", 1986, *P.L.* 380; MCBRIDE, "Damages as a remedy for unlawful administrative action", 1979 38 *C.L.J.* 323; CARANTA, E., *La responsabilità extracontrattuale della pubblica amministrazione*, Milan, 1993, p. 543.

64 See § 9 of this part.

2000-2001) claims against the Bank of England were based on misfeasance in public office tort.⁶⁵

The tort consists in an exercise of power by a public officer in bad faith that causes loss to the claimant.

In specific terms, what is bad faith? The mental requirement of tort breaks down into two forms. The most stringent form is targeted malice. It requires proof that the public officer has acted with the intention of injuring the claimant. The other is untargeted malice and occurs when the public officer acts in the knowledge that he is exceeding his powers and that in doing so he will probably injure the claimant.⁶⁶

The focus of the BCCI case was upon the second form (untargeted malice) of the mental requirement of the tort of misfeasance in public office.

The debate in the Court concerned two questions:

(i) the first pertained to the public officer's knowledge of the unlawfulness of his act;

(ii) the second concerned the awareness of the consequences of that unlawful act.

The Court ruled that:

(i) on the knowledge of the illegality, the claimant must show that the officer acted with a state of mind of reckless indifference to the illegality;

(ii) on the awareness of the consequences, the claimant must show that the public officer acted with a state of mind of recklessness about the consequences of his act in the sense of not caring whether these consequences happened or not.⁶⁷

In other words, it was sufficient "to show disregard of a sufficiently serious risk of loss, coupled with unlawfulness", which is "a clearly very broad interpretation of bad faith".⁶⁸

Therefore, the BCCI case represented a perceptible shift towards a more liberal approach to actions brought by investors on the basis of the tort of misfeasance in public office traditionally confined to targeted malice.

⁶⁵ House of Lords, *Three Rivers District Council and others v. Governor and Company of the Bank of England*, 2000, 2 *WLR*, 1220 and 2001, *UKHL*, 16. In the literature see ANDENAS, M., "Liability for Supervisors and Depositors' Rights – The BCCI and the Bank of England in the House of Lords", in *Euredia*, 2000, pp. 394-395.

⁶⁶ See ANDENAS, M., "Depositor Protection, European Law and Compensation from Regulators", p. 519.

⁶⁷ See ANDENAS, M., "Depositor Protection, European Law and Compensation from Regulators", pp. 519-522.

⁶⁸ See ANDENAS, M., "Depositor Protection, European Law and Compensation from Regulators", p. 522.

The regime of supervisor liability in Ireland mimics the English one.

Not only is the financial supervisor deemed not liable in negligence since the courts held that there is insufficient proximity between the latter and investors,⁶⁹ but specific rules are also in force that expressly limit the supervisor's liability to bad faith.⁷⁰

In regard to this, specifically, the tort of misfeasance in public office also applies to Bank of Ireland bodies and officers.

⁶⁹ See High Court, *McMahon v. Ireland, the Attorney General and the Registrar of Friendly Societies* [1998] I.L.R.M. 610, which explicitly followed the advice in *Yuen-Kun-Yeu v. Attorney General of Hong-Kong*.

⁷⁰ The insulation at common law from liability for negligent supervisory decisions has been confirmed by Irish legislation conferring a series of statutory immunities on the Central Bank and Financial Services Authority, except for acts or omissions that are proved to have been in 'bad faith'. The Central Bank Reform Act 2010 merged the functions of the Financial Services Authority of Ireland into the Central Bank. Section 33AJ of the Central Bank Act 1942 revised, updated to 22 February 2013, reads as follows:

"33AJ.—(1) This section applies to the following persons:

(a) the Bank;

(b) the Governor;

(ba) the Heads of Function;

(bb) the Secretary General of the Department of Finance, in his or her capacity as an *ex-officio* member of the Commission;

(bc) the appointed members of the Commission;

(c) the Registrar of Credit Unions;

(d) the Registrar of the Appeals Tribunal;

(e) employees of the Bank;

(f) agents of the Bank.

(2) A person to whom this section applies is not liable for damages for anything done or omitted in the performance or purported performance or exercise of any of its functions or powers, unless it is proved that the act or omission was in bad faith.

(3) The fact that the Bank has authorised or revoked the authorisation, or regulates the activities, of a person, under any of its functions is not a warranty by the Bank as to the person's solvency or performance.

(4) The fact that the Bank in performing any of its functions—

(a) has approved or revoked the approval, or regulates the affairs or activities, of a stock exchange or a financial futures and options exchange, or

(b) has approved, amended, revoked or imposed rules, or has consented or refused to consent to amendments of rules, is not a warranty by the Bank as to the solvency or performance of the exchange or any member of the exchange.

(5) Neither the State nor the Bank is liable for losses incurred because of the insolvency, default or performance of a person or body referred to in subsection (3) or (4).

(6) Nothing in subsections (3) to (5) limits the effect of subsection (2).

(7) In this section, 'agent' includes a person appointed or authorised by the Bank, the Governor or the Head of Financial Regulation to perform any function or exercise a power under the Central Bank Acts or any other enactment".

Similarly to English case law, Irish courts suggest that the necessary degree of malice “may be inferred from recklessness”.⁷¹

The Supreme Court seems to have taken an even broader view in its judgement *Deane v. Voluntary Health Insurance*, holding that a public body might be liable for misfeasance in public office where its statutory powers were exercised “unreasonably and unfairly” in a manner that causes loss and damage.⁷²

Not surprisingly “in the past 5 years there have been no cases of litigation taken against the Central Bank of Ireland arising from its supervisory functions, nor has it had to pay any compensation arising from this role”.⁷³

71 High Court, July 23, 1984, *Corliss v. Ireland*.

72 Supreme Court, July 28, 1994. For an overview of Irish case law on liability for misfeasance in public office see DOHERTY, J. and LENIHAN, N., “Central Bank independence and Responsibility for Financial Supervision within the ESCB: the case of Ireland”, in *Legal Aspects of the European System of Central Banks*, ECB, 2005, pp. 210-232, ECB. The authors stress (see p. 225) that “Commentators have noted that the decisions in other common law jurisdictions do not set the boundaries of liability for misfeasance of public office so widely insofar as they require that the public authority was knowingly reckless outside the scope of its legal powers or, if professedly acting within them, was doing so ‘maliciously’ in the sense of being activated by an ulterior predominant purpose, such as to hurt the plaintiff for conduct unconnected with the exercise of the power”.

73 See the IMF’s 2014 Detailed Assessment of Observance of Basel Core Principles for Effective Banking Supervision on Ireland (IMF Country Report No. 14/135), p. 40.

The same limitation of supervisory liability to bad faith applies in Bulgaria (though only with regard to the Bulgarian National Bank),⁷⁴ Estonia⁷⁵ and Malta.⁷⁶

5.3. The French-based liability regimes and the limitation of liability to gross negligence

Due to the complex and sensitive nature of financial supervision, the case law of the French *Conseil d'Etat* traditionally requires claimants – since the *Sieur Bapst* case⁷⁷ of 1963 - to show *faute lourde* (gross negligence) in liability actions

74 See DIJKSTRA, R.J., “Liability of Financial Supervisory Authorities in the European Union”, p. 351: “Supervision of the financial sector in this country is performed by two authorities, namely the Bulgarian National Bank (BNB) and the Financial Supervision Commission (FSC). As both of these authorities fall under the description of governmental bodies performing administrative functions, their liability for shortcomings in their supervisory role is governed by the provisions of the Law on the Liability of the State and the Municipalities for Damages. Article 1 of this law states that ‘the state and the municipalities shall be liable for damages inflicted on citizens and legal persons from unlawful acts, deeds or omissions of their bodies or officials upon, or on the occasion of, implementation of their administrative behavior.’ This means that, in theory, the BNB and FSC, in their capacity as governmental bodies, are liable for shortcomings in their supervisory roles if damage occurs. The liability provided for under the statute can be categorised as no-fault liability: in other words, liability could be established independently of whether the state (through its official) has acted intentionally or not. However, unlike the liability of the FSC, the liability of the BNB has been limited to actions in bad faith by the Law on Credit Institutions 2006. Article 79(8) of this law states that ‘[t]he Bulgarian National Bank, its bodies and the persons authorised by them shall not be liable for any damages caused in exercising their supervisory functions, unless they have acted with intent’”.

75 See DIJKSTRA, R.J., “Liability of Financial Supervisory Authorities in the European Union”, p. 353: “In Estonia supervision of the financial markets and financial institutions is performed by the Estonian Financial Supervision Authority (EFSA). The liability of the EFSA is addressed in § 58 of the Financial Supervision Act 2001 (RT I 2001, 48, 267) which states that ‘[t]he liability of the Supervision Authority for rights violated or damage caused in the conduct of financial supervision, and the bases of and procedure for the restoration of violated rights and the payment of compensation for damage caused shall be provided by law.’ This Article refers to the State Liability Act 2002 (RT I 2001, 47, 260). Paragraph 13(3) of the State Liability Act states that ‘a public authority shall be relieved of liability for damage caused in the course of performance of public duties if the damage could not have been prevented even if diligence necessary for the performance of public duties had been fully observed’. Based on this paragraph and the comments from the experts, it follows that the EFSA will only be liable towards third parties in cases of actions or omissions made in bad faith. However, to date, the EFSA has not yet been subject to claims by third parties. Thus, there is no court practice to validate this assumption”.

76 See DIJKSTRA, R.J., “Liability of Financial Supervisory Authorities in the European Union”, p. 358-359: “The Malta Financial Services Authority (MFSA) is the sole regulator for financial services in Malta. Paragraph 29 of the Malta Financial Services Act (Act XXXIV 1988) limits the liability of the MFSA to acts in bad faith:

“The Authority, the Board of Governors, the Co-Ordination Committee, the Supervisory Council, the Board of Management and Resources, the Legal Office and the officers and employees of the Authority shall not be liable in damages for anything done or omitted to be done in the discharge or purported discharge of any function under this Act, unless the act or omission is shown to have been done or omitted to be done, as the case may be, in bad faith”.

77 See Conseil d'Etat 28 June 1963, *Sieur Bapst*, [1963] *Recueil des Décisions du Conseil d'Etat*, 1963, 411. The case establishes the basic principle that gross fault is required for state liability due to negligent bank supervision. “Cons., sur le premier point, que la responsabilité des services publics chargés du contrôle des banques et des établissements financiers ne saurait être engagée à l'égard des clients

lodged against the State for the alleged defective financial supervision of the competent public authority.⁷⁸

Nevertheless, the *Sieur Bapst* case gave no definition of what *faute lourde* entails.

Some clarifications were made in the *Sieur d'André* case of 1964: not avoiding the crisis of a financial intermediary coupled with knowledge of the signals of the crisis should have met the *faute lourde* criterion.⁷⁹

The standard of liability applied by the French Administrative Courts was particularly high.⁸⁰

Not surprisingly, until the *Kechichian* case of 2001, only one claim had ever satisfied the *faute lourde* requirement (*Achard* case of 1964).⁸¹

This restrictive approach was temporarily abandoned by the *Cour Administrative d'Appel de Paris* in the *El Shikh* and *Kechichian* cases: the Court decided that the standard of *faute simple* (negligence) applied to the supervisory role of the *Commission Bancaire*.⁸²

d'établissements dont les dirigeants se sont rendus coupables d'abus de confiance qu'au cas où il serait établi que lesdits service aurait commis une faute lourde... ”.

78 See FAIRGRIEVE, D. and BELLOIR, K, “Liability of the French State for Negligent Supervision of Banks”, 1999, *European Business Law Review*, 17. In addition to supervisory powers, the French supervisory authority also enjoys sanctioning ones. The latter are tantamount to judiciary powers. As a consequence of that, under early *Conseil d'Etat* case law, they did not involve the State's liability: see, among others, the *Sieur Bapst* case, where it is underlined that “les décisions prises dans l'exercice de la fonction juridictionnelle ne sont pas de nature à donner ouverture à une action en responsabilité contre l'Etat” (*Conseil d'Etat* 28 June 1963, *Sieur Bapst*, 1963 *Recueil*, 412). As in the *Darmant* case, the *Conseil d'Etat* applied to the “quasi-judiciary powers” of the supervisory authority the *faute lourde* rule: “une faute lourde commise dans l'exercice de la fonction juridictionnelle par une juridiction administrative est susceptible d'ouvrir droit à indemnité”; the only limit being that of the *res judicata*: “l'autorité qui s'attache à la chose jugée s'oppose à la mise en jeu de cette responsabilité, dans le cas où la faute lourde alléguée résulterait du contenu même de la décision juridictionnelle et où cette décision serait devenue définitive”: *Conseil d'Etat* 29 December 1978, *Darmont*, 1978 *Recueil*, 542. Besides the above judgments, see: *Conseil d'Etat*, 4 January 1952, *Pourcelet*, 1952, *Recueil*, 4; *Cour Administrative d'Appel de Lyon*, 28 December 1990, 1990, *Recueil*, 963; *Conseil d'Etat* 12 October 1983, *Consort Levy*, 1983, *Recueil*, 406 and *Dalloz* 1985 *Informations Rapide*, 203. In the literature see MOREAU, J., *Responsabilité résultant d'actes de tutelle et de contrôle*, JCA, No. 715.

79 See *Conseil d'Etat*, 28 June 1963, *Sieur d'André*, [1964] *Recueil des Décisions du Conseil d'Etat*, 329: “cons., enfin, que, si l'inspection à laquelle il a été procédé en 1948, a permis de relever certaines irrégularités, ces irrégularités n'étaient pas de nature à compromettre la situation de l'établissement.. ”. The liability of the French Banking Authority was nonetheless excluded as signals didn't show that a crisis was approaching. As correctly noted in the literature “in its judgment, the *Conseil d'Etat* seems to suggest that the Commission's fault must derive from a failure to react to banking irregularities that could potentially bankrupt the bank”: FAIRGRIEVE, D. and BELLOIR, K, “Liability of the French State for Negligent Supervision of Banks”, 16. Subsequent cases underline this requirement. See *Conseil d'Etat*, 29 December 1978, [1978] *Recueil des Décisions du Conseil d'Etat*, 542; *Tribunal Administratif de Marseille*, 1 December 1998, *Fauvry*, *JCP Edition Entreprise*, 1989, II, 15480.

80 See CLIQUENNOIS, M., “Essai sur la responsabilité de l'Etat du fait de ses activités de contrôle et de tutelle”, *Petites Affiches*, 16 août 1995 p. 4.

81 See *Conseil d'Etat*, 24 January 1964, *Achard*, [1964] *Recueil des Décisions du Conseil d'Etat*, 43. The *faute lourde* was found in the fact that the French Banking Authority had failed to take any steps to ensure that the bank complied with its warning.

82 See *Cour Administrative d'Appel de Paris*, 30 March 1999, *El Shikh*, *AJDA*, 1999/11, 951 and *Cour Administrative d'Appel* 25 January 2000, *Kechichian*.

Nevertheless, the ruling of the *Cour Administrative d'Appel* was immediately overturned by the *Conseil d'Etat* which confirmed the *faute lourde* approach.⁸³

The protective role of *faute lourde* in the area of financial supervision is therefore still deemed necessary in France in order to provide a margin of manoeuvre for the public bodies charged with supervisory powers, even though the *Conseil d'Etat* recognised the liability of the State for the unlawful conduct of the *Commission Bancaire*.

83 See Conseil d'Etat, 30 November 2001, *Kechichian*, *Juris-Classeur Périodique*, 2002, édition Générale., II, No. 10042. The *faute lourde* principle was confirmed on the basis of the following arguments: "considérant que la responsabilité de l'Etat pour les fautes commises par la Commission bancaire dans l'exercice de sa mission de surveillance et de contrôle des établissements de crédit ne se substitue pas à celle de ces établissements vis-à-vis, notamment, de leurs déposants; que, dès lors, et eu égard à la nature des pouvoirs qui sont dévolus à la Commission bancaire, la responsabilité que peut encourir l'Etat pour les dommages causés par les insuffisances ou carences de celle-ci dans l'exercice de sa mission ne peut être engagée qu'en cas de faute lourde; qu'il suit de là qu'en jugeant que toute faute commise par la Commission dans la surveillance et le contrôle des établissements de crédit pouvait engager la responsabilité de l'Etat, la cour administrative d'appel de Paris a commis une erreur de droit".

Liability regimes based on the gross negligence requirement were also introduced in Luxembourg (1998),⁸⁴ Latvia (2001),⁸⁵ Belgium (2002),⁸⁶

84 See Article 20 of the *Loi du 23 décembre 1998 portant création d'une commission de surveillance du secteur financier*, under which "(1) La surveillance exercée par la CSSF n'a pas pour objet de garantir les intérêts individuels des entreprises ou des professionnels surveillés ou de leurs clients ou de tiers, mais elle se fait exclusivement dans l'intérêt public. (2) Pour que la responsabilité civile de la CSSF pour des dommages individuels subis par des entreprises ou des professionnels surveillés, par leurs clients ou par des tiers puisse être engagée, il doit être prouvé que le dommage a été causé par une négligence grave dans le choix et l'application des moyens mis en oeuvre pour l'accomplissement de la mission de service public de la CSSF". See DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union", p. 358.

See also TISON, M., "Challenging the Prudential Supervisor: Liability versus Regulatory Immunity", p. 14. The author first observes that "until 1993, the law merely stated that the State did not bear liability for the acts of the Institut Monétaire Luxembourgeois (IML), which then exercised prudential supervision over banks" and that "did not exempt, however, the IML from liability". He then underlines that "the Law of 23 December 1998 first clarifies, in a way similar to German law and the earlier German case law, the objectives of prudential supervision: supervision exclusively serves the public interest, and does not purport to protect the individual interests of the institutions subject to supervision, their clients or third parties. Second, the same provision lays down the conditions of possible supervisory liability: the supervisory authority can only be held liable towards either a supervised financial institution, its clients or third parties, when it is established that the damage incurred by the victims is caused by a gross negligence in the choice and use of the methods deployed for the exercise by the supervisory authority of its public duty. It may be submitted that gross negligence does not only encompass bad faith, which constitutes the standard for liability under English and Irish law, but more generally refers to a shortcoming which a normal person placed in the same circumstances would never commit. In this regard, the liability regime is largely similar to the situation which at present prevails in France and Belgium (...). However, it should be stressed that, absent any case law, the scope of the statutory liability regime still remains unclear, as the explanatory memorandum of the law underlined that the statutory regime did not preclude the application of the general rules of law as regards liability of public authorities".

85 See DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union", p. 357: "Since 2001, the Financial and Capital Market Commission (Finanšu un kapitāla tirgus komisija, FKTK), an autonomous public institution, has been responsible for supervision over the Latvian financial sector. Its liability has been established in the Law on Credit Institutions. Article 111(6) of this Law states:

"The Financial and Capital Market Commission is responsible for damage caused to a third party by the Financial and Capital Market Commission's actions in fulfilling its statutory functions only in the case where the Financial and Capital Market Commission has deliberately acted unlawfully or with gross negligence".

Based on this Article, the FKTK can be placed in the 'gross-negligence' category".

86 In Belgium both the NCB and the FSMA enjoy limitation of liability to gross negligence. Under Article 12-*bis*, section 3, of the *Loi du 22 février 1998 fixant le Statut de la Banque Nationale de Belgique* (coordination officieuse dd. 1 septembre 2011) "la Banque exerce sa mission de contrôle exclusivement dans l'intérêt général. La Banque, les membres de ses organes et les membres de son personnel n'encourent aucune responsabilité civile en raison de leurs décisions, non-interventions, actes ou comportements dans l'exercice de la mission légale de contrôle de la Banque, sauf en cas de dol ou de faute lourde". Additionally, civil liability is limited to fraud or gross negligence in cases where persons have carried out the remedial measures outlined in Article 57-*bis* of the Banking Law. Under Article 68 of the Belgian Financial Law (*Loi relative à la surveillance du secteur financier et aux services financiers*) "la FSMA exécute ses missions exclusivement dans l'intérêt général. La FSMA, les membres de ses organes et les membres de son personnel n'encourent aucune responsabilité civile en raison de leurs décisions, actes ou comportements dans l'exercice des missions légales de la FSMA sauf en cas de dol ou de faute lourde". See DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union", p. 350. See also TISON, M., "Challenging the Prudential Supervisor: Liability versus Regulatory Immunity". The author observes (p. 17) that "Government motivated the inclusion of the provision with reference to the Basle Committee's *Core Principles* on the one hand, and the circumstance that prudential supervision under a normal liability regime would entail disproportionate financial risks for the supervisory authority".

Italy (2005), and, more recently, in the Netherlands (2012)⁸⁷ and Cyprus (2013).⁸⁸

As specifically regards Italy, Article 24(6-*bis*), of Law No 262 of 2005 on the protection of savings, as amended by Article 4(2), of Legislative Decree No 303 of 2006, stipulates that supervisory authorities and their staff are responsible only if their acts or omissions are shown to have been in bad faith or due to gross negligence.

87 The *Wet aansprakelijkheidsbeperking DNB en AFM en bonusverbod staatsgesteunde ondernemingen* (Limitation of liability of DNB and AFM and prohibition of bonuses in state-aided companies Act: Act of 7 June 2012, *Staatsblad* [Bulletin of Acts, orders and decrees] 2012, No. 265.) introduces liability limitation for the NCB and for the financial sector conduct supervisor. The provision of sec. 1:25d of the Financial Sector Supervision Act stipulates that: “1. The *Nederlandsche Bank*, its Governing Board members, the Supervisory Board, and its employees are not liable for damages caused by an act or omission while exercising a task entrusted to it by law or a competence granted to it by law, unless this damage results to a considerable extent from the wilful inappropriate performance of a task or from the wilful inappropriate performance of competencies or to a considerable extent is attributable to gross negligence. 2. The *Autoriteit Financiële Markten*, its Governing Board members, the Supervisory Board, and its employees are not liable for damages caused by an act or omission while exercising a task entrusted to it by law or a competence granted to it by law, unless this damage results to a considerable extent from the wilful inappropriate performance of a task or from the wilful inappropriate performance of competencies or to a considerable extent is attributable to gross negligence”.

For the liability regime in force prior to the entry into force of Limitation of liability of DNB and AFM and prohibition of bonuses in state-aided companies Act see DIJKSTRA, R.J., “Liability of Financial Supervisory Authorities in the European Union”, p. 359. In the absence of a specific law dealing with the liability of supervisory authorities, both the Financial Market Authority (FMA) and the Dutch Central Bank (DCB) were subject to the normal tort rules contained in Article 6:162 of the Dutch Civil Code. The standard for financial supervisors’ liability was therefore “reasonable care”. “The Supreme Court of the Netherlands pointed out in the *Vie d’Or* case that, in order to determine whether financial supervision complies with the standards of reasonable care, all circumstances of the individual case have to be taken into account. These circumstances include the ‘nature’ of financial supervision, the fact that financial regulators have discretionary powers in order to fulfill their supervisory duties, and the fact that financial regulators face the difficult task of taking into account both the interests of the supervised institutions and individual consumers (the supervisor’s dilemma). The applicable liability criterion for the DNB and AFM is therefore negligence”: DIJKSTRA, R.J., “Liability of Financial Supervisory Authorities in the European Union”: *ibid.* See Supreme Court of Netherlands, 13 October 2006, No C04/279HR.

Moreover, it is worth noting that under sec 6:163 of the Dutch Civil Code “[t]here is no obligation to repair damage when the violated norm does not have as its purpose the protection from damage such as that suffered by the victim’. In the light of the above in the literature has been observed that: “One effect of this ‘protective purpose of the norm’ principle is to limit the liability of public authorities to cases where one of the purposes of the rule imposing the relevant duty on the authority is the protection of the interest of the claimant affected by the authority’s alleged breach of that duty” and that “depositor protection is generally considered to be one of the purposes of the regulation and supervision of financial institutions, albeit that it is not the sole such purpose, and its relative importance seems to have diminished over time”: NOLAN, D., “The Liability of Financial Supervisory Authorities”, 209-210.

88 See paragraph 32 of The Business of Credit Institutions Law of 1997 to 2013, that reads as follows: “32. (1) The Central Bank and any person who is a Director or an officer of the Central Bank, shall not be liable in any action suit or other legal proceedings for damages for anything done or omitted in the discharge of the functions and responsibilities of the Central Bank under this Law or under the Regulations issued under this Law, unless it is shown that the act or omission was not in good faith or was the result of gross negligence.

(2) The protection provided under sub-section (1) extends likewise to the Management Committee and to the members of the Management Committee of the Central Information Register, appointed pursuant to sub-section (4) of section 41, with regard to the exercise of their duties”.

See DIJKSTRA, R.J., “Liability of Financial Supervisory Authorities in the European Union”, p. 351-352.

The new Italian regime of supervisors' liability replaced the previous one based on the general tort law standard of negligence.⁸⁹

The Italian Supreme Court's (Corte di Cassazione) case law is still dealing with claims against supervisory authorities lodged before the entry into force of Law No 262 of 2005.

Nevertheless, though not referring to the gross negligence criterion, the outcome of the Corte di Cassazione's assessment of supervisors' liability comes to nearly the same conclusions as the French *Conseil d'Etat* jurisprudence.⁹⁰

In its judgment No 3132 of 2001 (case *Hotel Villaggio Santa Teresa di Gallura*)⁹¹ the Corte di Cassazione decided that the Italian Companies and Stock Exchange Commission (Consob) had to be held liable as it did not use its powers despite the fact that they were necessary in order to protect the interests safeguarded by law (Articles 18 ff. of Law No 216 of 1974⁹²) and that the need to use these powers unmistakably appeared from the wording of the prospectus submitted to Consob's approval.⁹³

89 See Article 2043 of the Italian Civil Code which foresees that "any wilful or negligent act that causes an unjustified damage to another obliges the person who has committed the act to pay damages". For further details see footnote No 202.

90 In the same vein see Rossi, F., "Tort Liability of Financial Regulator: A Comparative Study of Italian and English Law in a European Contest", p. 663: "the criterion followed by the Corte di Cassazione in the HVST [Hotel Villaggio Santa Teresa di Gallura] case is that, in order for a liability of the members of the Commission to arise, there should be a failure to act that the Corte di Cassazione identified in a gross misconduct, because the falsified information contained in the prospectus should appear clear *ex actis*".

91 The judgment is published in *Giur. Comm.*, 2002, II, pp. 5 ff., with comments of SCOTTI, O., "Diffusione di informazioni inesatte e tutela degli investitori: configurazione della responsabilità della Consob per omessa vigilanza"; in *Dir. banc. e merc. finanz.*, 2001, pp. 525 ff., with comments of NIUTTA, A. and JOVINO, P.D., "La responsabilità della Consob nell'ipotesi di omessa vigilanza su una sollecitazione del pubblico risparmio con emissione di titoli atipici"; in *Foro it.*, 2001, I, c. 1139, with comments of PALMIERI, A., "Responsabilità per omessa o insufficiente vigilanza: si affievolisce l'immunità della pubblica amministrazione"; in *Giur. It.*, 2001, I, pp. 2269 ff., with comments of D'AURIA, M., "La responsabilità civile della Consob. Profili civilistici".

On the topic see also SCOGNAMIGLIO, G., "La responsabilità civile della Consob", in *Riv. Dir. comm.*, 2006, I, pp. 695 ff.; CLARICH, M., "La responsabilità della Consob nell'esercizio della funzione di vigilanza: due passi oltre la sentenza della Cassazione n. 500/99", in *Danno e Resp.*, 2, 2002, pp. 223 ff.; VELLA, F., "La responsabilità civile delle autorità di vigilanza sui mercati finanziari: alla ricerca di un equilibrio tra 'immunità' e tutela degli investitori", in *Analisi Giuridica dell'Economia*, 2002, I, pp. 295 ff.; CARANTA, R., "Responsabilità della Consob per mancata vigilanza e futuri problemi di giurisdizione", in *Resp. Civ. e Prev.*, 2001, pp. 571 ff.;

92 See Articles 93-bis to 101 of the Italian Consolidated Law on Finance (Legislative Decree No 58 of 1998) on the solicitation of public savings and the disclosure requirements therein.

93 The Corte di Cassazione returned to the case with its judgment No 4527 of 2009 dealing with the limitation of liability of the members of Consob's decision-making bodies and staff. With regard to this specific issue the Court held that "la limitazione della responsabilità civile dei commissari ed esperti della Consob alle ipotesi di (dolo o) colpa grave non significa che l'ordinamento tolleri un comportamento lassista di costoro o li esponga alla responsabilità nei confronti dei terzi danneggiati solo in presenza di macroscopiche inosservanze dei doveri di ufficio o di abuso delle funzioni per il perseguimento di fini personali, giacché si ha colpa grave anche quando l'agente, pur essendone obbligato iure, non faccia uso della diligenza, della perizia e della prudenza professionali esigibili in relazione al tipo di servizio pubblico o ufficio rivestito".

5.4. The protection of supervisors irrespective of a specific rule limiting their liability

Liability regimes within EU countries show a clear trend towards a form of legal protection of supervisors, spanning from immunity from investors (Austria, Germany, Greece and Poland) to the general limitation of liability to bad faith (Bulgaria, Estonia, Ireland, Malta and the UK) or gross negligence (Belgium, Cyprus, France, Italy, Latvia, Luxembourg and the Netherlands).

In the other EU Member States supervisors' liability falls in theory under the general criteria of no-fault (Czech Republic, Lithuania, Spain and Slovakia) or simple negligence (Denmark, Portugal, Slovenia and Sweden).⁹⁴

Nevertheless, in practice some other elements play an important role in the legal protection of supervisors.

An emblematic case is the Czech Republic. Supervision of the financial market falls under the responsibility of the Czech National Bank (CNB). Since the banking legislation provides for no specific provision on the CNB's liability, general rules apply. Under Articles 3 and 13 of the State Liability Act, the State and the public authorities are liable for any damage caused by unlawful decisions or improper administrative actions to a legal entity or person in the course of executing public authority on behalf of the State, as is the case of the CNB.

Nevertheless, as observed in the literature, whilst "in theory, the liability standard is relatively low since it is based on no-fault liability", "in practice, the substantive laws play an important role as there is no clear definition of what constitutes improper conduct (or supervisory failure). As a result, and despite several cases against the State for the unlawful conduct of the CNB, the courts have yet to find the CNB guilty of not complying with its statutory obligations".⁹⁵

Another case is Spain. Spanish supervisors are subject to the general liability regime. Under Article 139 of the Act on the Legal Regime of Public Administration and General Administrative Procedure of 1992 "individuals are entitled to compensation from the State regarding damages that are the result of the normal or abnormal functioning of public services".⁹⁶ The claimant is therefore not required to show that the supervisor breached a whatsoever standard of legality. This notwithstanding, where the claimant is expected to

⁹⁴ For an overview of all the liability categories within EU countries, including no-fault liability and simple negligence, see DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union".

⁹⁵ See DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union", p. 352.

⁹⁶ See DIJKSTRA, R.J., "Liability of Financial Supervisory Authorities in the European Union", p. 362-363.

bear the loss or no causal link can be found between the authority's conduct and the victim's harm, the authority is not liable.⁹⁷

More generally, as can be seen in several common law jurisdictions and the French *Conseil d'Etat* case law, supervisors are protected by courts irrespective of a specific rule limiting their liability.

In some cases, the rules limiting the supervisor's liability are nothing more than the application to the specific field of financial markets of some general principles of civil law.

Indeed, Article 24(6-*bis*), of Italian Law No 262 of 2005 is considered in the literature as a specific application of the general principle contained in Article 2236 of the Italian Civil Code.⁹⁸ This, which courts have also applied to cases of non-contractual liability,⁹⁹ stipulates that when the nature and content of the services required are very technical and pertain to difficult matters, the liability of the practitioner is implicated only in the case of wilful misconduct or gross negligence.

Apart from the cases referred to above, "experience shows that even where" actions for damages "are governed by the ordinary law of civil or administrative liability, it is rare for a damages claim by a depositor against a financial supervisor to succeed. The depositor may fall at any one of a number of hurdles, including fault, causation, and objections based on the nature of the damage (the pure economic loss issue), liability for omissions or for the deliberate acts of third parties, liability for the exercise of judicial or 'quasi-judicial' functions, and the principle of the so-called 'protective purpose of the norm'".¹⁰⁰

More to the point, one may refer to:

(i) Section 6:163 of the Dutch Civil Code,¹⁰¹ the German *Schutznormtheorie*¹⁰² or the proximity requirement in common law¹⁰³ (protective purpose of the norm);

97 See NOLAN, D., "The Liability of Financial Supervisory Authorities", 199-200.

98 See D'AMBROSIO, R., "La responsabilità delle autorità di vigilanza: disciplina nazionale e analisi comparatistica", pp. 261 ff.; FRANZONI, M., "La responsabilità civile delle Authorities per omissione di vigilanza", in *Mercato finanziario e tutela del risparmio*, edited by Galgano, G. and Visentini, G., Padova, 2006, *Tratt. dir. comm e dir. Publ. Econ.*, edited by Galgano, F., vol. No 43; MONATERI, P.G., "La responsabilità civile delle autorità garanti", in *Danno e responsabilità*, 2000, pp. 361 ff..

99 See Corte di Cassazione, SS.UU., 6.5.1971, No 1282 in *Giust. Civ.*, 1971, I, 1417; see also Corte di Cassazione, 25.5.1991, No 5582; 7.8.1982, No 4437; 7.3.1981, No 1544.

100 NOLAN, D., "The Liability of Financial Supervisory Authorities", 208. For an analysis of hurdles claimants may incur where relying upon the tort of negligence rather than that of misfeasance in public office see ANDENAS, M., "Depositor Protection, European Law and Compensation from Regulator", pp. 529-531.

101 See footnote No 87.

102 See § 5.1 of this part.

103 See cases referred to in footnote No 60.

(ii) the characterization under the French *Conseil d'Etat* case law of some French supervisory authority's powers as quasi-judicial;¹⁰⁴

(iii) the reluctance to award compensation for pure economic loss in common law;¹⁰⁵

(iv) the difficulty to admit negligence liability for omissions in common law;¹⁰⁶

(v) the exclusion of liability, in common law and in the Swiss Public Liability Act, for the deliberate act of a legally responsible third party (the failed institution and its managers);¹⁰⁷

104 See the *Conseil d'Etat's* case law in footnote No. 78.

105 As correctly observed in the literature, "even legal systems more sympathetic to claims for pure economic loss may balk at allowing its recovery in this context. In Canada, where a more liberal approach is taken to this issue than in England, the Supreme Court referred in *Cooper v Hobart* to the danger of indeterminate liability (the so-called 'floodgates' argument) as a reason for holding that no duty of care was owed, while in France, where recovery for pure economic loss is unproblematic at a conceptual level, it seems that the fact that the interests affected by the alleged fault of financial supervisors are purely economic influenced the decision of the *Conseil d'Etat* to apply the lesser *faute lourde* standard to them in the *Kechichian* case": NOLAN, D., "The Liability of Financial Supervisory Authorities", 212-213. See also ZWEIGERT, K, and KÖTZ, H., *Introduzione al Diritto Comparato, II, Istituti*, Milan, 2011, 344-345.

106 See House of Lords, *Gorringe v Calderdale MBC*, [2004] 1 Weekly Law Reports (WLR) 1057. Their lordship held that a public authority can be liable in negligence for its failure to exercise a statutory power or duty only if the circumstances are such that a private party would also have come under an obligation of positive conduct. "By contrast, it would appear that the nonfeasance objection is not a significant obstacle to claims against financial supervisors in continental jurisdictions": NOLAN, D., "The Liability of Financial Supervisory Authorities", 213.

107 See *Yuen Kun Yeu*, 1987, WLR, 1987, pp. 786: "On the plaintiffs' case as pleaded the immediate cause of the loss suffered by the plaintiffs in this case was the conduct of the managers of the company in carrying on its business fraudulently, improvidently and in breach of many of the provisions of the Ordinance".

See also *Davis v. Radcliffe* in *All.E.R.*, 1990, p. 541: "A further consideration which militates against the imposition of a duty of care in the position of the respondents in the present case is that it is being sought to make them liable in negligence for damage caused to the appellants by the default of a third party, SIB [Saving and Investment Bank]. In the case of physical damage caused by the deliberate wrongdoing of a third party, such liability will only be imposed in limited classes of cases... Here it is suggested that such liability should be imposed for purely financial loss flowing from the negligence of a third party. It must be rare that any such liability will be imposed; but in any event it is difficult to see that, in the present case, the respondent possessed sufficient control over the management of SIB to warrant the imposition of such a liability".

As noted in the literature, "it is instructive to compare the approach taken to this issue in French administrative law, where the third party's involvement does not bar the claim, but the damages are instead limited to reflect the public authority's relative causal responsibility for the claimant's loss. In the *Kechichian* case, for example, although the banking supervisor was held liable to the depositors, it was required to compensate only 10% of the lost deposits, on the grounds that the primary cause of the bank's collapse had been the fraudulent activities of its directors. Where either of these approaches to the third-party problem is adopted, it will operate as a significant constraint on liability in this context": NOLAN, D., "The Liability of Financial Supervisory Authorities", 215.

(vi) the difficulties when it comes to establishing that the supervisor is in fault, considering, among the other circumstances, its margin of manoeuvre,¹⁰⁸

(vii) the difficulties claimants will face (basically in French administrative courts) in establishing that the supervisor's fault was the cause of their loss.¹⁰⁹

Therefore, the limitation of supervisors' liability is not only the subject of some rules in force in most of the EU countries specifically aimed at protecting the supervisory authorities from specious lawsuits, but it is also the effect of some general principles of administrative and tort law. Though these principles are not common to all the Member States, they are clear examples of the courts' willingness to protect supervisors and are therefore worth considering by the CJEU to ensure a form of legal protection for the ECB similar to that granted to the NCAs in their respective jurisdictions.

5.5. The trend towards the limitation of supervisors' liability outside the EU

The mainstream limiting supervisors' liability in the EU is also confirmed by the regimes in force outside the EU both in some emerging countries¹¹⁰ and in the

108 See *Yuen Ku Yeu v. Attorney General of Hong Kong*, 1987, *Davis and other v. Radcliffe*, 1990 and *United States v. Gaubert*, 1991 reported in footnote No 61.

109 French case law is here worth mentioning. In the *El Shikh* case, *AJDA*, 1999/11, 952, the *Cour Administrative d'Appel* dismissed the claims on the grounds that no causal link existed between the authorities' alleged failures and the loss of the funds deposited by the claimants with the bank. Since the bank's collapse was largely attributable to fraudulent activity at its principal office in London, there was no direct causal link between any failings on the part of the French authorities and the depositors' losses. See *Cour Administrative d'Appel de Paris*, 30 March 1999, *El Shikh*, *AJDA*, 1999/11, 952: "Considérant que, si... la Commission bancaire n'a procédé à aucune investigation portant sur l'activité des agences françaises et monégasques, cette inaction ne saurait engager la responsabilité de l'Etat, dès lors que la faillite du groupe BCCI trouve son origine dans des actions frauduleuses conduites au niveau de l'ensemble des établissements et sociétés du groupe, et notamment de l'établissement implanté à Londres, et qu'elle est donc sans lien direct avec la situation propre des établissements relevant de la compétence de la Commission bancaire, ceux-ci ne représentant au demeurant qu'une faible partie des activités totales du groupe".

A different approach was followed by the same Court in the *Kechichian* case (CAA Paris, 25 January 2000): here the inadequate supervision was deemed as causally significant in the failure of the bank, but had only deprived depositors of a chance of avoiding their losses. As a consequence of that, the damages awarded had to be limited to one-fifth of the funds each had lost: "Considérant que le comportement fautif sus-décrit de la commission bancaire a eu pour effet... de compromettre les chances qu'avaient les requérantes d'échapper au risque que représentait pour eux la faillite de la banque à laquelle ils avaient confié leurs dépôts ; que la réparation du dommage résultant pour les requérants de cette perte de chance de se soustraire au risque qu'ils s'est finalement réalisé doit être fixée à une fraction du montant non remboursé de leur dépôts ... ; que, compte tenu, d'une part, du caractère nécessairement hypothétique des effets qu'aurait eu sur la situation de la banque et celle des déposants une action de contrôle normalement exercée de la commission bancaire et, d'autre part, l'importance des fautes commises par cette dernière, cette fraction doit être fixée à 20%".

110 See, for example, Nigeria. The relevant section of the Nigerian Central Bank Act (Section 52 of the Central Bank of Nigeria Act 2007) reads as follows: "Neither the Federal Government nor the Bank nor any officer of that Government or Bank shall be subject to any action, claim or demand by or liability to any persons in respect of anything done or omitted to be done in good faith in pursuance or in execution of, or in connection with the execution or intended execution of any power conferred upon that Government, the Bank or such Officer, by this Act".

common law ones. As regards the latter, the limitation of supervisors' liability is based both on the specific rules providing for a bad faith criterion¹¹¹ and on the case law approach, aimed basically at preserving the margin of manoeuvre of the supervisory authorities.¹¹²

With regard to the US, "claims against financial supervisory authorities are governed by the Federal Tort Claims Act, and in the light of the 'discretionary function' immunity conferred on federal agencies by this legislation it has been said that it would be very difficult to bring a tort action against US financial regulators in the type of case under consideration".¹¹³

The case of Switzerland is also worth mentioning.

Sections 3 and 4 of the Public Liability Act (*Verantwortlichkeitsgesetz*) stipulate that unlawful acts may lead to damages to be compensated for, even if there is no fault on the part of the civil servant.

Nevertheless, they also provide for a reduction of liability in the case of contributory liability on the part of the claimant.

Consistently with the Public Liability Act, Section 9 of the *Finanzmarktaufsichtsgesetz* (Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority) limits the liability of the Financial Market Authority to cases where fundamental duties have been breached and where there is no primary liability on the part of the supervised institution¹¹⁴

As there will almost always be a primary liability of the financial institutions subject to supervision, liability of the Swiss supervisory authority would be basically excluded due to the deliberate act of a legally responsible third party.

111 See the Australian Prudential Regulation Authority Act 1998 (Cth) sec 58, the Canadian Financial Institutions and Deposit Insurance System Amendment Act, RS 1985, ch 18, sec 24, the Indian Banking Regulation Act 1949, sec 54, the Malaysian Banking and Financial Institutions Act 1989, sec 114, the Monetary Authority of Singapore Act, ch 186, sec 22, the South African Banks Act 1990 (Act No 94 of 1990), sec 88.

112 See, among the others, *United States v. Gaubert*, 1991 and *Yuen Ku Yeu v. Attorney General of Hong Kong*, 1987.

113 See NOLAN, D., "The Liability of Financial Supervisory Authorities", p. 194; PROCTOR, C., "Financial Regulators: Risks and Liabilities" (Part 2) (2002) 2 *Journal of International Banking and Financial Law*, p. 71. In case law, see S. Ct.'s judgment *United States v. Gaubert*, quoted in footnote No. 61.

114 Section 6 of Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority reads as follows:

"1 The liability of FINMA, its management bodies, its staff and FINMA mandataries is governed by the Government Liability Act of 14 March 1958, subject to paragraph 2 below. The liability of audit companies appointed under private law is governed by the provisions of company law (Swiss Code of Obligations Articles 752–760).

2 FINMA and its mandataries are liable only if:

a. they have committed a breach of fundamental duties; and
b. loss or damage is not due to a breach of duty by a supervised person or entity".

6. Whether and to what extent the rules on the legal protection of supervisors are compatible with Article 6 of the European Convention of Human Rights (and with Article 47 of the Charter of Fundamental Rights of the European Union)

The overview above on the legal protection provided for supervisors by national regimes authorizes the conclusion that the CJEU is entitled to find common rules for limiting the liability of the ECB while performing the tasks entrusted to it by the SSMR.

Nevertheless, this conclusion is conditional upon the solution of the further problem of whether and to what extent the rules on the legal protection of supervisors in force in EU Member States are compatible with:

(i) the European Convention of Human Rights (hereinafter ECHR)¹¹⁵ and the corresponding provisions of the Charter of Fundamental Rights of the European Union (hereinafter the Charter) and

(ii) substantive EU banking legislation.

The present section deals with the compatibility of the legal protection of supervisors with the ECHR (and the Charter) whilst the following one illustrates how this legal protection interacts with EU banking law.

The compatibility of national rules on the legal protection of supervisors with the relevant Member States' Constitutions is not dealt with in this paper.¹¹⁶

115 See D'AMBROSIO, R., "La responsabilità delle autorità di vigilanza: disciplina nazionale e analisi comparatistica", p. 297-301. See also ATHANASSIOU, P., *Financial Sector Supervisors' Accountability: A European Perspective*, pp. 26-27: "One situation where the ECHR may be relevant for establishing the liability of financial sector supervisors is where an aggrieved depositor, investor and/or shareholder challenges a statutory immunity clause, alleging that it deprives them of a right to bring proceedings against the supervisor, in contravention of Article 6(1) of the ECHR (right to a fair hearing). This scenario is by no means fanciful given that, as the ECJ concluded in *Internationale Handelsgesellschaft*, 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice', and that the rights arising from the ECHR are binding on the Member States and their courts".

116 With regard to the Italian legal framework see D'AMBROSIO, R., "La responsabilità delle autorità di vigilanza: disciplina nazionale e analisi comparatistica", pp. 282-285. In the light of *Corte costituzionale* case law (judgments 1/1962, 2/1968 and 18/1989), the author concludes that limitations of supervisors' liability may be considered as compatible with the Italian Constitution to the extent that they are grounded on the need to protect interests safeguarded by the Constitution itself, such as the smooth functioning of public bodies (Article 97 Cost.) and the protection of depositors through effective banking supervision (Article 47 Cost.).

With regard to the German regime see ANDENAS, M. and FAIRGRIEVE, D., "Misfeasance in public office, Governmental Liability and European Influence", p. 772. The authors' view is that "a statutory immunity directly barring tort claims would be unconstitutional as Article 34 of the German Constitution prohibits such immunities. The only way open to the legislator was to limit the purpose of the banking supervision". In footnote No 85 therein the authors clarify that "Art 34 GG also bars legislation that qualifies the degree of fault required for liability" and that "French distinctions such as *faute lourde* could not be expected to pass review under Art 34 GG. The Constitution does not bar a limitation of the right of recourse against the civil servant personally to a qualified form of liability".

Under Article 6 of ECHR “in the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

The European Court of Human Rights (hereinafter ECtHR) held that Article 6 “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal” and that it “embodies the right to a court, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only”.¹¹⁷

Nevertheless, Article 6 of the ECHR cannot be used to create civil rights that do not exist under the substantive law of the State concerned.

Even though this was not crystal clear in some decisions of the ECtHR,¹¹⁸ the Court now firmly adheres to the position that Article 6 only applies to procedural rules.¹¹⁹

117 ECtHR, *Golder v. UK*, 21 February 1975, Application no. 4451/70, § 36. “Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the *Wemhoff* judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to ‘supplementary means of interpretation’ as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English ‘determination’, French ‘décidera’).”

118 See ECtHR, *Osman v. United Kingdom*, 28 October 1998, §139: “On that understanding the Court considers that the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the *Hill* case. In the view of the Court the assertion of that right by the applicants is in itself sufficient to ensure the applicability of Article 6 § 1 of the Convention”.

119 See ECtHR, *Z and others v. United Kingdom*, 10 May 2001, Application no. 29392/95, § 87: “The Court recalls its constant case-law to the effect that “Article 6 § 1 extends only to ‘contestations’ (disputes) over (civil) ‘rights and obligations’ which can be said, at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) ‘rights and obligations’ in the substantive law of the Contracting States” (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 46-47, § 81; *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, p. 70, § 192; and *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, pp. 36-37, § 80). It will however apply to disputes of a ‘genuine and serious nature’ concerning the actual existence of the right as well as to the scope or manner in which it is exercised (see *Bentham v. the Netherlands*, judgment of 23 October 1985, Series A no. 97, pp. 14-15, § 32)”.

Since the rules limiting or excluding supervisors' liability cannot be considered as procedural ones, they do not fall within the scope of Article 6 of the ECHR¹²⁰

As regards the ECB, the above problem needs to be examined in the light of Article 47 of the Charter.

Though it is true that the respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice, the ECB is subject to the Charter and not to the ECHR.

Nevertheless, it is worth noting that Article 47 of the Charter mimics Article 6 of the ECHR. Moreover, Article 52(3) of the Charter stipulates that "in so far as" the "Charter contains human rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention...".

It follows that the ECtHR's interpretation of the right to a fair trial contained in the ECHR needs to be taken into account by the CJEU as regards the same right provided for under the Charter, as the relevant provisions are perfectly aligned.

7. Whether and to what extent the rules on the legal protection of supervisors are compatible with substantive EU banking legislation

Though the rules limiting the supervisor's liability or even excluding the latter towards investors may be considered as compatible with Articles 6 of the ECHR and 47 of the Charter, since both of these Articles protect procedural rather than substantive rights, a further problem arises here as to whether and to what extent the rules on the legal protection of supervisors can be deemed compatible with substantive EU banking law.¹²¹

120 See ATHANASSIOU, P., "Financial Sector Supervisors' Accountability: A European Perspective", pp. 27-28: "Although the implications of successfully invoking the ECHR against supervisory immunity would no doubt be significant, the risk of a fundamental erosion of immunities on account of their conflict with European human rights law is perhaps limited, mainly on account of the case law of the ECtHR and, in particular, its traditional interpretation of the concept of 'rights' in Article 6(1) of the ECHR. More specifically, the ECtHR has accepted that, even if the meaning of 'rights' cannot be determined exclusively by reference to domestic law (i.e. the provisions of the national legal system of the relevant Contracting State), Article 6(1) targets *substantive* as opposed to *procedural* rights, the existence and scope of which are matters of domestic law. It follows that where the national law-makers or courts have *not* recognised a civil law right to a claim for damages for supervisory negligence, Article 6(1) cannot be used to create one. Moreover, given that the Article 6(1) right to due process is not absolute, and that restrictions on access to the courts can be permissible, it would only be in the face of an absolute or a very far-reaching supervisory immunity that such a right might take effect, assuming such immunity to qualify as a *procedural* bar to access to judicial relief. But, even where a challenge might be possible on the basis of the ECHR, its outcome would be far from certain".

121 See D'AMBROSIO, R., "La responsabilità delle autorità di vigilanza: disciplina nazionale e analisi comparatistica", pp. 286-297 and ATHANASSIOU, P., "Financial Sector Supervisors' Accountability: A European Perspective", pp. 22-26.

The key issue is whether and to what extent EU banking legislation confers rights on depositors that may be invoked by their relevant national courts.

In the *Peter Paul* case of 2004¹²² the ECJ stated that limitation of supervisors' liability in German law was compatible with EU banking legislation on the assumption that banking directives did not contain any rule granting rights to depositors.

The House of Lords took a similar position in the BCCI case of 2000-2001.¹²³

Under both these judgments the supervisory powers that directives entrust to national authorities vis-à-vis credit institutions were deemed as only aimed at ensuring the sound and prudent management of the credit institutions.

Both the Courts grounded their decisions on the following reasons.

Though the ultimate objectives of the relevant banking directives included the protection of depositors, it did not necessarily follow that these directives were aimed at conferring rights on depositors in the event of their deposits being unavailable as a result of defective supervision.¹²⁴

122 ECJ, C-222/02 of 12.10.2004. In the *Peter Paul* case depositors in a bankrupt German bank sought compensation in respect of the loss of their deposits beyond the amount recoverable under the Deposit-Guarantee Schemes Directive on the grounds of allegedly defective supervision by the former *Bundesaufsichtsamt für das Kreditwesen* (Federal Office for the Supervision of Credit Institutions). As already explained, in German law the liability of the *Bundesaufsichtsamt* to compensate third parties for any damage arising from a wilful or negligent breach of official duty under the German Civil Code was statutorily precluded. However, the depositors challenged this statutory immunity on the ground that it was contrary to Community law, and in particular the three banking directives subsequently codified in the Consolidated Banking Directive.

123 The House of Lords held that the first banking directive "placed duties of cooperation on the competent authorities where a credit institution was operating in one or more member state other than that in which its head office was situated. But it stopped short of prescribing any duties of supervision to be performed by the competent authority within each member state. It is not possible to discover provisions which entail the granting of rights to individuals, as the granting of rights to individuals was not necessary to achieve the results which were intended to be achieved by the directive": *W.L.R.*, 2000, 2, 1257.

124 ECJ, C-222/02, *Peter Paul*. §§ 38 to 47: "38. In a number of the Recitals in the preambles to the directives referred to in the second question, parts (a) and (b), it is stated in a general manner that one of the objectives of the planned harmonisation is to protect depositors. 39. Furthermore, Directives 77/780, 89/299 and 89/646 impose on the national authorities a number of supervisory obligations vis-à-vis credit institutions. 40. However, contrary to the claims of Paul and others, it does not necessarily follow either from the existence of such obligations or from the fact that the objectives pursued by those directives also include the protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities. 41. In that regard, it should first be observed that Directives 77/780, 89/299 and 89/646 do not contain any express rule granting such rights to depositors. 42. Next, the harmonisation under Directives 77/780, 89/299 and 89/646, since it is based on Article 57(2) of the Treaty, is restricted to that which is essential, necessary and sufficient to secure the mutual recognition of authorisations and of prudential supervision systems, making possible the granting of a single license recognized throughout the Community and the application of the principle of home Member State prudential supervision. 43. However, the coordination of the national rules on the liability of national authorities in respect of depositors in the event of defective supervision does not appear to be necessary to secure the results described in the preceding paragraph. 44. Moreover, as under German law, it is not possible in a number of Member States for the national authorities responsible for supervising credit institutions to be liable in respect of individuals in the event of defective supervision. It has been submitted in particular that those rules are based on considerations related to the complexity of banking supervision, in the context of which the authorities are under an obligation to protect a plurality of

The decisions of the House of Lords and the ECJ were both criticised in the literature, on the ground that it would be difficult to maintain that banking directives were not intended to confer rights on depositors.

The decision of the House of Lords deserved an additional criticism, since it required, for the tortious liability to arise, not only that depositors' rights were identifiable on the basis of a directive, but also that provisions allegedly conferring these rights needed to be precise and unconditional, which is more a requirement for the direct effect of these provisions than a condition for awarding damages to depositors.¹²⁵

It was also noted in the literature that the preamble of the Coordinated Banking Directive,¹²⁶ consolidating the directives mentioned in the *Peter Paul* judgement, identified the protection of depositors as a major rationale for subjecting banks to authorisation and prudential supervision.¹²⁷

interests, including more specifically the stability of the financial system. 45. Finally, in adopting Directive 94/19 the Community legislature introduced minimal protection of depositors in the event that their deposits are unavailable, which is also guaranteed where the unavailability of the deposits might be the result of defective supervision on the part of the competent authorities. 46. Under those conditions, as pointed out by the Commission and the Member States which submitted observations to the Court, Directives 77/780, 89/299 and 89/646 cannot be interpreted as meaning that they confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities. 47. In the light of the foregoing, the answer to the second question must be that Directives 77/780, 89/299 and 89/646 do not preclude a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority”.

125 See ANDENAS, M., “Liability for Supervisors and Depositors’ Rights – The BCCI and the Bank of England in the House of Lords”, p. 407; the author observes that “there are several places in the speech, as it is in the majority judgments of the lower courts, where it seems as if the requirements for tort liability include precision and unconditionality, which of course are the basic requirements for the direct effect. The Dillenkofer condition for tort liability that the directive conferred rights on individuals does not go that far. The precision and unconditionality required for direct effect cannot be read into the Dillenkofer requirements that the results prescribed by the directive must entail the grant of rights to individuals, and that the content of those rights must be identifiable on the basis of the directive”.

126 Directive 2000/12/EU, now Directive 2013/36. Recital 57 of EU Directive 2006/48 stipulated that: “supervision of credit institutions on a consolidated basis aims at, in particular, protecting the interests of the depositors of credit institutions and at ensuring the stability of the financial system”. See Recital 47 of Directive 2013/36/EU. Recital 12, first part, of Dir. 2013/36/EU is also relevant. It reads as follows: “in order to protect savings and to create equal conditions of competition between credit institutions, measures to coordinate the supervision of credit institutions should apply to all of them”.

127 The objective of creditor and depositor protection was also embodied in Article 3 of Directive 2000/12/EU. Under this Article credit institutions subject to prudential supervision may as a rule accept deposits from the public. Other actors may be exceptionally authorised by MS legislations to collect deposits from the public, as far as these legislations provide for adequate protection of depositors. Article 3 of Directive 2000/12 has been replaced by Article 5 of EU Directive 2006/48. The corresponding provision contained in Article 9 of Directive 2013/36/EU, reads as follows:

“1. Member States shall prohibit persons or undertakings that are not credit institutions from carrying out the business of taking deposits or other repayable funds from the public.

2. Paragraph 1 shall not apply to the taking of deposits or other funds repayable by a Member State, or by a Member State's regional or local authorities, by public international bodies of which one or more Member States are members, or to cases expressly covered by national or Union law, provided that those activities are subject to regulations and controls intended to protect depositors and investors”.

Moreover, even though ECJ case law did not show a settled stance in terms of depositor protection, some judgements underlined the importance of banking authorisation and prudential rules in terms of the protection of depositors and consumers.¹²⁸

Protection of depositors and/or investors is included within the purposes of the Directive on deposit guarantee schemes (hereinafter also DGSD),¹²⁹ the

128 See, among others, the following ECJ judgments: C-366/97, *Romanelli*, § 12 (“as is clear from Directives 77/780 and 89/646, the protection of savings constitutes one of the objectives of the measures taken to coordinate credit institutions”); C-222/95, *Parodi*, § 22 (the Court acknowledges that “the banking sector is a particularly sensitive area from the point of view of consumer protection” and that “consumers must be protected against the harm which they could suffer through banking transactions effected by credit institutions disregarding the requirements relating to their solvency or whose managers do not have the necessary professional qualifications or integrity”); C-441/93, *Panagis Pafitis*, § 49 (“it is true that considerations concerning the need to protect the interests of savers and, more generally, the equilibrium of the savings system, require strict supervisory rules in order to ensure the continuing stability of the banking system”). Since the case law of the ECJ in the area of banking has not shown a settled stance in terms of depositor protection, the House of Lords should have made a reference to the ECJ rather than considering the interpretation of the First banking directive as an *acte claire*.

129 See Directive 2014/49/EU on deposit guarantee schemes. Under Recital No 14 “the key task of a DGS is to protect depositors against the consequences of the insolvency of a credit institution. DGSs should be able to provide that protection in various ways. DGSs should primarily be used to repay depositors pursuant to this Directive (the ‘paybox’ function)”.

DGSs may also be used to finance resolution of credit institutions (see Recital 15), while respecting the “least cost criterion” laid down under Article 109(1) of the BRRD (“the liability of the deposit guarantee scheme shall not be greater than the amount of losses that it would have had to bear had the institution been wound up under normal insolvency proceedings”). Moreover, national laws may allow DGSs “to go beyond a pure reimbursement function and to use the available financial means in order to prevent the failure of a credit institution with a view to avoiding the costs of reimbursing depositors and other adverse impacts”, but the costs of the measures taken to prevent the failure should not exceed the costs of fulfilling the DGSs’ mandate to protect covered deposits (see Recital 16). Both the tasks of financing the resolution of credit institutions and prevent their failure are nonetheless consistent with the ultimate goal of depositors’ protection.

As clarified under Recital No 45, the Directive “should not result in the Member States or their relevant authorities being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognized”.

In the same vein and based on the corresponding Recital No 24 of Directive 94/19/EC, see ECJ, C-222/02, *Peter Paul*, §§ 26 to 32: “26. ... it should be borne in mind that Directive 94/19 seeks to introduce cover for depositors, wherever deposits are located in the Community, in the event of the unavailability of deposits made with a credit institution which is a member of a deposit guarantee-scheme. 27. The depositor's right to compensation in such a situation is governed by Article 7(1) and (6) of that directive. Article 7(1) determines the maximum amount of compensation which a depositor may claim on the basis of the directive, whilst Article 7(3) specifies that Member States may under their national law provide for rules offering depositors a higher or more comprehensive cover for deposits. Article 7(6) of Directive 94/19 requires Member States to ensure that the depositor's rights to compensation, as defined in particular in Article 7(1) and (3), may be the subject of an action by the depositor against the deposit-guarantee scheme. 28. Article 3(2) to (5) of the directive provides for an obligation for the competent authorities which have issued authorisations to credit institutions to ensure, in cooperation with the deposit-guarantee scheme, that those institutions comply with their obligations as members of that scheme and to adopt, where appropriate, in the conditions specified in Article 3(5), a decision revoking the authorisation of the institution in question. 29. The purpose of Article 3(2) to (5) of Directive 94/19 is to guarantee to depositors that the credit institution in which they make their deposits belongs to a deposit guarantee scheme, in order to ensure protection of their right to compensation in the event that their deposits are unavailable, in accordance with the rules laid down in that directive and more specifically in Article 7 thereof. Those provisions thus relate only to the

Directive on investor-compensation schemes (hereinafter ICSD),¹³⁰ the ESAs regulations¹³¹ and the SSMR¹³² and it is still the paramount goal of EU legislation on financial markets.¹³³

Given the above, the following conclusions may be drawn.

introduction and proper functioning of the deposit-guarantee scheme as provided for by Directive 94/19. 30. Under those conditions, as pointed out by the governments which submitted observations to the Court and by the Commission, if the compensation of depositors is ensured in the event that their deposits are unavailable, as prescribed by Directive 94/19, Article 3(2) to (5) thereof does not confer on depositors a right to have the competent authorities take supervisory measures in their interest. 31 That interpretation of Directive 94/19 is supported by the 24th Recital in the preamble thereto, which states that the directive may not result in the Member States' or their competent authorities' being made liable in respect of depositors if they have ensured the compensation or protection of depositors under the conditions prescribed in the directive. 32. The answer to the first question must therefore be that, if the compensation of depositors prescribed by Directive 94/19 is ensured, Article 3(2) to (5) thereof cannot be interpreted as precluding a national rule to the effect that the functions of the national authority responsible for supervising credit institutions are to be fulfilled only in the public interest, which under national law precludes individuals from claiming compensation for damage resulting from defective supervision on the part of that authority”.

130 See Recital 4 of Directive 97/9/EC on investor-compensation schemes.

131 Regulations on ESAs include the protection of depositors and investors in the main tasks of financial supervisory authorities. See, among others, the following Articles of the EBA Regulation: (i) Article 1, paragraph 5(f) stipulates that the Authority shall contribute to “enhancing consumer protection”; (ii) Article 8.1(h) includes among the tasks of the authority that of fostering depositor and investor protection; (iii) Article 9, paragraph 1, states that “the Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market...”.

132 Under Recital No 30, “the ECB should carry out the tasks conferred on it with a view to ensuring the safety and soundness of credit institutions and the stability of the financial system of the Union as well as of individual participating Member States and the unity and integrity of the internal market, thereby ensuring also the protection of depositors and improving the functioning of the internal market, in accordance with the single rulebook for financial services in the Union. In particular the ECB should duly take into account the principles of equality and non-discrimination”.

133 See Article 5, paragraph 1, of Directive 2003/71/EU on the prospectus to be published when securities are offered to the public or admitted to trading, replacing Article 4 of Directive 80/390/EU and Article 11 of Directive 89/298/EU, stipulates that: “the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analysable and comprehensible form”.

See also Directive 2004/39/EU on markets in financial instruments (the so-called MIFID1) and particularly Recitals 2, 17, 26, 31, 44 and 61 and Articles 11, 13, paragraphs 3, 6 and 8, 18, 19 ff. of Directive 2004/39/EU. This Directive has recently been replaced by Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (the so-called MIFID2). The corresponding new provisions contained in Directive 2014/65/EU show the same rationale: see, among others, Recitals No 3, 4, 39, 42, 45, 51, 74, 77, 86, 87 and 151, and Articles 16(3), (8) and (9), 23, 34 to 30, 74(2) and 75.

In case law, see ECJ, Case C-604/11, *Genil 48 SL v Bankinter*, §§ 39 and 47, and more clearly Case C-248/11, *Nilas and Others*, § 48 where the Court acknowledges that: “as is clear in particular from Recitals 2, 5 and 44 in the preamble of the Directive 2004/39,... its objectives consist, inter alia, in protecting investors, preserving the efficient and orderly functioning of financial markets and the transparency of transactions”.

Also aimed at protecting investors is Directive 2009/65/EU on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (the so-called the UCITS IV Directive) and particularly Recitals No 3, 8, 10, 29, 32, 39, 43, 45, 51, 52, 54 and Articles 12(1) (6), 13(1) (b), 25(2), 26, 69, 76 and 78.

Under the *Francovich-Dillenkofer* standards,¹³⁴ EU legislation is intended to confer rights on individuals when the content of those rights is identifiable on the basis of the legislation itself. Both rules and recitals are relevant for this purpose. On the contrary, it is not required that rules be precise and unconditional, which instead is the base requirement for the direct effect of the directive.

The ECJ seems to be satisfied with the demonstration that EU rules are intended to protect the interests of private individuals, without it being required that such rules themselves confer enforceable rights.

The mere circumstance that these rules protect a multiplicity of interests should not in itself preclude a *Francovich-Dillenkofer* liability, but it has an influence on the assessment of the seriousness of the breach.¹³⁵

In relation to the above, substantive EU legislation on financial markets is intended to protect investors not only when safeguarding the interests of individual investors is the exclusive or the overarching objective of a directive or a regulation, as in the case of legislative acts on prospectuses and investment services, but also when these legislative acts are meant to safeguard collective interests within multiple objectives, as in the case of banking legislation.

Under the latter, the protection of depositors is neither the only nor the overarching interest safeguarded by EU legislation, the others being at least the sound and prudent management of credit institutions and the overall stability of the financial system.¹³⁶

The circumstance that EU law grants rights to depositors, while preventing the complete immunity of supervisors towards them, is not incompatible with a certain level of limitation of supervisors' liability.

A degree of limitation of supervisors' liability is indeed a fair compromise between the need to protect the rights of depositors and the need to ensure supervisors enjoy the necessary margin of discretion in the performance of their task of counterbalancing all the interests protected by EU law.

8. Towards a common criterion? The broad interpretation of misfeasance in public office in the English-based legal frameworks approaches the gross negligence criterion in the French-based ones

In the light of the above, the CJEU could infer the common principles applicable to the ECB's liability only from the Member States legal frameworks providing a limitation of supervisors' liability, since the immunity towards

134 See ECJ, Joined Cases C-6 and C-9/90, *Francovich v. Italian Republic*, 1991 and Joined Cases C-178, C-179, C-188-90/94, *Dillenkofer and Others v. Federal Republic of Germany*, 1996.

135 See § 9 of this part.

136 See § 4 of this part.

depositors is incompatible with EU banking law and the absence of any limitation of liability in contrast with the duty of supervisors to counterbalance depositors rights with the protection of other primary public interests.

Common principles on supervisors' liability should be drawn by the CJEU from the national legal systems based on bad faith and gross negligence.

It is the author's opinion that the broad interpretation of the House of Lords and the Supreme Court of Ireland of misfeasance in public office approaches the gross negligence criterion as restrictively applied in the French *Conseil d'Etat* jurisprudence. The Italian Corte di Cassazione also appears to require a very high level of negligence for supervisors' liability to arise.

As for the English and Irish courts' view, it is difficult to see the gap between gross negligence and bad faith.

In the BCCI case recklessness is still interpreted in a subjective sense of awareness of risk by the defendant. Thus, inadvertent recklessness in the sense of reasonable foreseeability is not enough.

Nevertheless, "recklessness about the consequences, in the sense of not caring whether the consequences happen or not, will satisfy the test", so that "the 'couldn't care less' test for recklessness as to consequences is elastic".¹³⁷

Two interpretations are possible:

(i) one interpretation "could imply advertence to the risk of the consequences occurring but accompanied by entire indifference to whether that happened or not. This combines awareness with a lack of concern"; whilst

(ii) the other "is more radical, and would cover the circumstances where the defendant had not thought about the particular consequences of certain acts or omissions and thus showed practical indifference to their occurrence".¹³⁸

As regards both the interpretations of recklessness, meeting the gross negligence standard in the *Sieur d'André* judgment is a very short step.

Indeed, in the *Sieur d'André* judgment the gross negligence standard is attained where the claimant had not avoided the crisis of a financial intermediary and this was coupled with knowledge of the signals of the crisis.

One may therefore conclude that "misfeasance is now an intentional tort for which recklessness suffices" and that "the gap between this tort and the tort of

¹³⁷ See ANDENAS, M., "Depositor Protection, European Law and Compensation from Regulators", p. 521.

¹³⁸ See ANDENAS, M., "Depositor Protection, European Law and Compensation from Regulators", p. 521.

negligence, premised on the all-pervading notion of reasonable foreseeability, has undoubtedly been narrowed”.¹³⁹

Though circumscribed to the field of criminal liability, a distinction is drawn in German and Italian case law and literature between recklessness (*dolus eventualis, dolo eventuale*) and wilful negligence (*bewusste Fahrlässigkeit, colpa cosciente*).

In both cases the agent takes into account the fact that an event may occur, but in the former he accepts the risks that the event will occur whilst in the latter he is convinced that it won't.

Nevertheless, under the approach followed in some Italian judgments pertaining to the criminal liability of members of the management bodies of credit institutions and listed companies the gap between recklessness and wilful negligence seems again to be reduced. Since the proof of recklessness is linked to the offender's awareness of some “signals of alarm” the scope of recklessness seems to broaden so as to include all the circumstances where those signals occur.¹⁴⁰

9. Liability under EU law: the sufficiently serious violation criterion and the ECB's task of protecting a multiplicity of interests within the SSM

In addition to the principles common to the Member States' regimes limiting supervisors' liability, the legal protection of the ECB in its capacity as supervisory authority can be alternatively derived by the CJEU from the general criteria applicable to the liability of EU Institutions.

¹³⁹ See ANDENAS, M., “Depositor Protection, European Law and Compensation from Regulators”, p. 529. In the light of the arguments illustrated in the text it is difficult to share the conclusions of the NOLAN, D. survey, “The Liability of Financial Supervisory Authorities”, p. 222, according to which “if the legislator does decide to give financial supervisors special protection from liability, then either complete immunity or the use of a gross negligence standard is to be preferred to a requirement of bad faith. A gross negligence approach is less likely than an ordinary negligence standard to cause defensive supervision, while at the same time affording depositors redress in the most egregious cases of supervisory failure. And while complete immunity may seem distasteful, it is to be preferred to a bad faith test which, being practically impossible to satisfy, gives only a false hope to depositors”.

¹⁴⁰ Criticism of this approach can be found in PULITANÒ, D., *Diritto penale*, Torino, 2013. At p. 323 the author underlines that “il passaggio dalla colpa al dolo (eventuale) potrà prospettarsi in capo a chi abbia non soltanto percepito ‘segnali d’allarme’, ma li abbia anche concretamente valutati come segnali di specifici fatti-reato, concretamente rappresentati... In simili casi, sussisterebbe il contenuto psicologico del dolo, quale effettiva rappresentazione o previsione del fatto..., e l’inerzia acquisterebbe il significato di consapevole accettazione del verificarsi di un determinato fatto illecito... concretamente rappresentato”.

Liability under EU law occurs where all¹⁴¹ the three following conditions¹⁴² are satisfied:

(i) unlawful conduct (action or omission) on the part of the institutions. In this respect the breach must be sufficiently serious and the rule of law that was breached must be intended to confer rights to individuals;¹⁴³

(ii) damage to the claimant;¹⁴⁴

(iii) a direct causal link between the breach and the damage sustained by the injured party.¹⁴⁵

Treating all the issues of tortious liability under EU law is beyond the scope of this paper. In the author's view elements for limiting the ECB's liability could better be inferred from the features of unlawful conduct.

Since in § 7 the question as to whether Union law confers rights on depositors and investors has already been treated, the author will cover here the issue pertaining to the sufficiently serious violation test.

The starting point is that the sufficiently serious violation criterion applies not only to the legislative acts of EU institutions, as traditionally laid down in CJEU case law,¹⁴⁶ but also to the administrative ones.¹⁴⁷

141 See CFI, Case T-220/96, *Elliniki Viomichania Oplon AE (EVO) v Council and Commission*, § 39: "It is settled case-law that non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty is subject to a number of conditions relating to the unlawfulness of the conduct alleged against the Community institutions, actual damage and the existence of a causal link between the conduct of the institution and the damage complained of (Case C-104/97 P *Atlanta v European Community* [1999] ECR I-6983, paragraph 65, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrika and Dole Fresh Fruit Europe v Commission* [2001] ECR II-1975, paragraph 131). Since those three conditions must all be satisfied, if any one of them is not satisfied, the entire action must be dismissed and it is not necessary to consider the other conditions (Case C-146/91 *KYDEP v Council and Commission* [1994] ECR I(-4199, paragraph 81, and *Atlanta v European Community*, paragraph 65)".

142 See CFI, Case T-364/03, *Medici Grimm KG v Council*, § 59; ECJ, Case 26/81, *Oleifici Mediterranei v EEC*, § 16-17; Case C-146/91, *KYDEP v Council and Commission*, § 19; ECJ, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission*, § 106.

143 See ECJ, C-221/10 P, *Artogodan*, § 80: "where the unlawfulness of a legal act is in issue, the non-contractual liability of the European Union depends on the fulfillment of a set of conditions, including the existence of a sufficiently serious breach of a rule of law that is intended to confer rights on individuals".

144 See ECJ, Case 51/81, *De Franceschi v Council and Commission*, § 9; Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81, *Birra Wührer and Others v Council and Commission*, § 9; and CFI, Case T-478/93, *Wafer Zoo v Commission*, § 49.

145 See ECJ, Case C-234/02 P, *European Ombudsman v. Lambert*, § 49.

146 See ECJ, C-5/71, *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975.

147 See ECJ, C-352/98, *Laboratoires Pharmaceutiques Bergaderm SA*, §§ 39-47 : "39. The second paragraph of Article 215 of the Treaty provides that, in the case of non-contractual liability, the Community is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties. 40. The system of rules which the Court has worked out with regard to that provision takes into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 43). 41. The Court has stated that the conditions under which the State may incur liability for damage caused to individuals by

As regards the supervisor's administrative activity, a sufficiently serious violation occurs when the supervisor manifestly and gravely disregards the limits of its discretionary powers.¹⁴⁸

Against this background, the circumstance that the rules embodied in EU banking law, including the SSM Regulation, protect a multiplicity of interests has an influence on the assessment of the seriousness of the violation.

As clarified in Recital 30 SSMR, in its capacity as both micro- and macroprudential supervisory authority the ECB carries out the new tasks conferred upon it by the Regulation referred to with a view to ensuring the safety and soundness of banks, the stability of the financial system and the unity and integrity of the internal market, thereby ensuring the protection of depositors and improving the functioning of the market.

As supervisory authority, the ECB also has the duty to cooperate with the NCAs so as to ensure a high level of consumer protection and the fight against money laundering.¹⁴⁹

Moreover, under the ESCB and ECB Statute the ECB carries out monetary policy functions.

a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage (*Brasserie du Pêcheur and Factortame*, paragraph 42). 42. As regards Member State liability for damage caused to individuals, the Court has held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (*Brasserie du Pêcheur and Factortame*, paragraph 51). 43. As to the second condition, as regards both Community liability under Article 215 of the Treaty and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion (*Brasserie du Pêcheur and Factortame*, paragraph 55; and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others v Germany* [1996] ECR I-4845, paragraph 25). 44. Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, to that effect, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28). 45. It is therefore necessary to examine whether, in the present case, as the appellants assert, the Court of First Instance erred in law in its examination of the way in which the Commission exercised its discretion when it adopted the Adaptation Directive. 46. In that regard, the Court finds that the general or individual nature of a measure taken by an institution is not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question. 47. It follows that the first ground of appeal, which is based exclusively on the categorisation of the Adaptation Directive as an individual measure, has in any event no bearing on the issue and must be rejected".

148 This criterion has been followed by the ECJ starting from the *Bergaderm* case quoted in footnote No 147. As noted in the literature "before *Bergaderm*, case law attributed particular importance to whether the breach was the result of administrative or legislative action. In *Bergaderm*, the Court held that the determining criterion is not the administrative or legislative character of the measure but the degree of discretion available to the institution in question": TRIDIMAS, T., *The General Principles of EU Law*, p. 478.

149 See Recital 29 of the SSM Regulation.

Even though, in the light of the principle of separation between supervisory and monetary policy functions “the ECB shall carry out the tasks conferred on it by” the SSMR “without prejudice to and separately from its tasks relating to monetary policy and any other tasks”,¹⁵⁰ the ultimate decision-making body remains the Governing Council.

In the light of Article 26(8) SSMR, the Governing Council may object to a draft decision of the Supervisory Board “in particular stating monetary policy concerns”.¹⁵¹

A final ECB supervisory decision may therefore be expected also to take into account other interests than those protected under substantive EU banking law.

The multiplicity of interests that the ECB must protect and counterbalance - basically, but not exclusively, under the SSMR - clearly amplifies its margin of manoeuvre, which will turn the sufficiently serious violation rule into an effective means to counter the risk of excessive claims against the ECB.

As already noted in the literature on the role of supervisory authorities in the light of EU law, “it is clear that banking supervisors enjoy a wide discretion in applying the often generally worded provisions of EU banking law in day-to-day supervision, both as regards authorization requirements and for ongoing prudential requirements. As already indicated, the decision-making process in banking supervision often is the result of a balancing of various, sometimes conflicting interests. This amplifies the discretion that the banking supervisor enjoys, as it should not exclusively serve the depositors’ interests to the detriment of other legitimate interests (systemic protection, interest of the supervised entities). The case law of the European Court of Justice is in line with these concerns: a ‘serious’ breach will only occur when the supervisory authority has manifestly and gravely disregarded the limits on the exercise of its discretionary powers. This leads to the conclusion that *Francovich* liability effectively allows to counter the risk of excessive liability claims”.¹⁵²

The view that the multiplicity of interests protected by supervisors could be invoked as an argument to advocate their legal protection from a flood of specious lawsuits rests not only on most common law courts’ judgments,¹⁵³ but also on the ECJ’s *Peter Paul* judgment.¹⁵⁴

150 See Article 25(1) SSMR. For further details see Part III, § 4.

151 The words “in particular” suggest that there are other concerns than the monetary policy ones on the basis of which the Governing Council may object to a complete draft decision of the Supervisory Board under Article 26(8) SSMR. These other concerns could refer to macroprudential interests, such as those of preventing systemic risks and ensuring the overall stability of the financial market.

152 TISON, M., “Who’s Afraid of Peter Paul? The European Court of Justice to Rule on Banking Supervisory Liability”, Financial law Institute Working Paper Series, 2004-11, p.8.

153 See, among others, the cases reported in footnote No 61.

154 See in this respect § 44 of the decision: “Moreover, as under German law, it is not possible in a number of Member States for the national authorities responsible for supervising credit institutions to be

There is nonetheless a further aspect that should be taken into account.

The post-*Bergaderm* case law of the Court of First Instance (hereinafter CFI) seems to follow a different methodology in assessing institutions' liability.

As noted in the literature, "the ECJ focuses on discretion whilst the CFI prefers an analysis which attributes importance to the legislative or administrative nature of the breach and is dominated by the concept of duty of care".¹⁵⁵

Nevertheless, in the *Comafrica* case,¹⁵⁶ the CFI found that there was no lack of care by the Commission, taking into account, among the other circumstances, the complexity of the import regime and the time constraint involved.

Both the circumstances also occur, *mutatis mutandis*, in the field of banking supervision.

Given the above, it is the author's view that even following the different approach of CFI case law the ECB's liability would in most cases be excluded (or at least limited) given the complexity of the questions involved in banking supervision and the time constraint to which the supervisor is subject.

10. The singleness and unitariness of the SSM as a further element suggesting a limitation of liability for the ECB as supervisory authority

Like the European System of Financial Supervision (the ESFS)¹⁵⁷ and the Single Resolution Mechanism (the SRM),¹⁵⁸ the SSM does not have legal personality.

liable in respect of individuals in the event of defective supervision. It has been submitted in particular that those rules are based on considerations related to the complexity of banking supervision, in the context of which the authorities are under an obligation to protect a plurality of interests, including more specifically the stability of the financial system".

155 See TRIDIMAS, T., *The General Principles of EU Law*, p. 492.

156 See Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99, *Comafrica and Dole Fresh Fruit Europe v. Commission*, 2001, § 149: "Accordingly, having regard particularly to the limitations imposed by the complex nature of the 1993 and 1999 regimes, the time constraints involved, the vast magnitude of the transactions, the difficulties linked with operations spread over the administrations of 15 Member States and in the light of the extensive efforts made by the Commission to reduce the extent of the apparent discrepancies in the figures, the Court considers that the Commission did act with due care and diligence".

157 See, for example, Article 2 of Regulation 1093/2010 establishing the European Banking Authority.

158 See Article 1 of the SRMR, which reads as follows:

"This Regulation establishes uniform rules and a uniform procedure for the resolution of the entities referred to in Article 2 that are established in the participating Member States referred to in Article 4.

Those uniform rules and that uniform procedure shall be applied by the Single Resolution Board established in accordance with Article 42 (the 'Board'), together with the Council and the Commission and the national resolution authorities within the *framework* of the single resolution mechanism ('SRM') established by this Regulation. The SRM shall be supported by a single resolution fund ('the Fund')...."

See also Recital No 11 SRMR under which "for participating Member States, in the context of the Single Resolution Mechanism (SRM), a centralised power of resolution is established and entrusted to the Single Resolution Board established in accordance with this Regulation ('the Board') and to the national resolution authorities. That establishment is an integral part of the process of harmonisation in the field of resolution

Legal personality is expressly conferred by the Treaties on the Union,¹⁵⁹ the ECB and the European Investment Bank (EIB)¹⁶⁰ and by EU secondary law on some EU bodies, including the recently formed EU supervisory authorities (EBA, ESMA and EIOPA)¹⁶¹ and the Single Resolution Board.¹⁶²

Nor is legal personality mentioned in the Recitals of the SSMR referring to the SSM.¹⁶³

The SSM is rather conceived, like the ESFS and the SRM, as an integrated network of both national and Union supervisory authorities.¹⁶⁴

Thus supervisory decisions – and the liability therefor – cannot be formally ascribed to the SSM, but have to be imputed to the ECB or to the NCAs according to the rules on the distribution of competences contained in the SSMR, basically based on the significant or less significant status of the credit institution concerned.

This notwithstanding, the SSM goes beyond the existing EU networks, since it is conceived as a unitary mechanism to which the SSMR refers in several respects, pertaining to both structural and functional aspects.¹⁶⁵

operated by Directive 2014/59/EU and by the set of uniform provisions on resolution laid down in this Regulation. The uniform application of the resolution regime in the participating Member States will be enhanced as a result of it being entrusted to a central authority such as the SRM...”

159 See Article 47 of the TEU.

160 See Articles 282(3) and 308 of the TFEU.

161 See, for example, Article 5(1) of Regulation 1093/2010, which stipulates that “the Authority [EBA] shall be a Union body with legal personality”. See also Recital 14, according to which “in order to fulfil its objectives, the Authority should have legal personality as well as administrative and financial autonomy”.

162 See Article 42(1) of the SRMR, which reads as follows: “...The Board shall be a Union agency with a specific structure corresponding to its tasks. It shall have legal personality”.

163 See Recitals 10 and 12 SSMR.

164 See Recital 9 of the Regulation establishing the EBA.

165 See in the literature CLARICH, M., “I poteri di vigilanza della Banca Centrale Europea”, p. 129-132. In the author’s view, “una volta esclusa la possibilità di istituire una ‘autorità unica di vigilanza’, che avrebbe richiesto una fusione degli apparati di vigilanza nazionali in un unico apparato centrale europeo, il ‘meccanismo’, per quanto composto da elementi strutturali separati, è concepito per operare in modo unitario attraverso ‘leve’ azionate dal centro che lasciano pochi spazi di libertà ai singoli elementi”. Moreover, “il meccanismo di vigilanza unico rappresenta un modello di integrazione operativa e organizzativa tra apparati nazionali ed europei che va molto al di là di quanto sin qui realizzato con le reti di regolatori nazionali coordinate a livello europeo da agenzie istituite ormai in molti settori della regolazione d’impresa... Fino a oggi la punta più avanza era costituita probabilmente dalla cooperazione tra autorità garanti della concorrenza degli Stati membri e Commissione europea disciplinata dal Regolamento (CE) n. 1/2003 e finalizzata alla miglior applicazione della disciplina della concorrenza posta dal Trattato sul Funzionamento dell’Unione europea (artt. 101 e 102)... Tuttavia, il sistema previsto dal Regolamento (CE) n. 1/2003, come precisato dalla Commissione europea, dà origine a una ‘rete’ di autorità di concorrenza (Network of Competition Authorities), caratterizzata sia da relazioni verticali con la Commissione, sia da relazioni orizzontali tra autorità nazionali, più che appunto un ‘meccanismo’ unitario... Al di là della denominazione, può essere invece qualificato come un meccanismo unitario il Sistema Europeo delle Banche Centrali... Ma la differenza rispetto al meccanismo di vigilanza unico è che... le funzioni monetarie... non comportano la necessità di una presenza capillare negli Stati membri con strutture paragonabili, sotto il profilo quantitativo, a quelle necessarie per l’attività collegata alla vigilanza sulle oltre seimila banche europee. Per essere efficace, l’attività di vigilanza deve essere esercitata sul territorio, a contatto diretto con i singoli enti creditizi, che non a livello centralizzato. Il meccanismo di vigilanza unico, che è qualcosa di qualitativamente diverso

Under Article 2(9) SSMR “‘Single Supervisory Mechanism’ (SSM) means the system of financial supervision composed by the ECB and national competent authorities of participating Member States as described in Article 6”.

Article 6 SSMR specifies, in turn, that:

- (i) “the ECB shall carry out its tasks within a single supervisory mechanism”;
- (ii) the latter is “composed of the ECB and national competent authorities”;
- (iii) the “ECB is responsible for the effective and consistent functioning of the SSM”.

In the light of the above, one may infer that the ECB and the NCAs shall carry out the supervisory tasks entrusted to them within a System, which therefore has to be single, unitary and integrated. This principle should guide the ECB’s exercise of its responsibility “for the effective and consistent functioning of the SSM”.¹⁶⁶

Further elements highlight the unitariness of the SSM.

Differently from what is provided for with regard to ESAs,¹⁶⁷ the SSMR, similarly to the SRMR, deals with the independence and accountability regime of the System as a whole.

First of all, the SSMR requires the independence not only of the ECB but also of the NCAs in the carrying out of supervisory tasks,¹⁶⁸ which makes sense only assuming the unitary nature of the SSM.

The same is true for the accountability requirements towards national Parliaments, referred again to both the ECB and the NCAs.¹⁶⁹

Even fees levied by the ECB in order to cover expenditure incurred for the performance of its tasks under Articles 4 to 6 SSMR are without prejudice to the right of NCAs to levy fees “in respect of costs of cooperating with and assisting the ECB and acting on its instructions”.¹⁷⁰

da un semplice meccanismo di coordinamento, si prefigge gli obiettivi di istituire un quadro efficiente ed efficace per l’esercizio della vigilanza e di garantire l’applicazione uniforme di un corpus unico di norme”.

166 The lack of legal personality of the SSM reinforces the responsibility of the ECB “for the effective and consistent functioning of the SSM” (Article 6(1) SSMR).

167 Article 3 of the EBA Regulation (but the same is true for the other ESAs) only refers to the accountability of ESAs without considering that of NCAs. Independence requirements too are only addressed to the ESAs bodies.

168 See Article 19(1), first sentence, of the SSMR, under which “when carrying out the tasks conferred on it by this Regulation, the ECB and the national competent authorities acting within the SSM shall act independently”. See Article 47(1) SRMR..

169 See Article 21 SSMR. See Article 46 SRMR.

170 Article 30(5) SSMR.

Provisions pertaining to staff exchanges further underline the close integration of the SSM.¹⁷¹

Secondly, the qualification of the SSM as a unitary system of both the ECB and the NCAs can be inferred from the allocation of supervisory tasks.¹⁷²

Part II of this paper will be entirely devoted to this subject and to its side effects on the allocation of liability to the ECB and the NCAs.

This section is therefore confined to illustrating how some features of the allocation of supervisory tasks within the SSM clearly show the singleness and unitariness of the system.

Scrutiny of the requirements for banking licenses is under the remit of the NCAs.¹⁷³ Where the applicant does not comply with the requirements, the NCA and not the ECB is the authority empowered to reject the authorisation. Should the NCA's assessment conclude for the authorization to be granted, the final say shall pertain to the ECB,¹⁷⁴ but the ECB's decision is taken following a tacit consent procedure, which is a further element highlighting the unitariness of the System.¹⁷⁵

NCAs are also vested with the power to propose that the ECB withdraw an authorisation.¹⁷⁶

171 See Article 31 SSMR, which reads as follows: "the ECB shall establish, together with all national competent authorities, arrangements to ensure an appropriate exchange and secondment of staff with and among national competent authorities". See Article 83 SRMR.

172 See Part II.

173 For further details, see Part II, § 3.2.

174 See Article 14(2) SSMR: "If the applicant complies with all conditions of authorisation set out in the relevant national law of that Member State, the national competent authority shall take, within the period provided for by relevant national law, a draft decision to propose to the ECB to grant the authorisation. The draft decision shall be notified to the ECB and the applicant for authorisation. In other cases, the national competent authority shall reject the application for authorisation".

175 See Article 14(3) SSMR, under which: "the draft decision shall be deemed to be adopted by the ECB unless the ECB objects within a maximum period of ten working days, extendable once for the same period in duly justified cases. The ECB shall object to the draft decision only where the conditions for authorisation set out in relevant Union law are not met. It shall state the reasons for the rejection in writing".

176 See Article 14(5) SSMR: "Subject to paragraph 6, the ECB may withdraw the authorisation in the cases set out in relevant Union law on its own initiative, following consultations with the national competent authority of the participating Member State where the credit institution is established, or on a proposal from such national competent authority. These consultations shall in particular ensure that before taking decisions regarding withdrawal, the ECB allows sufficient time for the national authorities to decide on the necessary remedial actions, including possible resolution measures, and takes these into account. Where the national competent authority which has proposed the authorisation in accordance with paragraph 1 considers that the authorisation must be withdrawn in accordance with the relevant national law, it shall submit a proposal to the ECB to that end. In that case, the ECB shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority".

Assessment of the acquisition of qualifying holdings falls within the scope of the NCAs competence,¹⁷⁷ though the ECB has the final say; but, again, the ECB's decisions are adopted under a tacit consent procedure.¹⁷⁸

With regard to the supervisory powers pertaining to authorised credit institutions, NCAs are not only competent – under the ECB's oversight - to supervise the less significant ones but are also responsible for assisting the ECB with the preparation and implementation of any acts relating to the tasks conferred on the latter under the SSMR.¹⁷⁹

Moreover, NCAs are responsible for assisting the ECB in the performance of its investigations and on-site inspections, including the obligation of facilitating its access to the business premises of the legal persons subject to its supervisory powers.¹⁸⁰

Recital 28 is even more clear in recognising the NCAs as having some crucial prudential supervisory competences within the SSM.

It stipulates, in fact, that tasks not conferred on the ECB shall include, among others, the day-to-day verification of credit institutions as well as the supervision of credit institutions from third countries establishing a branch or providing cross-border services in the Union.

As will be better explained below,¹⁸¹ these tasks of the NCAs cannot be considered under their exclusive remit but are rather attracted under the SSM regime, being instrumental to the ECB's tasks.

The existence of some NCA supervisory tasks pertaining to all credit institutions under the SSM (significant or less significant as the case may be) and instrumental to the ECB's tasks is, again, another argument for the unitariness of the System.

Besides the exercise of powers entrusted to them by the SSMR, NCAs are responsible for assisting the ECB in the preparation and implementation of any ECB acts relating to the tasks under Article 4, including assistance in verification activities¹⁸² and may be required by the ECB to use the powers conferred upon

177 See Article 15(2) SSMR: “the national competent authority shall assess the proposed acquisition, and shall forward the notification and a proposal for a decision to oppose or not to oppose the acquisition, based on the criteria set out in the acts referred to in the first subparagraph of Article 4(3), to the ECB, at least ten working days before the expiry of the relevant assessment period as defined by relevant Union law, and shall assist the ECB in accordance with Article 6”. For further details, see Part II, § 3.2.

178 See Article 15(3) SSMR: “the ECB shall decide whether to oppose the acquisition on the basis of the assessment criteria set out in relevant Union law and in accordance with the procedure and within the assessment periods set out therein”.

179 See Article 6(3) SSMR.

180 See Articles 11(2) and 12(5) SSMR.

181 See Part II, § 2.

182 See Article 6(3) SSMR.

them under their pure national law vis-à-vis significant credit institutions¹⁸³ or to initiate a sanctioning procedure to both significant credit institutions, for violations of national law or in applying non-pecuniary sanctions, and the members of their management bodies.¹⁸⁴

Whilst NCAs' responsibilities are not confined to less significant credit institutions, the ECB is vested with ultimate responsibility for ensuring the smooth functioning of the SSM, which again highlights the unitariness of the System. For this purpose, the ECB may address instructions or recommendations to NCAs and adopt regulations under which they shall carry out the supervisory procedures.

The close integration of the Union and national levels under the SSMR is also evident in the macro-prudential field, where strict and mutual consultation mechanisms are provided for.¹⁸⁵ In this respect, it is worth noting that NCAs may be responsible at national level for carrying out macro-prudential policy as a whole, also beyond the distinction between significant and less significant credit institutions.¹⁸⁶ The same holds for the role that the ECB may be called upon to play.¹⁸⁷

Furthermore, it is on the assumption that the ECB and the NCAs are essential components of a single and unitary system that Article 6(2) SSMR stipulates that they shall both be “subject to a duty of cooperation in good faith, and an obligation to exchange information”.

The outcome of this obligation is that both the ECB and the NCAs should have access to the same information, on the ground of avoiding double reporting requirements for credit institutions,¹⁸⁸ which again underlines the singleness and unitariness of the System, which appears as a de facto unique authority to the addressees of the supervisory powers.

The SSM Framework Regulation (hereinafter SSMFR)¹⁸⁹ specifies the contents of the obligation to exchange information in Article 6(2) SSMR¹⁹⁰ and

183 See Article 9(1) SSMR. For further details, see Part II, § 5.2.

184 See Article 18(5) SSMR and Article 134 SSMFR. For further details, see Part II, § 5.3.

185 See Article 5 SSMR. For further details, see Part II, § 4.

186 See Article 5(1) SSMR.

187 Article 5(2) SSMR.

188 Recital 47 stipulates that “the ECB and the national competent authorities should have access to the same information without credit institutions being subject to double reporting requirements”.

189 Regulation of the ECB No 468/2014 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) (ECB/2014/17).

190 See also Recital 11 SSMFR: “it is essential for the smooth functioning of the SSM that there is full cooperation between the ECB and NCAs and that they exchange all the information that may have an impact on their respective tasks...”. Under Article 21(1) SSMFR, NCAs shall, in particular, provide the ECB in a timely and accurate manner with all the information necessary for the ECB to carry out the tasks conferred on it by the SSM Regulation. Conversely, under Article 21(2) SSMFR, “in circumstances where the ECB obtains information directly from the legal or natural persons referred to in Article 10(1) of the SSM Regulation, it shall provide the NCAs concerned with such information in a timely and accurate

also makes it clear that, before requiring information to be provided by credit institutions in accordance with Article 10(1) SSMR, the ECB shall first take into account information available to NCAs and that “the ECB shall make available to the relevant NCA a copy of any information received from the legal or natural person to whom the request for information has been addressed”.¹⁹¹

In the same vein, besides the exercise of their specific investigating powers by the ECB and the NCAs vis-à-vis significant and less significant credit institutions respectively, banks are compelled to send their relevant NCA the information to be reported on a regular basis in accordance with relevant Union law. Unless specifically provided for otherwise, all information reported by banks shall be submitted to the NCAs, which shall perform the initial data checks and make the information available to the ECB.¹⁹²

Once entered into the SSM through the NCAs – the point of entry of all supervisory information from credit institutions¹⁹³ - information is available to all the SSM components consistently with the allocation of responsibilities therein, professional secrecy being applicable only outside the System.

To sum up, both the ECB and the NCAs are subject to identical supervisory duties, which are performed on the basis of the same set of information and sometimes, as per Articles 14 and 15 SSMR, following the same assessment.

It would therefore be inconsistent with this framework for the ECB and the NCAs to be subject to different liability rules.

11. No limitation of ECB liability may induce the ECB to over-rely on the NCAs enjoying a greater degree of legal protection and/or create distortions in other aspects of the SSM architecture

No limitation of the ECB’s liability may induce the ECB to over-rely on the NCAs enjoying a greater degree of legal protection in their respective national legal frameworks, which may, in turn, de facto distort the allocation of supervisory powers and responsibilities within the SSM.

Furthermore, distortions in the allocation of supervisory powers may trigger unintended side effects with regard to other aspects of the SSM’s architecture, as

manner. Such information shall include, in particular, information necessary for the NCAs to carry out their role in assisting the ECB” (Article 21(2) SSMFR). Moreover, Article 21(3) SSMFR states that “without prejudice to paragraph 2, the ECB shall provide NCAs with regular access to updated information necessary for NCAs to carry out their tasks related to prudential supervision”.

¹⁹¹ Article 139 SSMFR, basically reproduces the rule in Article 10(3) SSMR, which reads as follows: “where the ECB obtains information directly from the legal or natural persons referred to in paragraph 1 it shall make that information available to the national competent authorities concerned”.

¹⁹² Article 140 SSMFR.

¹⁹³ See the ECB’s decision of 2 July 2014 on the provision to the European Central Bank of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014 (ECB/2014/29).

they may affect the allocation of accountability obligations towards the European Parliament or the national parliaments.

As underlined in the conclusions of the European Council of 18/19 October 2012 with regard to the SSM (point 17) “one of the guiding principles in this context is to ensure that democratic control and accountability take place at the level at which decisions are taken and implemented”.

Against this background, the ECB should be basically accountable towards the European Parliament and NCAs towards the national ones.¹⁹⁴

To the extent that the ECB over-relies on NCAs in cases where they are not strictly responsible under Article 6, distortions may arise in the distribution of the accountability obligations towards the European Parliament or the national parliaments.

Indeed, the European Parliament may be partially deprived in favour of the national ones of its primary function of overseeing the exercise of the tasks conferred on the ECB by the SSMR. Not surprisingly, the sharing of tasks with the NCAs is one of the crucial issues that the ECB Annual Report to the European Parliament is expected to cover.¹⁹⁵

Another shortcoming of the absence of any limitation of the ECB’s liability is the risk that the latter would feel tempted - where making use of its power to levy the annual supervisory fees under Article 30 SSMR - to offload onto credit institutions the costs of damages to be paid to them or to third parties.

Indeed, under the text of the ECB’s draft Regulation on supervisory fees subject to public consultation, the costs for damages incurred by the ECB as a result of defective banking supervision were included in the amount of the annual expenditure to be covered by those fees.¹⁹⁶ The relevant provision was

194 See Articles 20 and 21 SSMR.

Nevertheless, as clarified in Recital 56 SSMR, a “role for national parliaments is appropriate” as regards the ECB too, “given the potential impact that supervisory measures may have on public finances, credit institutions, their customers and employees, and the markets in the participating Member States”, whilst “where national competent authorities take action” under the SSMR, “accountability arrangements provided for under national law should continue to apply”.

Consistently with the wording of Recital 56, Article 21 SSMR provides for a form of ECB accountability to national parliaments too and clarifies, at paragraph 4, that “this Regulation is without prejudice to the accountability of national competent authorities to national parliaments in accordance with national law for the performance of tasks not conferred on the ECB by this Regulation and for the performance of activities carried out by them in accordance with Article 6”.

195 See point I (1) (ii) of the Inter-Institutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU). The ECB’s obligation to submit to the European Parliament, the Council, the Commission and the euro Group a report on the execution of its supervisory tasks is provided for under Article 20(1) SSMR. For further details on ECB accountability in the performance of its supervisory duties see ECB, *SSM Quarterly Report*, 2014/1, pp. 22-24.

196 According to the text of Article 6(1) and (2) of the ECB’s draft Regulation on supervisory fees of May 2014:

subsequently deleted. Thus, in the light of the final version of the regulation (the one approved on 22 October 2014) the ECB is expected not to recover damages payable to third parties via supervisory fees.

Under the text finally approved on 22 October 2014 – see Article 5(2) – “the amount of the annual costs shall be determined on the basis of the amount of the annual expenditure consisting of any expenses incurred by the ECB in the relevant fee period that are directly or indirectly related to its supervisory tasks”.

Nevertheless, a question arises here as to whether damages to be paid to third parties may be included among the expenses *indirectly* related to the ECB’s supervisory tasks.

It is worth noting that under the German legal framework payments due to claims for damages against the supervisor are borne by the credit institutions in the light of the provisions under §§ 13 ff. of the Act Establishing the Federal Financial Supervisory Authority (FinDAG).

Such provisions have been found lawful and not contrary to the German Constitution by the German Federal Administrative Court,¹⁹⁷ though it is doubtful whether provisions similar to those in force under German law would be found constitutional in other EU jurisdictions.

With regard to the Italian legal framework, to offload the costs of damages to be paid by the supervisor onto the supervised institutions would be in contrast with Article 97 of the Constitution and the principle of good administration therein.

“(1) The annual costs shall be the basis for determining the annual supervisory fee and they shall be recovered via the payment of such annual supervisory fee.

(2). The amount of the annual costs shall be determined on the basis of the amount of the annual expenditure consisting of:

(a) any expenses incurred by the ECB in the relevant fee period that are directly or indirectly related to its supervisory tasks;

(b) any damages incurred in the relevant fee period to be paid to a third party for a loss directly or indirectly caused by the ECB in the performance of its supervisory tasks”.

197 See *Bundesverwaltungsgericht*, 23 November 2011, 8 C 20.10. The claimant argued that Section 16(1) of the *Finanzdienstleistungsaufsichtsgesetz (FinDAG)* provides for the reimbursement of costs only insofar as they were “necessary” for the fulfilment of the *BaFin*’s tasks and that illicit activities could not be regarded as “necessary” for the fulfilment of such tasks. The Court held that a systematic analysis of the *FinDAG* could not support the claimant’s view. Nowhere within the *FinDAG* or in its implementing regulation did the term “costs” receive such a restricted interpretation as to exclude a priori any action for damages against the State. As regards the claimant’s constitutional concerns, the Court held that, as a general rule (Article 105 of the German Basic Law), public spending needs to be refinanced by the collection of taxes. The collection of money, which cannot be regarded as a tax, shall be considered as an exception and subject to the three following conditions: (i) the collection of money requires the intention to meet a legitimate goal; (ii) the entities which have to pay the money to the State need to have some sort of connection to the cause for which the money will be collected; and (iii) the collection of money shall not be in contrast with the constitutional principles of budgetary law. In the Court’s view all the above conditions were met.

The principle of good administration is also provided for by Article 42 of the Charter of Fundamental Rights of the European Union. The EU Institutions, including the ECB, subject as they are to the provisions of the Charter, have therefore to abide by that principle.

In the author's view an interpretation of Article 5(2) of the ECB regulation on supervisory fees enabling the ECB to include payments due to damages claims within the expenses *indirectly* related to its supervisory tasks would be in contrast with the principle of good administration.

12. Would the CJEU's limitation of ECB liability as supervisory authority pass the test of an IMF assessment under Basel Core Principle No 2?

This part concludes for a limitation of the ECB's liability, which the CJEU may alternatively infer from the principles applicable under most legislations of euro-area Member States to the supervisors' liability or from CJEU case law and the "sufficiently serious violation" criterion therein.

A problem arises here as to whether such a limitation, grounded as it is on the CJEU's creative interpretation of Article 340 TFEU rather than on the *ad hoc* provision contained in the SSMR, would pass the test of an IMF's assessment under Basel Core Principle No 2.

The IMF has already conducted a financial sector stability assessment on the European Union,¹⁹⁸ including a Technical Note on the European Banking Authority. Nevertheless, the latter contains no recommendations on the liability issues.

Given that the EBA is only exceptionally vested with specific supervisory powers,¹⁹⁹ it is the author's view that the lack of any assessment of the EBA's liability regime would not be a material issue.

An IMF assessment of the SSM might lead to different conclusions, considering the broad discretionary supervisory powers entrusted to the ECB and the NCAs under the SSMR.

According to the Basel criteria on the use of the assessment methodology,²⁰⁰ assessment of the compliance of countries with the Basel Core Principles should be such as "to allow a judgment on whether criteria are fulfilled in practice, not just in theory"; this seeks to clarify that the mere existence of laws and regulations "does not provide enough indication that the criteria are met".²⁰¹

Vice-versa, the methodology is silent and lacks any criterion for the assessor, where a country's legislation does not formally limit the liability of the

198 See IMF Country Report No. 13/74 of March 2013.

199 See § 2 of this part.

200 See Core Principles for Effective Banking Supervision, §§ 56-57.

201 See Core Principles for Effective Banking Supervision, § 57.

supervisor, though de facto its concrete application by the courts provides it with enough protection.

This is a methodological lacuna, where the legal protection of the supervisor, though not expressly provided for in the legislation, is the outcome of jurisprudence's interpretation of the general principles on tortious liability, which would make the country subject to the assessment compliant with Basel Core Principle No 2.

The Italian jurisprudence prior to the entry into force of Law No 262 of 2005 gives a clear example on how a national legal framework may in practice provide a form of legal protection for supervisors even in the absence of a specific rule limiting their liability to some form of qualified unlawfulness.²⁰²

Nevertheless, the IMF's 2004 Report "Italy: Detailed Assessment of Compliance with the Basel Core Principles for Effective Banking Supervision" states that "there is no legal protection offered to the BI [Bank of Italy] and its

202 Before the entry into force of the new text of Article 24 of Italian Law No 262 of 2005 (as amended by Article 4, paragraph 2, of Legislative Decree No 303 of 2006), the Bank of Italy enjoyed no limitation of liability. It was therefore regulated by the same provisions as applied to all other public authorities. According to the general principles on liability in tort, public authorities are deemed responsible under Article 2043 of the civil code for any wilful or negligent act that causes an unjustified damage to a person. This notwithstanding, under early case law, ordinary courts had no jurisdiction over claims for damages brought against the Bank of Italy in its capacity as supervisory authority on the assumption that with regard to the exercise of discretionary powers (such as those activated in banking supervision) private persons had only a legitimate interest, whose violation gave no action for damages under the provisions of Article 2043 of the civil code as interpreted and applied by jurisprudence.

This view partially changed in the early 1990s. Actions brought by individuals for damages they asserted they had suffered, as a result of the Bank of Italy's negligent supervision or failure to supervise intermediaries, were considered admissible by the Italian Supreme Court: see Corte di Cassazione, SS.UU., 22 July 1993 and 27 October 1994, No 8836. The decision pointed out that investors should not be considered as persons subject to the discretionary powers of the Bank of Italy, because they were to be considered as third parties with regard to the relationship between the supervisory authority and the banks. Investors therefore had a right to the integrity of their assets rather than a legitimate interest in the lawful use of the Bank of Italy's supervisory powers.

A perceptible shift towards a more liberal approach to actions brought against the public administration under Article 2043 of the civil code can be found in Corte di Cassazione judgment 500/1999. The Court awarded the compensation for damages under the provisions of Article 2043 of the civil code even where a legitimate interest (and not only a subjective right) was injured.

Despite this more liberal approach, the subsequent jurisprudence was still reluctant to recognise the supervisor's liability. In decision 3132/2001, while defining the Consob's wilful or negligent behaviour, the Corte di Cassazione stated that any supervisory authority in the exercise of its powers should follow the general principles of impartiality, fairness and good administration. According to these principles, the supervisory authority is required to use any means that is deemed adequate to its tasks and that the authority is obliged to use its powers whenever that is necessary to protect the interests safeguarded by law. Nevertheless, this necessity was found, in the 2001 and subsequent judgements, only in such a serious circumstances that the criterion applied by the Corte di Cassazione would have met the more restrictive approaches based on the gross negligence and wilful misconduct liability criteria applied by the French Conseil d'Etat and the House of Lords respectively.

For a survey of the case law on the supervisory authorities in Italy before the entry into force of their new liability regime under Article 24 of Italian Law 262/2005, see D'Ambrosio, R., "La responsabilità delle autorità di vigilanza: disciplina nazionale e analisi comparatistica" and Rossi, F., "Tort Liability of Financial Regulators: A Comparative Study of Italian and English Law in a European Contest", pp. 643 ff.

officers against the possibility of legal action resulting from measures adopted in good faith in the exercise of their supervisory functions”.²⁰³

An IMF assessment of the ECB’s liability regime as supervisory authority might lead to the same conclusion as that reached with regard to the Italian legal regime for supervisors prior to the entry into force of Law 262/2005 referred to above.

Indeed, apart from the stance the CJEU may decide to adopt, the SSMR provides for no specific rule expressly limiting the ECB’s liability.²⁰⁴

203 See the IMF’s 2004 Report “Italy: Detailed Assessment of Compliance with the Basel Core Principles for Effective Banking Supervision” (IMF Country Report No. 04/133), p. 30.

204 As will be better clarified below (see Part III), the members of the ECB internal bodies and the ECB staff involved in supervisory tasks benefit from the immunities provided for under Protocol 7 on the privileges and immunities of EU. Nevertheless, such immunities do not exclude the liability of members of ECB bodies and ECB staff towards the ECB itself. It is therefore doubtful whether the liability regime of members of ECB bodies and ECB staff would pass the test of an IMF assessment of compliance with Basel Core Principle No 2.

II

THE ALLOCATION OF TASKS, POWERS AND LIABILITY BETWEEN THE ECB AND THE NCAs WITHIN THE SSM

1. Outlook

As per Article 127(6) TFEU,²⁰⁵ the SSMR vests the ECB - within an integrated network of both EU and national authorities, the SSM - with some prudential supervisory tasks in relation to all credit institutions established in the participating Member States.²⁰⁶

Though the conferral of tasks also implies, as a rule, that of the relevant responsibilities and powers, there are nonetheless some exceptions. Thus some preliminary clarifications are needed in order to ascertain how tasks, responsibilities and powers are exactly allocated to the ECB and the NCAs within the SSM.

(a) Since under Article 127(6) TFEU the ECB may be vested only with specific supervisory tasks, the tasks not expressly conferred on the ECB remain under the remit of the NCAs.²⁰⁷ In the light of the principle of conferral, doubtful cases should be solved in favour of the NCAs' rather than of the ECB's jurisdiction.²⁰⁸

205 The question whether the allocation of tasks between the ECB and the NCAs within the SSM is in line with the TFEU is still an open one. Banking supervision cannot be deemed an exclusive EU (and therefore ECB) task as it clearly results from provisions under Articles 3 and 4 of the TFEU. In the light of the above, Article 127(6) TFEU confers on the ECB some (not all) supervisory tasks with regard to credit institutions. Though the ECB is vested with the ultimate responsibility for the SSM, some supervisory tasks remain, as will be better clarified below in the text, under the remit of the NCAs. These also maintain direct responsibility for supervising less significant credit institutions under the oversight of the ECB. This allocation of tasks and responsibilities within the SSM is the only one compatible with the present version of the TFEU; greater involvement of the ECB in banking supervision would only be possible through an amendment of the EU Treaties. Not surprisingly, Recital No 85 SSMR calls for an amendment of Article 127(6) TFEU. It reads as follows: "the Commission has stated in its Communication of 28 November 2012 on a Blueprint for a deep and genuine economic and monetary union that Article 127(6) TFEU could be amended to make the ordinary legislative procedure applicable and to eliminate some of the legal constraints it currently places on the design of the SSM (e.g. enshrine a direct and irrevocable opt-in by Member States whose currency is not the euro to the SSM, beyond the model of 'close cooperation', grant Member States whose currency is not the euro participating in the SSM fully equal rights in the ECB's decision-making, and go even further in the internal separation of decision-making on monetary policy and on supervision). It has also stated that a specific point to be addressed would be to strengthen democratic accountability over the ECB insofar as it acts as a banking supervisor. It is recalled that TEU provides that proposals for treaty change may be submitted by the Government of any Member State, the European Parliament, or the Commission, and may relate to any aspect of the Treaties".

206 Under Article 2, No (1) "participating Member State' means a Member State whose currency is the euro or a Member State whose currency is not the euro which has established a close cooperation in accordance with Article 7". The ECB is also vested with supervisory tasks in relation to credit institutions' parents, including financial holding companies and mixed financial holding companies.

207 See Article 1 and Recital 28 SSMR.

208 An opposite point of view could be grounded on the implied powers' doctrine. For the ECB to perform its supervisory tasks effectively, it should be vested with all the supervisory powers which will be conferred upon NCAs, from time to time.

A distinction may be made between the tasks that remain under the NCAs' remit.

Some of these tasks are assigned exclusively to the NCAs' jurisdiction and are outside the SSM, as is the case of (i) non-prudential supervisory tasks and (ii) prudential supervisory tasks pertaining to intermediaries which are not credit institutions.

Others are assigned to the NCAs but may be carried out only within the SSM as is the case of prudential supervisory tasks involving credit institutions that are strictly instrumental to those of the ECB. These tasks should fall within the scope of the ECB's ultimate responsibility for the SSM,²⁰⁹ though it is not clear whether their performance would also be subject to ECB oversight.²¹⁰

(b) Apart from the NCAs' supervisory tasks referred to above, prudential tasks with regard to credit institutions are fundamentally assigned to the ECB. Though these tasks are exclusively assigned to the ECB, the relevant responsibilities are allocated only to the ECB or to both the ECB and the NCAs, depending on the significant or less significant status of the credit institutions concerned.

(c) Nevertheless, there are some cases where, though the ECB is vested with the tasks, it is not entrusted with the relevant powers.²¹¹

As regards participating Member States in close cooperation, tasks and powers are always allocated to different authorities, the former being conferred on the ECB and the latter on the NCAs. Though vested with supervisory tasks, the ECB does not have direct supervisory powers with regard to credit institutions established in Member States in close cooperation. Not surprisingly, the only way for the ECB to exercise its supervisory tasks is for it to instruct the relevant NCAs.

As regards the Member States participating in the euro area, a misalignment between tasks and powers may occur first of all where the latter are provided for under pure national law (i.e.: national law not transposing directives) and are therefore under the exclusive competence of the NCAs, whilst the former

209 Under Article 6(1) SSMR "the ECB shall be responsible for the effective and consistent functioning of the SSM".

210 Under Article 6(5)(c) SSMR ECB oversight over the functioning of the system is expressly provided for only as regards the NCAs' responsibilities with regard to less significant credit institutions. Nevertheless, it would be consistent with the ECB's ultimate responsibility for the SSM to extend its oversight powers to all the NCAs' supervisory responsibilities with regard to credit institutions, irrespective of their status as significant or less significant.

211 The question whether Article 127(6) TFEU constitutes a sufficient legal basis for the conferral on the ECB not only of tasks but also of the relevant powers has been sharply debated in the literature. The main argument against Article 127(6) constituting such a sufficient legal basis comes from its wording: it mentions only the conferral of tasks. The main argument in favour comes from its rationale: Article 127(6) cannot be interpreted in such a way that no power necessary for carrying out the tasks can be transferred. On these aspects see LACKHOFF K., "How will the Single Supervisory Mechanism (SSM) Function? A Brief Overview", in *J.I.B.L.R.*, 2014, pp. 14-15.

remain under the remit of the ECB. Another case occurs where sanctions are to be applied to natural persons or for violations of national law.

Besides the above cases of misallocation between tasks and powers, the ECB may give instructions and recommendations to the NCAs or adopt rules on the way in which they have to carry out the supervisory procedures pertaining to less significant credit institutions or prepare or implement any ECB decisions addressed to significant ones.

(d) Against this background the following conclusions can be drawn.

The allocation of liabilities is basically aligned with the allocation of tasks, responsibilities and powers.

In cases of misalignment of tasks and powers (i.e. the ECB has the task whilst the NCAs are vested with the relevant power), the ECB is expressly empowered to give instructions to the NCAs.

Nevertheless, the power to give instructions to the NCAs is not confined to the cases of misalignment between tasks and powers but has a general application since it occurs even in the case of supervision of less significant credit institutions.

Where the ECB gives instructions to the NCAs the allocation of liabilities is conditional upon the margin of manoeuvre that NCAs enjoy in following these instructions.

It is the aim of this second part of the paper to discuss all the above issues, though its findings should not be considered as conclusive, considering the ambiguity of the wording used by the SSMR²¹² and the absence of any CJEU judgments on the provisions of the SSMR.

2. The tasks conferred on the ECB and those remaining under the remit of the NCAs

2.1. The conferral on the ECB of supervisory tasks under Article 4(1) and the list of the NCAs' tasks under Recital 28 SSMR

The ECB is vested with some specific (and key) supervisory tasks pertaining to the prudential supervision of credit institutions.

The tasks assigned to the ECB are listed under Article 4(1) SSMR.²¹³

212 See for example Recital No 28, where the words “tasks” and “powers” are interchangeable.

213 Article 4(1) SSMR reads as follows:

“1. 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:

(a) to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14;

Dealing with each of the tasks conferred on the ECB would be beyond the scope of this part.

Since the aim of this part is to assess the extent to which the allocation of liability to the ECB and the NCAs is aligned with that of tasks, responsibilities and powers, the author will focus on cases:

(i) where a task of the NCAs is also a task of the SSM and should therefore be subject to the ECB's coordinating powers and

(ii) where it is not crystal clear to what extent a task falls under the remit of the ECB or the NCAs.

These issues will be dealt with in Sections 2.2 and 2.3 respectively.

Tasks remaining under the remit of the NCAs are referred to in Recital No 28 SSMR.

(b) for credit institutions established in a participating Member State, which wish to establish a branch or provide cross- border services in a non-participating Member State, to carry out the tasks which the competent authority of the home Member State shall have under the relevant Union law;

(c) to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15;

(d) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;

(e) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models;

(f) to carry out supervisory reviews, including where appropriate in coordination with EBA, stress tests and their possible publication, in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by these institutions ensure a sound management and coverage of their risks, and on the basis of that supervisory review to impose on credit institutions specific additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law;

(g) to carry out supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States, including over financial holding companies and mixed financial holding companies, and to participate in supervision on a consolidated basis, including in colleges of supervisors without prejudice to the participation of national competent authorities in those colleges as observers, in relation to parents not established in one of the participating Member State;

(h) to participate in supplementary supervision of a financial conglomerate in relation to the credit institutions included in it and to assume the tasks of a coordinator where the ECB is appointed as the coordinator for a financial conglomerate in accordance with the criteria set out in relevant Union law;

(i) to carry out supervisory tasks in relation to recovery plans, and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements, and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers”.

Moreover, under paragraph 2 of Article 4 SSMR “for credit institutions established in a non-participating Member State, which establish a branch or provide cross- border services in a participating Member State, the ECB shall carry out, within the scope of paragraph 1, the tasks for which the national competent authorities are competent in accordance with relevant Union law”.

This finally clarifies that “supervisory tasks not conferred on the ECB should remain with the national authorities. Those tasks should include the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services, to supervise bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law, to supervise credit institutions from third countries establishing a branch or providing cross-border services in the Union, to supervise payments services, to carry out day-to-day verifications of credit institutions, to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments, the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection”.

2.2. The distinction among the NCAs tasks between those under the SSM and those not under the SSM

Recital No 28 only mentions the tasks remaining under the remit of the NCAs but does not distinguish between them, depending on the nature of the task (supervisory or non-supervisory) or the status of the addressee of the powers in which these tasks materialise (credit institutions or other financial intermediaries).

It is the author’s intention to make this distinction on the assumption that it is relevant in order to ascertain which of the NCAs’ tasks remain under the exclusive remit of the NCAs (i.e. the non-supervisory tasks and the supervisory tasks involving financial intermediaries other than credit institutions) and which come under the SSM regime, being strictly instrumental to the ECB’s tasks (the supervisory tasks involving credit institutions).

In doing that, Recital No 28 should not be read by itself but in conjunction with Articles 1,²¹⁴ 6(3)²¹⁵ and 17(1)²¹⁶ and with Recitals No 29²¹⁷ and 37²¹⁸ SSMR.

Referring to the above, one may therefore distinguish between:

(i) the NCAs' supervisory tasks involving credit institutions, such as those of receiving "notifications from credit institutions in relation to the right of establishment and the free provision of services"²¹⁹ and carrying out "day-to-day verifications of credit institutions";²²⁰ these tasks come under the SSM regime since they are strictly instrumental to the ECB's supervisory tasks;

(ii) the NCAs supervisory tasks involving financial intermediaries not supervised by the ECB;

(iii) the NCAs non-supervisory tasks involving credit institutions, such as those of carrying out "the function of competent authorities over credit institutions in relation to markets in financial instruments", "the prevention of the use of the financial system for the purpose of money laundering and terrorist financing" or "consumer protection".

214 Article 1, unique paragraph, subparagraph 2, second period reads as follows: "the scope of the ECB's supervisory tasks is limited to the prudential supervision of credit institutions pursuant to this Regulation. This Regulation shall not confer on the ECB any other supervisory tasks, such as tasks relating to the prudential supervision of central counterparties"; subparagraph 5 states, in turn, that "the institutions referred to in Article 2(5) of the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms are excluded from the supervisory tasks conferred on ECB in accordance with Article 4 of this Regulation. The scope of the ECB's supervisory tasks is limited to the prudential supervision of credit institutions pursuant to this Regulation. This Regulation is without prejudice to the responsibilities and related powers of the competent authorities of the participating Member States to carry out supervisory tasks not conferred on the ECB by this Regulation".

215 Article 6(3) SSMR stipulates that "where appropriate and without prejudice to the responsibility and accountability of the ECB for the tasks conferred on it by this Regulation, national competent authorities shall be responsible for assisting the ECB, under the conditions set out in the framework mentioned in paragraph 7 of this Article, with the preparation and implementation of any acts relating to the tasks referred to in Article 4 related to all credit institutions, including assistance in verification activities. They shall follow the instructions given by the ECB when performing the tasks mentioned in Article 4".

216 Under Article 17(1) SSMR, "between participating Member States the procedures set out in the relevant Union law for credit institutions wishing to establish a branch or to exercise the freedom to provide services by carrying on their activities within the territory of another Member State and the related competences of home and host Member States shall apply only for the purposes of the tasks not conferred on the ECB by Article 4".

217 Under Recital No 29 SSMR "the ECB should cooperate, as appropriate, fully with the national authorities which are competent to ensure a high level of consumer protection and the fight against money laundering".

218 Recital 37, second period, SSMR reads as follows: "...in order to ensure high-quality, Union-wide supervision, national competent authorities should be responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of the ECB supervisory tasks. This should include, in particular, the ongoing day-to-day assessment of a credit institution's situation and related on-site verifications".

219 See Recital 28 in conjunction with Article 4(2) SSMR.

220 See Recital 28 in conjunction with Recital 37 and Article 6(3) SSMR.

That tasks under (i) do not pertain exclusively to the NCAs but are also SSM tasks is confirmed by the SSMFR, which explicitly regulates how they have to be carried out in order to allow the ECB to accomplish to its responsibilities.

In one case - the day-to-day verification of credit institutions - the SSMFR has even turned an NCA task into an ECB task, departing from the wording and the rationale of the SSMR recitals and provisions²²¹ and from the principle of subsidiarity on which the Regulation is based.

Conversely, assigning the day-to-day verification of credit institutions to the NCAs without any direct involvement of the ECB would have been in line with the principle of subsidiarity referred to in Recital 87 SSMR.

Indeed, in addition to vesting the NCAs with key supervisory responsibilities with regard to less significant credit institutions, compliance with the principle of subsidiarity has been realized under the SSMR through the allocation to the NCAs of some supervisory powers with regard to all credit institutions, which could be better achieved at local level, such as day-to-day verification of credit institutions.

This notwithstanding, under Part II, Title 1, of the SSMFR, the day-to-day verification of significant credit institutions is carried out through Joint Supervisory Teams (hereinafter JSTs) established by the ECB.

This is clearly laid down in Article 3 of the SSMFR, in the light of which JSTs are operational units within which NCAs assist the ECB's staff in the supervision of significant supervised entities.²²²

More to the point, instead of establishing coordination between the ECB and the NCAs, with the ECB having the power to give the latter instructions, the SSMFR has provided for the NCAs' staff to be coordinated directly by the ECB within the JSTs.

NCAs only maintain the power to submit draft decisions prepared on their own initiative to the ECB for its consideration through the relevant JST.²²³

In the light of the above JSTs' national members act on behalf of the ECB rather than the NCAs and their activity appears to be an extension of an ECB task than of an NCA task. It follows that for the acts or omissions of NCAs' members of JSTs the ECB should be liable and not the NCAs.²²⁴

221 Besides Recitals 28 and 37 mentioned in the text, see also Recital 79 SSMR. This suggests that the ECB would only be entitled to require an NCA to involve staff members of another NCA and to make arrangements with NCAs to ensure an appropriate exchange and secondment of staff with and among the NCAs.

222 See Part III, § 2.1.

223 See Article 91(2) SSMFR. Diverging views between the ECB and the NCAs will normally be resolved within the JST and if this is not possible they will be submitted to the Supervisory Board.

224 For further details on this issue, see Part III, § 2.2.

Part II, Title 3, of the SSMFR lays down the procedural rules governing the right of establishment (of branches) and the exercise of the freedom to provide services by supervised entities.

In line with the SSMR, NCAs remain competent to receive notifications from credit institutions in relation to the right of establishment and the freedom to provide services in the cases of:

(i) internal passports (supervised entities established in a participating Member State wishing to establish a branch or provide services in another participating Member State);

(ii) out-bound passports (supervised entities established in a participating Member State wishing to establish a branch or provide services in a non-participating Member State);

(iii) in-bound passports (supervised entities established in a non-participating Member State wishing to establish a branch or provide services in a participating Member State).

In the above-mentioned cases, NCAs must immediately inform the ECB of receipt of such notifications from significant supervised institutions or, in the case of in-bound passports, from the relevant supervisory authority; responsibilities are allocated to the ECB and the NCAs depending on the significant or less significant status of the credit institution or, in the case of in-bound passports, of the branch concerned.²²⁵

A different case is that of credit institutions from third countries establishing a branch or providing cross-border services in the Union. Supervision of these credit institutions is considered by Recital No 28 of the SSMR to be a pure NCA task.

Vice-versa, the case of a credit institution established in a participating MS wishing to establish a branch or provide services outside the EU is not expressly covered by the SSMR. In some MS jurisdictions the case is subject to an NCA authorization. Since the relevant power may impinge on the ECB's supervisory tasks, it should be subject to the provisions contained in Article 9(1), third subparagraph, SSMR.²²⁶

²²⁵ See Articles 11 to 17 SSMFR. As regards the in-bound passport, the allocation of responsibilities to the ECB and the NCAs seems at first glance in contrast with the wording of Article 4(2) SSMR, which reads as follows: "for credit institutions established in a non-participating Member State, which establish a branch or provide cross-border services in a participating Member State, the ECB shall carry out, within the scope of paragraph 1, the tasks for which the national competent authorities are competent in accordance with relevant Union law". Nevertheless, it is worth noting that not only paragraph 1 but also paragraph 2 of Article 4 SSMR should be read in conjunction with Article 6 and the criterion of allocation of responsibilities therein.

²²⁶ See § 5.2 of this part.

2.3. Cases where it is not clear to what extent a task falls within the remit of the ECB or the NCAs

NCAs keep the task of supervising financial institutions other than credit institutions.

Nevertheless, to single out which financial institutions do not have the status of credit institutions is not always an easy task.

The wording of Article 1 SSMR may help the interpreter as it clarifies that the SSMR “shall not confer on the ECB any other supervisory tasks, such as tasks relating to the prudential supervision of central counterparties”.

Nevertheless, there are cases where a bank carries out the activities of both a credit institution and a central counterparty. In such cases a reasonable criterion in order to ascertain which is the competent authority could be that of the prevailing activity.

A different view nonetheless seems to have been adopted in the SSMFR. Indeed, Article 2, point (20), second subparagraph, SSMFR states that “a central counterparty (CCP), as defined in Article 2(1) of Regulation (EU) No 648/2012 of the European Parliament and of the Council, which qualifies as a credit institution within the meaning of Directive 2013/36/EU, shall be considered a supervised entity in accordance with the SSM Regulation, this Regulation and relevant Union law without prejudice to the supervision of CCPs by relevant NCAs as laid down under Regulation (EU) No 648/2012”.

A further problem would be that of ascertaining which activities have to be taken into account in order to classify the credit institution concerned as significant or less significant, whether both the banking and the central counterparty activities or only the banking one.

The first solution seems to be preferable since Article 6(4) SSMR does not distinguish between the assets that have to be considered while assessing the significance of a credit institution.

Under Recital No 28 SSMR “other bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law” shall not fall under the SSM.

Moreover, NCAs remain responsible for supervising credit institutions’ activities in relation to the market in financial instruments.

Not surprisingly, the ECB’s banking license will cover neither investment services activity nor other credit institutions’ activities in relation to the market in financial services, such as the custodian of common funds’ assets.

Article 22 of the UCITS IV Directive²²⁷ stipulates that “the assets of a common fund shall be entrusted to a depositary for safe-keeping”, and in some EU jurisdictions such depositaries must be authorized by the NCA.²²⁸

Under the EMIR regulation (Regulation No 648/2012) “OTC derivative contracts that are intragroup transactions shall not be subject to the clearing obligation” (Article 3(2)) but they shall be subject to some risk-mitigation techniques. The latter are provided for under Article 11 of the EMIR regulation and may be waived by the NCAs where certain conditions are met. In the case of intragroup transactions entered into by counterparties which are established in different Member States exemptions from the risk-mitigation techniques have to be authorized by both the relevant competent authorities. Disagreements are settled by ESMA.

It is the author’s view that the NCAs’ powers to authorize these exceptions, though impinging on the prudential requirements, pertain to the field of the market in financial instruments as confirmed by the involvement of ESMA’s mediation powers.

A different approach is followed with regard to the structural changes required from credit institutions.

The latter are included within the ECB’s supervisory tasks, as clearly laid down under Article 4(1)(i) SSMR and confirmed by Article 5, point 7 of the draft EU Regulation on structural measures improving the resilience of EU credit institutions, which identifies the ECB as the competent authority for the purposes of the regulation.²²⁹

Though the decision to impose structural changes mainly pertains to the activities carried out by banks in the field of the market in financial instruments (separation of certain trading activities), the ECB’s competence is here grounded on the arguments (see Article 8 ff. of the draft Regulation) that such a decision: (i) involves the whole organizational structure of the banking group; (ii) entails the re-organization of the group into two separate and homogeneous functional sub-groups constituted on the one side by the core credit institution carrying out mainly retail activities and on the other side by the trading entity(ies) engaging in speculative activities, without prejudice to the ban on proprietary trading as per Article 6(1); and (iii) implies that the core credit institution and the trading

227 Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

228 Under Article 47(3) of the 1998 Italian Consolidated Law on Finance the exercise by a credit institution of custodian functions needs to be authorized by the Bank of Italy.

229 In the same vein see the ECB Opinion of 19 November 2014 on the draft ECB Regulation (CON/2014/83), p. 9: “as the ECB is considered a competent authority for the exclusive purpose of carrying out the tasks conferred on it by, inter alia, Article 4(1) of Regulation (EU) No 1024/2013, and as the tasks specified in the proposed regulation correspond to the tasks already conferred on the ECB under Article 4(1)(i) of Regulation (EU) No 1024/2013, the ECB should also have the power to exercise appropriate sanctioning powers in accordance with the framework laid down in Article 18 of Regulation (EU) No 1024/2013”.

entity(ies) shall comply with prudential requirements on an individual or sub-consolidated basis along with other organizational requirements aimed at ensuring legal, operational and economic separation of the two entities.

Furthermore, as clearly shown by Recital 28 SSMR, the NCAs remain competent for consumer protection and the fight against money laundering.

Nevertheless, it is not clear what is the scope of these tasks.

In some national legal frameworks, such as the Italian one, consumer protection and the fight against money laundering extend to the relevant organizational agreements and internal control mechanisms.²³⁰

The latter fall within the scope of the ECB's supervisory tasks.²³¹

Nevertheless, in the light of the principle of conferral and the strict interpretation of the rules on the allocation of competencies to the EU institutions, this circumstance cannot militate against any concurrent responsibilities of the NCAs.

A possible criterion for the allocation of responsibilities in these fields could be:

(i) the ECB would be responsible for ensuring that credit institutions have organisational agreements and internal control mechanisms in place compliant with the relevant EU prudential banking law, whilst

(ii) the NCAs would be responsible for ensuring that credit institutions' organisational agreements and internal control mechanisms are such as ensure a high level of consumer protection and an effective fight against money laundering.²³²

230 Article 127(01) of the Italian Banking Law reads as follow: "the credit authorities shall exercise the powers provided for in this title having regard not only to the aims specified in Article 5 but also to the transparency of contractual conditions and the fairness of dealings with customers. For these purposes the Bank of Italy, in conformity with the resolutions of the Credit Committee, may issue regulations regarding entities' organization and internal controls". Under Article 53(1) of Legislative Decree 231/2007 (Implementation of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and of Directive 2006/70/EC laying down implementing measures for Directive 2005/06/EC), "the sectoral supervisory authorities [including the Bank of Italy], in their respective competences, shall verify the adequacy of their organizational and procedural arrangements and compliance with the obligations contained in this decree and its implementing provisions by... financial intermediaries [including credit institutions]".

231 See Article 4(1)(e) SSMR.

232 A similar solution can be found in Article 6 of the 1998 Italian Consolidated Law on Finance (Legislative Decree 58/1998 and subsequent amendments) and the allocation of tasks to the Bank of Italy and the Italian Companies and Stock Exchange Commission (Consob) therein. Under the above-mentioned Article 6, whilst both the Bank of Italy and Consob shall jointly govern the obligations of authorized persons, by regulation "on matters of: a) corporate governance, general requirements of organization, remuneration and incentive systems" and "d) procedures, including internal audit, for the correct and transparent provision of investment services and activities together with collective asset management services", for supervision purposes the responsible parties shall be the Bank of Italy for aspects pursuant to paragraph a) and Consob for those pursuant to paragraph d).

3. The allocation of micro-prudential supervisory competences within the SSM, the criterion contained in Article 6 SSMR and its exceptions

3.1. The general criterion contained in Article 6 SSMR

According to Article 4(1) SSMR, “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”.

Three paramount ideas are contained in this sentence:

(i) the ECB is competent to carry out supervisory tasks “in relation to all credit institutions established in participating Member States”;

(ii) these tasks have to be performed “within the framework of Article 6” and

(iii) they have to be carried out “for prudential supervisory purposes”.

It follows that the prudential supervision of all credit institutions, as defined by Directive 36/2013 and Regulation 575/2013, is assigned to the ECB, but some credit institutions will be directly supervised by the ECB, whereas others can continue to be directly supervised by the NCAs under the oversight of the ECB.²³³

The criteria according to which the ECB is competent to supervise credit institutions directly are laid down in Article 6 SSMR and are specified in Articles 39 ff. SSMFR.

The ECB will be competent to exercise direct supervision on those credit institutions that are considered significant on the basis of the three following criteria: their size, their importance for the economy of the EU or any participating Member State and the significance of their cross-border activities.²³⁴

These three criteria are to be examined on a consolidated basis, at the highest level of consolidation within the participating Member States and are alternatives.

A distinction has to be made between the first two criteria and the third.

A credit institution *shall* be classified as significant on the basis of its size²³⁵ and its importance for the economy of the EU or any participating Member

²³³ In this regard, Recital 16 of the SSMR clearly states that “the safety and soundness of large credit institutions is essential to ensure the stability of the financial system. However, recent experience shows that smaller credit institutions can also pose a threat to financial stability. Therefore, the ECB should be able to exercise supervisory tasks in relation to all credit institutions authorised in, and branches established in, participating Member States”.

²³⁴ See in the literature LACKHOFF, K., “Which Credit Institutions will be Supervised by the Single Supervisory Mechanism?”, in *J.I.B.L.R.*, 2013, 454 ff.

²³⁵ See Article 50 SSMFR.

State²³⁶ whilst it *may* be considered as significant on the basis of its cross-border activity.²³⁷

Moreover, it is worth noting that “particular circumstances”, as referred to in the second and fifth subparagraphs of Article 6(4) SSMR, may lead to the classification of a significant credit institution as less significant.

These particular cases only occur “when there are specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of the SSM Regulation and, in particular, the need to ensure the consistent application of high supervisory standards”²³⁸ and have to be determined on a case-by-case basis and not for categories of credit institutions.²³⁹

In addition, there is another group of credit institutions that are supervised directly by the ECB: “those for which public financial assistance has been requested or received directly from the EFSF or the ESM”.²⁴⁰ It is to be noted that direct supervision by the ECB is a necessary precondition for eligibility for direct recapitalization of a bank.

Beyond these criteria, the ECB may also decide – on its own initiative or at the request of NCAs - to take over the direct supervision of credit institutions that are less significant “when necessary to ensure consistent application of high supervisory standards”, including “in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM”.²⁴¹

Moreover, the ECB maintains responsibility for the entire SSM: it exercises oversight over the functioning of the system, may make direct use of the powers under Articles 10 to 13 of the SSMR and may request, on an *ad hoc* or continuous basis, information from the NCAs on the performance of the tasks assigned to them.²⁴²

236 See Article 56 SSMFR.

237 See Article 59 SSMFR.

238 See Article 70 SSMFR.

239 See Article 71 SSMR. In the first application of Articles 70 ff. SSMFR the ECB based its decisions to classify some credit institutions as less significant, although they complied with the formal significance criteria, on the following alternative criteria: (i) “the need to preserve the integrated supervision currently exercised by the NCAs”; (ii) the circumstance that the credit institution, “although one of the three most significant in a member State”, was “too small to come under the ECB’s direct supervision”: ECB, *SSM Quarterly Report*, 2014/3, pp. 7-8.

240 See Article 6(4) SSMR.

241 See Article 6(5)(b) SSMR. Under Article 68 SSMFR the ECB is not obliged to accept to take over the direct supervision of a less significant credit institution at the request of an NCA. Nevertheless, should the ECB disagree with the NCA, it shall consult with the latter prior to adopting its final decision as to whether its supervision of the less significant credit institution is necessary in order to ensure the consistent application of high supervisory standards.

242 See Article 6(5)(c) to (e) SSMR. Moreover, Part VII of the SSMFR describes the main principles governing the relationship between the ECB and the NCAs, as direct supervisors of less significant credit institutions. NCAs must, as a rule, inform the ECB of any rapid and significant deterioration in the financial situation of a less significant supervised entity. A distinction can be made between *ex ante* and *ex post* ECB oversight over NCAs supervision of less significant credit institutions. The former will be limited to draft decisions and procedures that concern certain less significant credit institutions identified by the ECB on

In accordance with Article 31(2) SSMR, if the ECB considers that the participation of staff members from an NCA in another NCA's supervisory team is appropriate, it may require the latter to involve staff members of the former in its supervisory team.

The scope of this provision is not clear.

Whilst in the light of Recital 79 SSMR, it should have applied particularly to the supervision of "large credit institutions",²⁴³ under the SSMFR its scope is circumscribed to the less significant credit institutions,²⁴⁴ on the assumption that to the significant ones shall apply the different set of rules on the tasks and functioning of the JSTs.²⁴⁵

In the performance of its supervisory tasks towards significant credit institutions the ECB may make use of all the prudential tools referred to in Article 16(2) SSMR (the so-called Pillar 2 measures). These tools basically reproduce those specified in Article 104 of the CR Directive, the only difference being that Article 16 gives the ECB the further power to "remove at any time members from the management body of credit institutions who do not fulfill the requirements set out in the acts referred to in the first subparagraph of Article 4(3)".²⁴⁶

As regards the significant supervised groups for which a college of supervisors has been established and for which the Pillar 2 measure consists of a requirement to either increase the level of own funds or liquidity requirements, a joint supervisory decision must be taken under Article 113 of the CRD IV. Though this is not binding on the supervised entity, it nonetheless determines the contents of the final binding decision to be taken by each supervisor.

the basis of general criteria taking account of the risk situation of the entity and its impact on the domestic financial system. Such draft decisions and procedures will need to be notified by the NCAs to the ECB only if they are considered material, in which case the ECB may provide comments on the draft decision or procedure. As regards ex post reporting by NCAs on their supervisory activities, they will prepare regular reports for the ECB, on the basis of which the ECB will assess, inter alia, the consistency of supervisory outcomes within the SSM.

243 Recital 79 SSMR states that: "to ensure a peer control on an on-going basis, particularly in the supervision of large credit institutions, the ECB should be able to request that national supervisory teams involve also staff from competent authorities of other participating Member States, making it possible to install supervisory teams of geographical diversity with specific expertise and profile".

244 Article 7 SSMFR reads as follows: "without prejudice to Article 31(1) of the SSM Regulation, when, in relation to the supervision of less significant supervised entities, the ECB determines that it is appropriate to involve staff members from one or more other NCAs in the supervisory team of an NCA, the ECB may require the latter to involve staff members of such other NCAs". The effects of this provision on the allocation of liability to the ECB and the NCAs involved in the supervision of less significant credit institutions will be examined in Part III, § 2.3.

245 See Articles 3 to 6 SSMFR.

246 See Article 16(2)(m) SSMR.

The tools referred to in Article 16(2) SSMR may also be employed as measures at an early stage under the conditions laid down in Article 16(1) SSMR.²⁴⁷

Besides the measures at an early stage provided for in Article 16 SSMR, the ECB may also adopt, in the light of Articles 13 SRMR and 2(1), point 21, of Directive 2014/59/EU (the so-called BRRD),²⁴⁸ the other early intervention measures listed in Article 27(1) and the removal of the senior management or management body provided for in Article 28 and the appointment of a temporary administrator under the conditions laid down in Article 29 of the above-mentioned directive.

Moreover, under the provisions of the SRMR the ECB is vested with the power to assess whether a credit institution is failing or is likely to fail irrespective of its significant or less significant status,²⁴⁹ which appears to be consistent with the ECB's general powers to withdraw the banking license from all SSM credit institutions.²⁵⁰

247 Under Article 16(1) SSMR, measures at an early stage are adopted only “in any of the following circumstances: (i) the credit institution does not meet the requirements of the acts referred to in the first paragraph of Article 4(3); (ii) the ECB has evidence that the credit institution is likely to breach the requirements of the acts referred to in the first subparagraph of Article 4(3) within the next 12 months; (iii) based on a determination, in the framework of a supervisory review in accordance with point (f) of Article 4(1), that the arrangements, strategies, processes and mechanisms implemented by the credit institutions and the own funds and liquidity held by it do not ensure the sound management and coverage of its risks”.

In the light of Article 16(1) the tools under Article 16(2) may be applied as measures at an early stage not only to credit institutions but also to financial holding companies and mixed financial holding companies. Besides this case the ECB does not enjoy any supervisory powers over financial holding companies and mixed financial holding companies, since the provisions contained in Article 16(2) refer to “institutions” only (i.e., under the CRD IV and CRR package, to credit institutions and investment firms). Nevertheless, under Article 9 SSMR and the provisions contained in the CRD IV pertaining to supervision on a consolidated basis (see, among others, Article 119), the ECB enjoys all the powers conferred on the NCAs by their relevant national laws transposing that Directive over financial holding companies and mixed financial holding companies. This conclusion is in line with Article 4(1)(g) SSMR vesting the ECB with the power “to carry out supervision on a consolidated basis over credit institutions’ parents established in one of the participating Member States, including over financial holding companies and mixed financial holding companies”.

248 Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms. Under Article 2(1), point 21, of the Directive “‘competent authority’ means a competent authority as defined in point (40) of Article 4(1) of Regulation (EU) No 575/2013 including the European Central Bank with regard to specific tasks conferred on it by Council Regulation (EU) No 1024/2013”. In the light of the above the ECB shall enjoy all the powers NCAs are vested with under the relevant provisions of the BRRD.

249 See the wording of Article 18(1), second subparagraph, SRMR according to which “an assessment of the condition referred to in point (a) of the first subparagraph [i.e.: that the entity is failing or is likely to fail] shall be made by the ECB, after consulting the Board”. See also Recital 26, first sentence, SRMR, which reads as follows: “the ECB, as the supervisor within the SSM, and the Board, should be able to assess whether a credit institution is failing or is likely to fail and whether there is no reasonable prospect that any alternative private sector or supervisory action would prevent its failure within a reasonable timeframe”. In the literature see MOLONEY, N., “European Banking Union: Assessing its Risks and Resilience”, in *Common Market Law Review*, 2014, p. 1640.

250 See § 3.2 of this part.

3.2. The tasks of granting and withdrawing banking licenses and the power to assess the acquisition and disposal of qualifying holdings

Exceptions to the allocation of supervisory powers laid down under Article 6 of the SSMR are contained in Articles 14 and 15.

These Articles regulate the power to grant and withdraw banking licenses and the power to assess the acquisition and disposal of qualifying holdings respectively.

For these purposes the ECB is fundamentally the only competent authority within the SSM.

The rationale of these provisions seems to be to preserve both the unity and the integrity of the internal banking market, expressly mentioned in Article 1(1) of the SSM Regulation.

In the light of the above, there was a need to give the same authority the powers to assess the requisites both for entering the banking market and for acquiring ownership stakes in credit institutions, irrespective of their status as significant or less significant.

This view is confirmed by Recital No 20 of the SSM Regulation, according to which “prior authorisation for taking up the business of credit institutions is a key prudential technique to ensure that only operators with a sound economic basis, an organisation capable of dealing with the specific risks inherent to deposit taking and credit provision, and suitable directors carry out those activities. The ECB should therefore have the task of authorising credit institutions that are to be established in a participating Member State and should be responsible for the withdrawal of authorisations...”.

In turn, Recital No 22 states that “an assessment of the suitability of any new owner prior to the purchase of a significant stake in a credit institution is an indispensable tool for ensuring the continuous suitability and financial soundness of credit institutions’ owners. The ECB as a Union institution is well placed to carry out such an assessment without imposing undue restrictions on the internal market”.

Though in the above cases the ECB is expected to be the only competent authority, NCAs play an important role as well.

With regard to the granting and withdrawal of banking licenses, the ECB’s power is subject to specific arrangements reflecting the role of NCAs.²⁵¹

As already mentioned,²⁵² if the applicant does not comply with the requirements for the authorisation to be granted, the NCA rejects the application

251 See Recital 20 SSMR.

252 See Part I, § 10.

and the procedure ends at the national level;²⁵³ if the applicant complies with these requirements, the NCA takes a draft decision subject to the ECB's tacit consent.²⁵⁴

The initial assessment of credit institutions' compliance with the requirements for the authorisation to be granted is therefore carried out by the NCAs. This assessment includes all national law provisions, both those transposing Directive 36/2013 and the pure national ones.²⁵⁵

Withdrawals of banking licenses are adopted by the ECB following consultations with or acting on a proposal from NCAs.

The latter case occurs "where the national competent authority which has proposed the authorization... considers that the authorisation must be withdrawn in accordance with the relevant national law"; the NCA "shall submit a proposal to the ECB to that end" and "the ECB shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority".²⁵⁶

In the author's view this wording does not imply that the ECB is obliged to stick to the NCA's proposal. Nevertheless, should the ECB depart from the proposal, it needs to state the specific reasons for rejecting the proposed withdrawal.

As already mentioned, since the ECB's tasks do not cover the activities performed by credit institutions in relation to the market in financial instruments,²⁵⁷ the granting and withdrawal of investment services' licenses fall under the remit of the NCAs.²⁵⁸

253 See Article 14(2) SSMR. See also Article 75 SSMR, which reads as follows: "NCAs shall reject applications that do not comply with the conditions for authorisation laid down in the relevant national law and send a copy of their decision to the ECB". Not crystal clear on the allocation of competences to the ECB and the NCAs is the ECB's *Guide to banking supervision*. Indeed, on page 29 the Guide states that "if an application is to be rejected or additional conditions need to be imposed, it will become the subject of a hearing procedure. Once a final decision has been reached, the applicant is notified by either the NCA processing the application (in the case of licensing applications) or the ECB (in the case of intended acquisitions of qualifying holdings)". Under the SSM NCAs are competent to adopt the decision rejecting banking licenses and not simply to notify that decision.

254 See Article 14(2) and (3) SSMR. See also Article 76 SSMFR.

255 See Recital 21 SSMR, "in addition to the conditions set out in Union law for the authorisation of credit institutions and the cases for withdrawal of such authorisations, Member States may currently provide for further conditions for authorisation and cases for withdrawal of authorisation. The ECB should therefore carry out its task with regard to authorisation of credit institutions and withdrawal of the authorisation in case of non-compliance with national law on a proposal by the relevant national competent authority, which assesses compliance with the relevant conditions laid down in national law". In the same vein, Article 74 SSMFR clarifies that "the NCA to which an application is submitted shall assess whether the applicant complies with all conditions for authorisation laid down in the relevant national law of the NCA's Member State".

256 See Article 14(5) SSMR.

257 See the wording of Recital 28 SSMR.

258 See § 2.3 of this Part and footnote No 228.

As regards the task of assessing the acquisition and disposal of qualifying holdings, though the ECB is the only competent authority, NCAs are vested with the power to make a preliminary assessment of compliance with national law; in this case and differently from what is provided for with regard to banking licenses the NCA's assessment is limited to national law transposing the Directive 213/36/EU and, according to the SSMR, should not include pure national law.²⁵⁹

3.3. The application of pecuniary administrative penalties under Article 18 SSMR

The allocation of responsibilities for the application of pecuniary administrative penalties under Article 18 SSMR is not crystal clear.²⁶⁰

²⁵⁹ See Recital 22 and Article 15 SSMR. Nevertheless, under Article 86(1) SSMFR “the NCA to which an intention to acquire a qualifying holding in a credit institution is notified shall assess whether the potential acquisition complies with all the conditions laid down in the relevant Union and national law...”.

²⁶⁰ For further details see D'AMBROSIO, R., “Due process and safeguards of the persons subject to the SSM supervisory and sanctioning powers”, pp. 38-49.

Article 18 SSMR reads as follows:

“1. For the purpose of carrying out the tasks conferred on it by this Regulation, where credit institutions, financial holding companies or mixed financial holding companies, intentionally or negligently, breach a requirement under relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent authorities under the relevant Union law, the ECB may impose administrative pecuniary penalties of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10 % of the total annual turnover, as defined in relevant Union law, of a legal person in the preceding business year or such other pecuniary penalties as may be provided for in relevant Union law.

2. Where the legal person is a subsidiary of a parent undertaking, the relevant total annual turnover referred to in paragraph 1 shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year.

3. The penalties applied shall be effective, proportionate and dissuasive. In determining whether to impose a penalty and in determining the appropriate penalty, the ECB shall act in accordance with Article 9(2).

4. The ECB shall apply this Article in accordance with the acts referred to in the first subparagraph of Article 4(3) of this Regulation, including the procedures contained in Regulation (EC) No 2532/98, as appropriate.

5. In the cases not covered by paragraph 1 of this Article, where necessary for the purpose of carrying out the tasks conferred on it by this Regulation, the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with the acts referred to in the first subparagraph of Article 4(3) and any relevant national legislation which confers specific powers which are currently not required by Union law. The penalties applied by national competent authorities shall be effective, proportionate and dissuasive.

The first subparagraph of this paragraph shall be applicable in particular to pecuniary penalties to be imposed on credit institutions, financial holding companies or mixed financial holding companies for breaches of national law transposing relevant Directives, and to any administrative penalties or measures to be imposed on members of the management board of a credit institution, financial holding company or mixed financial holding company or any other individuals who under national law are responsible for a breach by a credit institution, financial holding company or mixed financial holding company.

6. The ECB shall publish any penalty referred to paragraph 1, whether it has been appealed or not, in the cases and in accordance with the conditions set out in relevant Union law.

7. Without prejudice to paragraphs 1 to 6, for the purposes of carrying out the tasks conferred on it by this Regulation, in case of a breach of ECB regulations or decisions, the ECB may impose sanctions in accordance with Regulation (EC) No 2532/98”.

According to the prevailing view, Article 18 should be read in accordance with Article 6 and the allocation of supervisory powers therein.²⁶¹

Nevertheless, this reading should also consider both the nature of the rule violated (whether Union or national law) and the status of the addressee (whether a legal or a natural person).

As a consequence, the ECB may apply its sanctioning powers fundamentally to significant credit institutions, following the general rule contained in Article 6.

Moreover, in the light of the criteria laid down in Recital 36 SSMR²⁶² the ECB cannot impose penalties on natural persons or apply sanctions for violations of national law.

Under this interpretation, which is also the one followed in Part X of the SSMFR:

(i) the allocation of sanctioning powers to the ECB and the NCAs in the case of violations of requirements under directly applicable Union law is conditional upon the significant or less significant status of the credit institution concerned;²⁶³

(i) the ECB's power to require NCAs to open sanction proceedings in the case of violations of national law transposing banking directives is intended to be limited to significant credit institutions;²⁶⁴

(i) sanctions for violations of ECB regulations and decisions are applied by the ECB not only to significant credit institutions but also to less significant ones, to the extent that these regulations and decisions create obligations upon the latter;²⁶⁵

261 The interpretation of Article 18 in connection with Article 6 of the SSM Regulation is criticized by MANCINI, M., "Dalla vigilanza nazionale armonizzata alla Banking Union", *Quaderni di ricerca giuridica della Consulenza legale della Banca d'Italia*, No 73, September 2013, pp. 29 to 30.

262 Recital 36 SSMR reads as follows: "In order to ensure that supervisory rules and decisions are applied by credit institutions, financial holding companies and mixed financial holding companies, effective, proportionate and dissuasive penalties should be imposed in case of a breach. In accordance with Article 132(3) TFEU and Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions(1), the ECB is entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions. Moreover, in order to enable the ECB to effectively carry out its tasks relating to the enforcement of supervisory rules set out in directly applicable Union law, the ECB should be empowered to impose pecuniary penalties on credit institutions, financial holding companies and mixed financial holding companies for breaches of such rules. National authorities should remain able to apply penalties in case of failure to comply with obligations stemming from national law transposing Union Directives. Where the ECB considers it appropriate for the fulfillment of its tasks that a penalty is applied for such breaches, it should be able to refer the matter to national competent authorities for those purposes".

263 See Article 18(1) SSMR and Article 124(1)(a) SSMFR.

264 See Article 18(5) and Article 134 SSMFR.

265 See Article 18(7) SSMR and Article 122 SSMFR See also Council Regulation (EU) 2015/159 amending Regulation (EU) No. 2532/98 concerning the powers of the European Central Bank to impose sanctions.

(iv) NCAs remain competent to apply: pecuniary administrative penalties to natural persons, non-pecuniary sanctions to both natural and legal persons, and sanctions for violations of pure national law.²⁶⁶

3.4. The adoption of reparatory measures

As mentioned in the preceding section, the power to impose non-pecuniary administrative sanctions is allocated to the NCAs.

The distinction between non-pecuniary sanctions and reparatory measures is therefore relevant in order to establish which is the competent authority.

Under Article 18(5) SSMR, non-pecuniary sanctions addressed to credit institutions and measures addressed to members of the management board of credit institutions are applied by the NCAs.

Measures addressed to credit institutions should be applied by the ECB - as per Articles 4, 6 and 9(1) SSMR - or NCAs depending on the significant or less significant status of the credit institutions concerned.

Irrespective of its classification as a non-pecuniary sanction or reparatory measure,²⁶⁷ the withdrawal of a banking license for sanctioning purposes should be considered an exclusive task of the ECB, in the light of Articles 9(1) and 14(5) SSMR, and 18(f) and 67(2)(c) of Directive 36/2013.

With regard to all the other tools mentioned in Articles 66(2) and 67(2) of Directive 36/2013, a problem arises as regards how to determine the notions of reparatory measures and administrative penalties: on the basis of EU or national law.²⁶⁸

Under the case law of the CJEU the distinction should be based on the aim of the decision.²⁶⁹

Whilst administrative penalties have a punitive aim, reparatory measures have a reparatory one. For the sake of the harmonised application of the SSMR these notions should be determined according to EU law.

²⁶⁶ See Article 18(5) and Article 134 SSMFR.

²⁶⁷ It is the author's understanding that the withdrawal of a banking license is a reaction to unlawful behavior that is too severe for it to be considered as having only a reparatory aim. It should therefore be considered as a penalty.

²⁶⁸ In the view of the CJEU, EU legal provisions that make no express reference to the law of the Member States, including therefore those contained in the SSM Regulation, have to be interpreted autonomously. See ECJ, C-66/08, Kozłowski, § 42: "it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question". See also Case C-195/06 Österreichischer Rundfunk [2007] ECR I-8817, § 24 Case 327/82 Ekro [1984], §§ 10 to 11, Case C-287/98 Linster [2000], §§ 41 to 44, and Case C-170/03 Feron [2005], §§ 23 to 28.

²⁶⁹ See footnote n. 13 and the CJEU case law therein.

It is the author's understanding that, among the tools listed in Articles 66(2) and 67(2) of Directive 36/2013:

(i) the *public statement*²⁷⁰ and the *suspension of voting rights* applied in the case of the disposal/reduction of the shareholder's stake without notifying the competent authority in writing are non-pecuniary sanctions, falling as such under the remit of the NCAs;²⁷¹

(ii) the *cease and desist order*²⁷² and the *suspension of voting rights* applied in the case of the offender acquiring/increasing its stake without notifying the competent authority in writing during the assessment²⁷³ are reparatory measures, falling as such under the remit of the ECB where addressed to significant credit institutions and under that of the NCAs where addressed to less significant ones or to natural persons.

Nevertheless, the solution to the problem is still uncertain.²⁷⁴

4. The allocation of macro-prudential supervisory competences within the SSM

A different criterion than the one laid down in Article 6 with regard to micro-prudential tasks is provided for in Article 5 of the SSM Regulation for the allocation of macro-prudential tasks.²⁷⁵

The macro-prudential supervisory tasks are therefore not influenced by the allocation of tasks indicated in Article 6 of the SSM Regulation.

First of all, the national competent or designated authorities will continue to be vested with the powers to apply any macro-prudential tool which is not provided for in relevant Union law.²⁷⁶

270 The public statement, which indicates the natural or the legal person responsible and the nature of the breach, has basically, in the prudential supervision of credit institutions, a negative reputational effect on the offender. It has therefore a punitive rather than a restoring aim and should be considered a penalty.

271 In the event of a partial disposal not notified to the authority, the suspension is only aimed at punishing the offender for non-compliance with the rules on notification. Thus it should be considered a penalty.

272 The order requiring natural or legal persons to cease their conduct and to desist from repetition in the future seems to have the sole purpose of restoring the public interest harmed by the offender. It should therefore be classified as a measure.

273 The "suspension" here is only aimed at impeding the exercise of voting rights by a shareholder that the supervisory authority had no opportunity of scrutinizing or that it considered as not fit and proper. Thus the purpose is to restore the public interest harmed by the offender. It should therefore be considered a measure.

274 For further details see D'AMBROSIO, R., "Due process and safeguards of the persons subject to the SSM supervisory and sanctioning powers", pp. 24 to 26 and 35 to 38.

275 See NAPOLETANO, G., "Legal aspects of macroprudential policy in the United States and in the European Union", pp. 185-197.

276 See Article 1(1), sixth subparagraph of the SSMR: "this Regulation is without prejudice to the responsibilities and related powers of the competent or designated authorities of the participating Member States to apply macro-prudential tools not provided for in relevant acts of Union law".

Secondly, both the national authorities and the ECB may apply the macro-prudential tools provided for under the CRD IV/CRR package in relation to all credit institutions irrespective of their significant or less significant status.

The initiative in applying the tools is taken by the national authorities.

Nevertheless, the ECB may apply higher buffers or take stricter measures in place of the national authorities. Despite the less than perfectly clear wording of Article 5(2), the ECB should apply these tools even where the national authorities do not apply them at all.

This notwithstanding, compliance with macro-prudential instruments should be supervised by the relevant competent authority, the ECB for significant credit institutions and the NCAs for the less significant ones.

The same should be true for the adoption of corrective measures other than those referred to in Article 5 and Article 16(2) SSMR. The latter (the Pillar 2 measures) may in fact also be applied for macro-prudential purposes.

As is clarified by Recital 24, the provisions of the SSMR “on measures aimed at addressing systemic or macro-prudential risk are without prejudice to any coordination procedures provided for in other acts of Union law”.

The Recital seems to refer to the ESRB Regulation²⁷⁷ and to the multilateral coordination procedures therein for the adoption of macro-prudential tools, whilst coordination procedures under Article 5 SSMR are on a bilateral basis between the national authorities and the ECB.²⁷⁸

5. Cases of misalignment between prudential supervisory tasks and the relevant powers

5.1. The misalignment between the ECB’s supervisory tasks and the relevant powers of the NCAs of the Member States in close cooperation (Article 7(1) SSMR)

Member States whose currency is not the euro may wish to participate in the SSM.

Article 7 of the SSMR provides that a regime of close cooperation may be established allowing such Member States to participate.

²⁷⁷ See Regulation No 1092/2010 quoted in footnote No 32.

²⁷⁸ On the need to coordinate the macroprudential tasks of the ECB and the ESRB, see in the literature WYMEERSH, E., “The Single Supervisory Mechanism or SSM, Part One of the Banking Union”, pp. 19-20 and CIRAULO, F., “Il regolamento UE n. 1024/2013 sul meccanismo unico di vigilanza e l’unione bancaria europea. Prime riflessioni”, in *Amministrazione in cammino*, 5 July 2014, pp. 17-19. The role of the ESRB in ensuring consistent macroprudential oversight across the Union has been confirmed by the CRD IV: see, among others, Recitals No 86 and 88.

Under the regime of close cooperation, the ECB will carry out the tasks referred to in Article 4(1) and (2) and Article 5 of the SSMR in relation to credit institutions established in the Member State under close cooperation.²⁷⁹

This means that, with respect to both the significant credit institutions and the less significant ones established in a Member State under close cooperation, the ECB and the NCAs will be in a position comparable to their situation under the SSMR with respect to credit institutions established in euro-area Member States.

Nevertheless, since the ECB may not act directly in relation to credit institutions established in a Member State under close cooperation it must ask the relevant NCA to make use of its supervisory powers under the ECB's instructions.²⁸⁰

For this purpose, among the conditions for close cooperation, it is provided for that the Member State concerned:

(i) undertakes "to ensure that its national competent authority or national designated authority will abide by any guidelines or requests issued by the ECB"²⁸¹ and

(ii) "has adopted relevant national legislation to ensure that its national competent authority will be obliged to adopt any measure in relation to credit institutions requested by the ECB, in accordance with paragraph 4",²⁸² which provides for the ECB to have the power to address instructions to NCAs.²⁸³

Part IX of the SSMFR sets out the way in which close cooperation operates and supervision is conducted once a close cooperation has been established.

279 See Article 7(1) SSMR, first subparagraph, which reads as follows: "the ECB shall carry out the tasks in the areas referred to in Articles 4(1), 4(2) and 5 in relation to credit institutions established in a Member State whose currency is not the euro, where close cooperation has been established between the ECB and the national competent authority of such Member State in accordance with this Article".

280 See Article 7(1) SSMR, second subparagraph, which reads as follows: "to that end [i.e.: to carry out the tasks in the areas referred to in Articles 4(1), 4(2) and 5] the ECB may address instructions to the national competent authority or to the national designated authority of the participating Member State whose currency is not the euro". See also Article 9(3) SSMR, according to which "by derogation from paragraph 1 of this Article, with regard to credit institutions established in participating Member States whose currency is not the euro, the ECB shall exercise its powers in accordance with Article 7".

The rationale for the ECB's indirect supervision on credit institutions established in non-euro-area-participating Member States has to be found in the wording of Article 139(2)(d) TFEU, in the light of which the acts of the ECB shall not apply to member States with a derogation. See in the literature GUARRACINO, F., "Il meccanismo unico di vigilanza sugli enti creditizi tra diritto primario e riforma dei Trattati", in *Riv. trim. dir. ec.*, 2013, n. 3, pp. 190-192 and CIRAIOLO, F., "Il regolamento UE n. 1024/2013 sul meccanismo unico di vigilanza e l'unione bancaria europea. Prime riflessioni", pp. 28-29.

281 See Article 7(2)(b) SSMR.

282 See Article 7(2)(c) SSMR.

283 Article 7(4) SSMR reads as follows: "where the ECB considers that a measure relating to the tasks referred to in paragraph 1 should be adopted by the national competent authority of a concerned Member State in relation to a credit institution, financial holding company or mixed-financial holding company, it shall address instructions to that authority, specifying a relevant timeframe".

Moreover, it specifies that various parts of the SSMFR apply *mutatis mutandis* in respect of credit institutions in Member States where close cooperation has been established.²⁸⁴

5.2. The misalignment between the ECB's supervisory tasks and the powers conferred on the NCAs under pure national laws (Article 9(1), subparagraph 3, SSMR)

For the exclusive purpose of carrying out the tasks conferred on the ECB by Articles 4(1), 4(2) and 5(2), Article 9(1) SSMR provides for two different rules.²⁸⁵

The first is contained in subparagraph 2 and vests the ECB, besides the powers entrusted to it by the SSMR, with the same powers as NCAs enjoy under relevant Union law.

The second is contained in subparagraph 3 and gives the ECB the right to require NCAs, by way of instructions, to make use of powers conferred upon them by national law.

The focus of this section is on the second rule.

Nevertheless, since the wording of both the rules is not crystal clear, they must be read in conjunction with one another in order to clarify their meaning and scope.

The powers the ECB can benefit from under Article 9 are only those which may be encompassed within the “exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2)”,²⁸⁶ including the investigatory powers, as clearly emerges from the title of Article 9 (“Supervisory and investigatory powers”).

284 The close-cooperation regime is complemented by the ECB decision of 31 January 2014 on close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5). As regards the requisites to establish close cooperation, the decision partially departs from the general rules under Article 7 SSMR. Indeed, Article 3(2) (a) of the decision requires that the Member State concerned undertakes that “it will adopt” rather than “has adopted” (as clearly laid down under Article 7(2)(c) SSMR), “the relevant national legislation to ensure that legal acts adopted by the ECB pursuant to Regulation (EU) No 1024/2013 are binding and enforceable in the requesting Member State and that its national competent authority and its national designated authority are obliged to adopt any measure requested by the ECB in relation to the supervised entities, in accordance with Article 7(4) of Regulation (EU) No 1024/2013”. On the relationship between the ECB's decision on close cooperation and the provisions contained in the SSMFR see ECB, *SSM Quarterly Report, 2014/2*, pp. 11-12.

285 Article 9(1) SSMR reads as follows: “1. For the exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2), the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by relevant Union law.

For the same exclusive purpose, the ECB shall have all the powers and obligations set out in this Regulation. It shall also have all the powers and obligations, which competent and designated authorities shall have under relevant Union law, unless otherwise provided for by this Regulation. In particular, the ECB shall have the powers listed in Sections 1 and 2 of this Chapter.

To the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers”.

286 See Article 9(1) in conjunction with Article 9(2) SSMR.

Powers which are not strictly related to the prudential supervision of credit institutions and which are not contained under the CRR/CRD IV package should therefore be beyond the scope of Article 9(1) SSMR. This view is confirmed by Recital 45 SSMR, which refers to Union law on the prudential supervision of credit institutions and the powers therein.²⁸⁷

Under Article 9(1), subparagraph 2, a first question arises as to whether “relevant Union law” includes only the legislative acts adopted before the entry into force of the SSMR or also those adopted subsequently.

It is the author’s view that Article 9(1), subparagraph 2, SSMR needs to be read strictly so as to comply with the principle of conferral.

Such an interpretation has been confirmed by some recent Union legislative acts where they expressly consider the ECB (together with the NCAs) as a competent authority within the meaning of their provisions.²⁸⁸ Should the second subparagraph of Article 9(1) SSMR apply to powers conferred on NCAs by EU legislative acts enacted after the entry into force of the SSMR, there would have been no need to include the ECB within the competent authorities mentioned in those acts.

The ECB shall have all the powers which competent and designated authorities shall have under relevant Union law, “unless otherwise provided for” by the SSMR. Provisions of the SSMR that do not allow the ECB to enjoy the NCAs powers under Union law may be found in the field of sanctioning²⁸⁹ and regulatory powers.²⁹⁰

This clarified, it is now possible to assess the meaning and scope of the provision contained in Article 9(1), subparagraph 3, SSMR.

It is the author’s opinion that this provision refers exclusively to powers provided for by pure national law, i.e. by national law not implementing EU directives.²⁹¹

287 Recital 45 SSMR reads as follows: “in order to carry out its tasks, the ECB should have appropriate supervisory powers. Union law on the prudential supervision of credit institutions provides for certain powers to be conferred on competent authorities designated by the Member States for those purposes. To the extent that those powers fall within the scope of the supervisory tasks conferred on the ECB, for participating Member States the ECB should be considered the competent authority and should have the powers conferred on competent authorities by Union law. This includes powers conferred by those acts on the competent authorities of the home and the host Member States and the powers conferred on designated authorities”.

288 See, for example, Article 3 point 2, SRMR in conjunction with the new text of Article 4(2) (i) of Regulation 1093/2010 and Article 5, point 7, of the draft regulation on structural measures.

289 See LACKHOFF K., “How will the Single Supervisory Mechanism (SSM) Function? A Brief Overview”, p. 21, footnote no 60. Indeed, the ECB’s sanctioning powers are only those provided for under Article 18(1) and (7) SSMR. The limitations to the ECB’s sanctioning powers under Article 18 SSMR should not apply to the administrative measures as forms of reaction to a credit institution’s unlawful conduct. Administrative measures should be applied by the ECB in the light of the general rule of Article 9(1), subparagraph 2, SSMR.

290 See § 7 of this part.

291 Among the powers conferred to the NCAs by pure national law Recital 35 gives particular emphasis to the early intervention and precautionary ones.

A different and broader interpretation would, in the author's view, be incompatible with the second subparagraph of Article 9(1) and would create an unacceptable overlapping of the two subparagraphs.

The specific provision contained in Article 22 of the SSMFR fundamentally mimics that in Article 9(1), third subparagraph, SSMR, the only difference being that the former specifies that the NCAs' obligation to inform the ECB about the exercise of their "pure national law" powers following an ECB request should be accomplished "without undue delay".²⁹²

5.3. *The misalignment between the ECB's task of ensuring compliance with prudential rules on credit institutions and the NCAs' power to initiate a sanctioning procedure for cases other than the breach of a requirement provided for under directly applicable Union law (Article 18(5) SSMR).*

Article 18(5) SSMR vesting the ECB with the power to require NCAs to open proceedings aimed at ensuring that appropriate penalties are imposed²⁹³ needs to be read as limited to significant credit institutions only.²⁹⁴

As regards the powers conferred on the Bank of Italy by pure national law, a distinction needs to be made between the powers available with regard to all banks and those specifically pertaining to cooperative banks. The former are basically laid down in Articles 56 to 58, the latter in Articles 31, 35 and 36 of the 1993 Italian Banking Law. Moreover, some regional laws confer limited supervisory powers on regional authorities. The decision-making power nonetheless remains with the Bank of Italy, which under Article 159 of the Banking Law shall deliver, for purposes of supervision, binding opinions. Against this background, the regional laws are compatible with the architecture of supervisory authorities set up in the SSMR.

According to Articles 56 and 57, the Bank of Italy shall authorize amendments to banks' bylaws and mergers and divisions in which banks take part, if they are not in conflict with sound and prudent management. Under Article 58, the assignment to banks of businesses, parts of businesses, goods and legal relationships identifiable *en bloc* are subject to Bank of Italy regulations, which may provide for transactions of major importance to be subject to authorization. These regulations actually require authorization for certain transactions (e.g. those where the price is over 10% of the assignee's regulatory capital, where the parties to the transaction do not belong to the same banking group).

Provisions similar to those laid down in Articles 56 and 57 are contained in Articles 31 and 36 of the Italian Banking Law, as far as cooperative banks are concerned. Moreover, under Article 35(2) of the Italian Banking Law the Bank of Italy shall establish the criteria on the basis of which the bylaws of cooperative banks shall contain provisions governing their activities, lending and fund-raising operations and geographical operating limits. These powers may be relevant for the ECB should the latter decide to supervise a less significant credit institution directly as per Article 6(5) (b) SSMR.

²⁹² Article 22 SSMFR is titled "Right of the ECB to instruct NCAs or NDAs to make use of their powers and to take action if the ECB has a supervisory task but no related power" and reads as follows:

"1. To the extent necessary to carry out the tasks conferred on it by the SSM Regulation, the ECB may require, by way of instructions, the NCAs or the NDAs or both to make use of their powers, under and in accordance with the conditions set out in national law and as provided for in Article 9 of the SSM Regulation, where the SSM Regulation does not confer such powers on the ECB.

2. The NCAs and/or, in respect of Article 5 of the SSM Regulation, the NDAs, shall inform the ECB about the exercise of these powers without undue delay".

²⁹³ Article 18 SSMR is reported under footnote No 260.

²⁹⁴ See Article 134 SSMFR.

Thus NCAs should not be empowered to open these procedures against significant credit institutions unless the ECB so requires.

Within these constraints, Article 18(5) of the SSMR refers to cases not covered by paragraph 1 of the same Article.

Since the latter only applies to the administrative pecuniary penalties that the ECB may impose for violations of directly applicable Union law by credit institutions, financial holding companies and mixed financial holding companies, paragraph 5 of Article 18 SSMR consequently refers to:

(i) the application of any penalties to natural persons, irrespective of the nature of the rule violated;

(ii) the application of any penalties in the case of violations of national law transposing directives or of violations of national law conferring on NCAs powers not required by Union law;

(iii) the application of any non-pecuniary penalties, including those which may be imposed in the case of violations of directly applicable Union law.

6. The ECB's general power to give instructions to NCAs and the NCAs' margin of manoeuvre

In all the above cases of misalignment between the ECB's tasks and the NCAs powers, the ECB is empowered to give instruction to the NCAs.

(a) Under Article 7 SSMR, the ECB's power to instruct NCAs is consubstantial to the mechanism of close cooperation.

Article 7(1), second subparagraph, last sentence, stipulates that for the purpose of carrying out its supervisory tasks, "the ECB may address instructions to the national competent authority or to the national designated authority of the participating Member State whose currency is not the euro".

More to the point, where the ECB considers that a measure relating to the tasks referred to in Article 4(1) and (2) of the SSMR should be adopted by an NCA of a participating Member State in close cooperation in relation to a supervised entity or group, it will address to this NCA:

(i) in the case of a significant credit institution, a general or specific instruction, request or guideline requiring the issuance of a supervisory decision in relation to that significant supervised entity or group; or

(ii) in the case of a less significant credit institution, a general instruction, request or guideline.²⁹⁵

²⁹⁵ See Articles 107(3) and 108(2) SSM Framework Regulation.

The ECB shall specify the relevant timeframe under which the NCA shall comply with its instructions.²⁹⁶

Apart from the provisions on the ECB's power to instruct NCAs specifying the relevant timeframe, Article 7 SSMR is silent on the NCAs' constraints in following the ECB's instructions.

Under paragraph 2(c) of Article 7 SSMR, it is up to the relevant national legislation to ensure that its national competent authority will be obliged to adopt any measure requested by the ECB in relation to credit institutions.

Moreover, under paragraph 4, second subparagraph, of Article 7 SSMR "the national competent authority of the concerned Member State shall take all the necessary measures in accordance with the obligation referred to in point (c) of paragraph 2".

In the light of the above, one may conclude that in the performance of their duty to implement the ECB's instructions within the framework adopted by each Member State in close cooperation, NCAs enjoy a broad margin of manoeuvre in choosing the most appropriate measure to comply with the ECB's instructions.

(b) Differently from the regime in force as regards close cooperation, the ECB's powers under Articles 9(1), third subparagraph, and 18(5) SSMR, to instruct the NCAs of the euro-area Member States on the adoption of a particular supervisory decision are to be considered an exception to the normal performance of the ECB's tasks, since here the ECB is generally vested, together with both the tasks and the relevant supervisory powers.

Article 9(1), third subparagraph, SSMR stipulates that the ECB may require, by way of instructions, NCAs to make use of their powers "under and in accordance with the conditions set out in national law".

No detail is laid down under this provision on the powers of the ECB in the beginning of this procedure. Therefore, once the instruction is adopted by the ECB, NCAs should maintain their margin of manoeuvre, within the scope of the relevant national rules.

(c) Margins of manoeuvre even broader than those under Article 9(1), third subparagraph, SSMR, are those that NCAs enjoy under Article 18(5) SSMR.

Indeed, the wording of Article 18(5) SSMR suggests that NCAs are only obliged to open a proceeding and retain a margin of manoeuvre on its conclusion and on the specific penalty or measure to be applied to the offender.²⁹⁷

²⁹⁶ Under Article 7(4), second subparagraph, "that timeframe shall be no less than 48 hours unless earlier adoption is indispensable to prevent irreparable damage".

²⁹⁷ Article 18(5) refers to the members of a credit institution's management board or any other individuals who under national law are responsible for a breach by a credit institution. On the NCAs margins of appreciation under Article 18(5) SSMR see in the literature WOLFERS, B. and VOLAND, T., "Level the

Paragraph 5 of Article 18 stipulates that “in the cases not covered by paragraph 1 of this Article... the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate sanctions are imposed...”.

Recital 36 is even more clear in recognizing NCAs’ broad discretion, since it stipulates that “where the ECB considers it appropriate for the fulfilment of its tasks that a sanction is applied for such breaches [violations of national law transposing directives], it should be able to refer the matter to national authorities for those purposes”.

The wording “refer the matter to national authorities” militates in favour of NCAs having very broad discretion. Within the matter referred to them by the ECB, NCAs may choose to open any kind of sanctioning procedure.

A question arises here as to whether NCAs may decide not to open any sanctioning procedure.

It is the author’s view that the wording of Recital 36 does not go so far.

Under this recital the ECB refers the matter to the relevant NCA only after having considered appropriate that a sanction be applied. The ECB’s request to the NCA should therefore be grounded on sufficient elements indicating that there is a reason to suspect that one or more violations have been committed.

In the light of the above it would be difficult to share the view that NCAs’ margin of discretion includes deciding not to act at all.

It is unclear which powers an NCA may make use of in order to conduct its investigation. One may assume that, together with the request to open a sanctioning proceeding, the ECB will also ask the NCA, under Article 9(1) third subparagraph, to use their investigatory powers under national law.

This view is grounded on the assumption that the ECB, though vested with investigatory powers over significant credit institutions, cannot use these powers to ascertain that a violation has been committed by members of their management board.

The question is nonetheless still open.

(d) Besides the above cases of misallocation of tasks and powers, the ECB may give instructions to NCAs on the way they are to exercise their own responsibilities pertaining to less significant credit institutions.

Indeed, under Article 6(5)(a), first and second subparagraphs, SSMR “the ECB shall issue regulations, guidelines or general instructions to national competent authorities, according to which the tasks defined in Article 4 excluding

Playing Field: the New Supervision of Credit Institutions by the European Central Bank”, in *Common Market Law Review*, 2014, p. 1478.

points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by national competent authorities.

Such instructions may refer to the specific powers in Article 16(2) for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM”.

Moreover, under Article 97(5) SSMFR, “if the ECB requests an NCA to further assess specific aspects of a material NCA supervisory procedure [regarding a less significant credit institution], this request shall specify which aspects are concerned. The ECB and the NCA shall respectively ensure that the other party has sufficient time to enable the procedure and the SSM as a whole to function efficiently”.

In the light of the above the ECB’s instructions to NCAs pertaining to less significant credit institutions have as a rule a general nature.²⁹⁸ Thus NCAs enjoy in this field a broad margin of manoeuvre for the adoption of their detailed supervisory decisions.

But even where the ECB may address specific requests to NCAs with regard to a specific procedure concerning a less significant credit institution, it is up to the NCA to assess the aspects underlined by the ECB’s request.

To conclude on this point, irrespective of the nature of the ECB’s request (general or specific) NCAs maintain broad discretion in accomplishing it.

This conclusion is not only in line with the wording of the provisions referred to above but is also consistent with the allocation of responsibilities to the ECB and the NCAs within the SSM.

NCAs’ margins of manoeuvre in following the ECB’s requests concerning less significant credit institutions cannot be narrower than those they enjoy when using their pure national law powers in relation to significant credit institutions.

(e) A completely different situation occurs in the case provided for in Article 6(3) SSMR.

This stipulates that “were appropriate and without prejudice to the responsibility and accountability of the ECB for the tasks conferred on it by this Regulation, national competent authorities shall be responsible for assisting the ECB, under the conditions set out in the framework mentioned in paragraph 7 of this Article, with the preparation and implementation of any acts relating to the

²⁹⁸ See, for example, Article 97(1) SSMFR, which reads as follows: “1. To enable the ECB to exercise oversight over the functioning of the system, as laid down in Article 6(5)(c) of the SSM Regulation, NCAs shall provide the ECB with information relating to material NCA supervisory procedures concerning less significant supervised entities. The ECB shall define general criteria, in particular taking into account the risk situation and potential impact on the domestic financial system of the less significant supervised entity concerned, to determine for which less significant supervised entities which information shall be notified. The information shall be provided by the NCAs ex ante or in duly justified cases of urgency simultaneously to opening a procedure”.

tasks referred to in Article 4 related to all credit institutions, including assistance in verification activities. They shall follow the instructions given by the ECB when performing the tasks mentioned in Article 4”.

Article 6(3) should not be read by itself but in conjunction with Article 6(4) SSMR. This means that ECB's powers of instruction under Article 6(3) SSMR only relate to the significant credit institutions.²⁹⁹

Here NCAs enjoy no margin of discretion since both the tasks and the powers fall under the remit of the ECB. NCAs are responsible for assisting the ECB but they have to follow its instructions in full.

Some doubts may nonetheless be raised as regards the “assistance in verification activity”. As already mentioned in § 2.2, the day-to-day verification of *all* credit institutions is an NCA task, though it has to be performed under the ECB’s coordination. This circumstance allows the interpreter to take the view that even in the day-to-day verification of significant credit institutions NCAs should enjoy a margin of discretion. Nevertheless, this view is not supported by the SSMFR provisions on JSTs.

7. The scope of the ECB’s regulatory powers and the obligation of NCAs to abide by the ECB’s regulations

NCAs have to abide by the ECB’s regulations. Their scope will be examined below.

It is the author’s view that under the SSMR the ECB’s regulations cannot modify or amend the EU legal framework on credit institutions.

Indeed, in the light of Article 4(3) SSMR, second subparagraph, last sentence, “the ECB may... adopt 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”.

It follows that the only regulations that the ECB may adopt are those aimed at “organizing” or “specifying” the modalities according to which it intends to perform its supervisory tasks.³⁰⁰

²⁹⁹ *Contra*, WITTE, A. “The Application of National Banking Supervision Law by the ECB: Three Parallel Models of Executing EU Law?,” in *MJ*, (1) 2014, p. 103.

³⁰⁰ The same interpretation of Article 4(3) SSMR seems to be followed by FERRARINI, G. and RECINE, F., “The Single Rulebook and the Single Supervisory Mechanism: should the ECB have more say in prudential rule-making?”, in *European Banking Union* edited by Ferrarini, G. and Busch, D., forthcoming 2015 Oxford University Press, p. 23 of the draft: “To be true, the ECB can adopt regulations, but only to the extent necessary to either organise or specify the arrangements for carrying out the tasks conferred on it by the SSMR”. Nevertheless, the authors also suggest a more open approach with regard to the ECB’s regulatory powers grounded on the wording of Article 127(6) TFEU and on the notion of “policies related to the banking supervision” therein. Indeed, on page 26 of the draft they underline that “Article 127 (6) TFEU states that specific tasks may be conferred upon the ECB ‘concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings’. The notion

These regulations do not, as a rule, create obligations vis-à-vis credit institutions.³⁰¹

This conclusion is confirmed by two other provisions of Article 4(3) SSMR.

According to the first, contained in the second subparagraph of Article 4(3), “the ECB shall adopt guidelines and recommendations, and take decisions subject to and in compliance with relevant Union law and in particular any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU. It shall in particular be subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Article 10 to 15 of Regulation (EU) No 1093/2010, to Article 16 of that Regulation, and to the provisions of that Regulation on the European supervisory handbook developed by EBA in accordance with that Regulation”.³⁰²

According to the second, contained in the fourth subparagraph of Article 4(3), “where necessary the ECB shall contribute in any participating role to the development of draft regulatory technical standards or implementing technical standards by EBA in accordance with Regulation (EU) No 1093/2010 or shall draw the attention of EBA to a potential need to submit to the Commission draft standards amending existing regulatory or implementing technical standards”.

In other words, since the ECB is subject to the binding regulatory and implementing technical standards developed by the EBA and adopted by the Commission and since it may contribute to amending substantive banking law only by drawing the EBA’s attention to a potential need to submit these technical standards to the Commission, it cannot apparently issue substantive banking rules directly.

of ‘policies’ could no doubt include some rule-making powers in the areas of prudential supervision that the Council could very well specify in its mandate to the ECB grounding the SSM”.

On the interpretation of “policies related to the banking supervision” see also SMITS, R. *The European Central Bank. Institutional Aspects*, The Hague/London/Boston, 1997, p. 358. In the author’s view “on a wide interpretation of the term ‘policies’, read in connection with the term ‘specific tasks’, the ECB can thus be endowed with executive functions. This will make it a ‘competent authority’ at the Community level”.

On the limits to the ECB’s regulatory powers see also ANTONIAZZI, S., *La Banca Centrale Europea tra politica monetaria e vigilanza bancaria*, Torino, 2014, pp. 251-252.

301 The only relevant exception is the regulation imposing supervisory fees. The ECB’s power to adopt a regulation on supervisory fees referred to in Article 30 SSMR is grounded on the need to organize the arrangement for the carrying out of the ECB’s supervisory tasks and it is therefore in line with the provisions under Article 4(3) SSMR. Not surprisingly, both Articles 30 and 4(3) SSMR are mentioned in the preamble of the ECB’s Regulation of 22 October 2014. In the light of its Article 1, the Regulation applies to both significant and less significant credit institutions and groups of the participating MS. Recital (4) of the Regulation clarifies, in turn, that “the annual supervisory fee should accordingly comprise an amount to be paid annually by all credit institutions established in the participating Member States and branches established in a participating Member State by a credit institution established in a non-participating Member State that are supervised within the SSM”. Recitals (7) and (8) underlining the ECB’s responsibilities with regard to all credit institutions and those pertaining to the less significant ones are also worth mentioning.

302 Under Article 8(1)(aa) of Regulation (EU) No 1093/2010 the EBA has the power “to develop and maintain up to date, taking into account, inter alia, changing business practices and business models of financial institutions, a European supervisory handbook on the supervision of financial institutions in the Union as a whole, which sets out supervisory best practices for methodologies and processes”.

Amendments to the EBA Regulation adopted by Regulation 1022/2013 confirm this view.

These amendments are aimed at preventing the ECB³⁰³ and the participating Member States³⁰⁴ from prevailing in the adoption, inter alia, of EBA general acts under Articles 10 to 16 of the EBA Regulation.

Not surprisingly, the ECB's duty "to coordinate and express a common position of representatives from competent authorities of the participating Member States when participating in the Board of Supervisors and the Management Board of the European Banking Authority, for issues relating to the tasks conferred on the ECB by this Regulation", initially contained in Article 4(1)(l) of the Commission's proposal for the SSMR,³⁰⁵ has been repealed.

In the light of the above vesting the ECB with the power to adopt regulations directly with a view to modifying the EU's substantive banking law would frustrate the above-mentioned provision of the EBA Regulation.

A more open approach towards the scope of the ECB's regulatory powers seems to be found under Recital 32 SSMR according to which, "the ECB should carry out its tasks subject to and in compliance with relevant Union law including the whole of primary and secondary Union law, Commission decisions in the area of State aid, competition rules and merger control and the single rulebook applying to all Member States. EBA is entrusted with developing draft technical standards and guidelines and recommendations ensuring supervisory convergence and consistency of supervisory outcomes within the Union. The ECB should not replace the exercise of those tasks by EBA, and should therefore exercise powers to adopt regulations in accordance with Article 132 of the Treaty on the Functioning of the European Union (TFEU) and in compliance with Union acts adopted by the Commission on the basis of drafts developed by EBA and subject to Article 16 of Regulation (EU) No 1093/2010".³⁰⁶

303 Under Article 40(1) of EBA Regulation the ECB representative in the EBA Board of Supervisors "shall be non-voting".

304 See Article 44(1), second subparagraph, of the EBA Regulation, which reads as follows: "with regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of Protocol No 36 on transitional provisions, which shall include at least a simple majority of its members from competent authorities of Member States that are participating Member States as defined in point 1 of Article 2 of Regulation (EU) No 1024/2013 (participating Member States) and a simple majority of its members from competent authorities of Member States that are not participating Member States as defined in point 1 of Article 2 of Regulation (EU) No 1024/2013 (non-participating Member States)".

305 See COM (2012) 511/3.

306 Recital No 32 SSMR mimics Recital No 10 of the CRD IV apart from the first sentence of the latter, which reads as follows: "the conferral of supervisory tasks on the European Central Bank (ECB) for some of the Member States should be consistent with the framework of the European System of Financial Supervision set up in 2010 and its underlying objective to develop the single rulebook and enhance convergence of supervisory practices across the Union as a whole".

Nevertheless, given that the ECB's powers should not impinge on the EBA's prerogatives, it is not crystal clear what exactly is the scope of the ECB's regulatory powers, besides the organization and specification of the modalities according to which to perform its tasks.

All in all, the adoption of substantive EU banking rules is an exclusive task of the EU institutions vested with legislative powers such as the Parliament, the Council and – basically subject to an EBA proposal - the Commission.

Moreover, under Article 6(5)(a) SSMR “the ECB shall issue regulations... according to which the tasks defined in Article 4 excluding points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by national competent authorities”.

But, again, regulatory powers are here confined to the modalities according to which NCAs' supervisory powers can be performed and therefore cannot directly impose obligations vis-à-vis credit institutions.

As clearly results from the wording of Article 6(5) referred to above, powers under lit. (a) have to be exercised “within the framework defined in paragraph 7” and are therefore confined (see lit. (c) of paragraph 7) to the “procedures... for the relation between the ECB and the national competent authorities regarding the supervision of credit institutions considered as less significant”, excluding any imposition of obligations vis-à-vis the latter.

Cases in which the ECB may use the powers mentioned in Article 6(5)(a) SSMR are specifically laid down in Articles 97(1) and 99(1) SSMFR.

Under Article 97(1) SSMFR “the ECB shall define general criteria, in particular taking into account the risk situation and potential impact on the domestic financial system of the less significant supervised entity concerned, to determine for which less significant supervised entities which information shall be notified” by the NCAs.

Moreover, under Article 99(1) “the ECB may require NCAs to report to the ECB on a regular basis on the measures they have taken and on the performance of the tasks they are to carry out in accordance with Article 6(6) of the SSM Regulation”.

No obligation is directly imposed with reference to less significant credit institutions.

The rationale behind such limitations of the ECB's regulatory powers is twofold:

(i) to avoid any fragmentation of the internal market through the adoption of distinct supervisory rules for SSM and non-SSM credit institutions;

(ii) to preserve the constitutional balance of EU legislative powers and the prerogatives of other institutions.³⁰⁷

Furthermore, there are cases where Union law grants national legislators or national competent authorities some options and discretions in complying with or in transposing its provisions.

It goes without saying that the ECB cannot make use of the options and discretions granted by Union law to national legislators. Conversely, it must abide by national law exercising these options and discretions, though without prejudice to the principle of the primacy of Union law.

This assumption is confirmed by Article 4(3), first subparagraph, SSMR, which reads as follows: “for the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and 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”.³⁰⁸

But what happens where Union law grants the above-mentioned options and discretions not to the national legislators but directly to the NCAs?

As a rule, since the ECB must have all the powers which competent authorities have under relevant Union law,³⁰⁹ the ECB should be allowed to make use of these options.

The case may be different where options and discretions granted to the NCAs have to be used by way of a regulation.

307 See GARDELLA, A., “Ruolo dell’EBA e della BCE nella regolamentazione bancaria europea”, text of the paper presented at the Bank of Italy’s *Seminario sullo stato dei lavori della Banking Union*, Perugia, 16 May 2014. See also LO SCHIAVO, G., “From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe”, in *MJ*, (1) 2014, p. 134. Under the author’s view “it is expected that ECB will adopt regulations and decisions under Article 132 TFEU, which not only cover its supervisory mandate, but could also encroach on the EBA’s functions”.

308 See also Recital 34 SSMR, which reads as follows: “for the carrying out of its tasks and the exercise of its supervisory powers, the ECB should apply the material rules relating to the prudential supervision of credit institutions. Those rules are composed of the relevant Union law, in particular directly applicable Regulations or Directives, such as those on capital requirements for credit institutions and on financial conglomerates. Where the material rules relating to the prudential supervision of credit institutions are laid down in Directives, the ECB should apply the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and in areas where, on the date of entry into force of this Regulation, those Regulations explicitly grant options for Member States, the ECB should also apply the national legislation exercising such options. Such options should be construed as excluding options available only to competent or designated authorities. This is without prejudice to the principle of the primacy of Union law. It follows that the ECB should, when adopting guidelines or recommendations or when taking decisions, base itself on, and act in accordance with, the relevant binding Union law”.

309 See Article 9(1), second subparagraph, SSMR.

Under Article 9(1), second subparagraph, the ECB may enjoy the powers granted to NCAs, “unless otherwise provided for by” the SSMR.

Given that under Article 4(3), second subparagraph, SSMR the ECB is entitled to adopt regulations “only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred upon it” by the Regulation itself and given that NCAs’ regulatory options and discretions have the different aim of implementing EU banking law, it follows that the ECB cannot make use of the above-mentioned regulatory powers.

Besides the constraints illustrated above, there could also be other reasons militating against the ECB’s powers to exercise the NCAs’ options and discretions by way of regulations.

If the ECB were empowered to exercise an NCA’s regulatory options and discretions for significant credit institutions only, this might jeopardize the level playing field in the banking system of that Member State. Indeed, if the ECB and the NCA exercised the options and discretions differently for significant and less significant credit institutions, the own funds requirements of these institutions would be different.

Nor has the ECB the power to instruct NCAs how to exercise their options and discretions vis-à-vis less significant credit institutions. Indeed, as already mentioned, the instructions that the ECB may give to NCAs under Article 6(5) (a) SSMR are confined to the issues addressed by Article 6(7) SSMR, which does not deal with the exercise of national options and discretions.

Moreover, the above-mentioned potentially different regimes could also impede a consistent application of own funds requirements in a banking group. Whilst the significant credit institution of the group would have to respect the options and discretions as exercised in the ECB regulation, other financial institutions and any investment firms would have to respect the options and discretions as defined by the NCA.

All in all, the ECB’s regulatory powers basically create obligations on NCAs:

(i) where they are aimed at organizing the arrangements for the preparation and implementation by NCAs of the ECB’s own tasks, as per Articles 4(3) and 6(3) SSMR, and

(ii) where they establish rules under which NCAs are to carry out supervisory procedures and adopt the relevant decisions addressed to less significant credit institutions, as per Articles 6(5)(a) and (7)(c) SSMR.

Whilst in both cases NCAs must abide by the ECB’s regulations, it is the author’s view that the constraints the ECB may impose on NCAs and consequently the margin of manoeuvre the latter enjoy in the adoption of specific supervisory decisions differs from one case to another.

Similarly to what has already been said with regard to the ECB's power to give instructions to NCAs:

(i) in the first case, since the tasks and responsibility are conferred on the ECB, the constraints the ECB may impose on NCAs are expected to leave them no discretion, whilst

(ii) in the second case, since the responsibilities are conferred on the NCAs, the ECB's power to compel them should be less, leaving the NCAs some margin of manoeuvre.

8. The side effects of the allocation of tasks, responsibilities and powers on the allocation of liability within the SSM

8.1. The allocation of liability to the ECB and the NCAs in cases of access to banking activity and ownership of stocks of credit institutions

The allocation of liabilities to the ECB and the NCAs within the SSM is fundamentally aligned with the allocation of tasks and, as the case may be, with the allocation of responsibilities and powers.

In the light of the analysis in the foregoing paragraphs it is possible to draw the following conclusions.

As regards the granting or refusal of banking licenses, three cases can be distinguished:

(i) non-compliance with the requirements provided for in EU and national law; since only NCAs can reject an authorization only NCAs can be liable;

(ii) compliance with the requirements needed for granting authorizations; since the ECB has the final say following an NCA's proposal, both the ECB and NCAs may be liable, with the exception of the license for performing investment services, where NCAs are exclusively competent and therefore exclusively liable;

(iii) withdrawal of an authorization; the ECB may withdraw a banking license on its own initiative or acting upon a proposal by an NCA, taking full account of the justification it gives; in the first case only the ECB is liable; in the second both are liable.

Despite this, it is worth noting that the decision to grant or refuse an authorisation is not discretionary. It is always linked to strict technical parameters.

In the light of the above, national courts are reluctant to admit supervisor liability in such cases.³¹⁰

³¹⁰ See French *Conseil d'Etat* 13 June 1964, case *d'André*, *La Semaine Juridique*, 1965, *Edition Générale*, II, No. 14416 and 19 January 1966, *de Waligorski*, *La Semaine Juridique*, 1966, *Edition Générale*, II, No. 14526. See contra the Italian *Corte di Cassazione* n. 6688/2011, case *SFA Commissionaria s.r.l.*,

Authorisation to acquire qualifying holdings is under the ECB's ultimate responsibility, though NCAs are competent to assess acquisitions based on the criteria exclusively set out in EU banking law. It follows that both the ECB and the NCAs may be liable.

Nevertheless, it is worth highlighting that the criteria laid down in Article 23 of Directive 36/2013/EU are very strict, so that, apart from cases of manifest violation of these criteria, it would be difficult for supervisors to be held liable for damages while assessing the good repute of the qualifying shareholders of credit institutions.³¹¹

8.2. The allocation of liability to the ECB and the NCAs in cases of ongoing micro-prudential supervisory activity

As regards ongoing prudential supervision, whilst as a rule the allocation of liability is basically aligned with that of supervisory tasks, there are cases where it is not crystal clear which is the authority responsible for the relevant task.

To name but a few:

(i) under the SSMR the day-to-day verification of banking activity is an NCA task, but under the SSMFR this task is carried out by both the NCAs and the ECB under the latter's coordination;

(ii) conversely, ensuring compliance with the organisational requirements and internal control arrangements is an ECB task, but under their respective national laws NCAs may be responsible for ensuring that these requirements and arrangements grant a high level of consumer protection and prevent money laundering.

unreported. The Court recognized the liability of the Italian Companies and Stock Exchange Commission (*Consob*) given the particular circumstances of the case. In the Court's view, in its assessment of the requirements for access to investment services activities under Law 1/1991, *Consob* should have taken into account the breaches committed by the applicant and checked during a previous *Consob* investigation under Articles 1/18 ff. of Law 216/1974 on the solicitation of public savings.

311 The question whether or not supervisors maintain a certain margin of manoeuvre in assessing the good repute of qualifying shareholders has been recently submitted to the CJEU. See the Request for a preliminary ruling from the College van Beroep voor het bedrijfsleven (Netherlands) in Case C-18/14.

It is worth noting that under Italian case law the provisions contained in both Directive 2004/39/EC (as amended by Directive 2007/44/EC and now replaced by provisions contained in Directive 36/2013/UE) and the Italian implementing law (Article 15 of the 1998 Italian Consolidated Law on Finance as amended by Legislative Decree 21/2010) "assegnano all'Autorità di vigilanza un margine di apprezzamento dei profili di idoneità del candidato acquirente, sia sotto il profilo soggettivo che sotto il profilo oggettivo, sganciato da criteri predeterminati e riferito a parametri di valutazione piuttosto ampi, idonei come tali ad assicurare la protezione degli specifici interessi la cui cura è rimessa alla Banca d'Italia, alla luce del rilievo primario attribuito costituzionalmente al valore del risparmio, in modo tale da rendere effettivo l'esercizio della vigilanza, senza che ciò... possa risolversi nel riconoscimento di un potere arbitrario in violazione del principio di legalità": *TAR Lazio-Roma*, I, No 2826 of 23 February 2010.

In the cases referred to above claimants are expected to sue for damages both the ECB and the NCAs.

Another case where both the ECB and the NCAs may be asked for damages occurs where a joint supervisory decision has been taken by supervisors under the conditions laid down in Article 113 of the CRD IV.³¹²

Moreover, as will be clarified below,³¹³ where the ECB is empowered to give mandatory instructions to the NCAs, the ECB and not the relevant NCA is responsible, but compliance with the ECB's instructions will not trigger an ECB liability where NCAs enjoy a certain margin of manoeuvre.

Differently from what happens in the phase of granting, refusing or withdrawing banking licenses, in ongoing prudential supervision the supervisory authority enjoys, as a rule,³¹⁴ a large degree of discretion, so that, for liability to arise, it is expected to disregard the limits imposed on its margins of manoeuvre.

The mere fact that the authority does not react to the problems discovered within a financial institution does not, in itself, lead to liability.

As for the national case law referred to in Part I, liability may occur when the supervisor:

(i) failed to take any action notwithstanding its knowledge of serious difficulties within the institution;³¹⁵

(ii) took inadequate measures (gave an ultimate warning only, without further action, despite the existence of serious irregularities);³¹⁶

312 See § 3.1 of this part.

313 See § 8.4 of this part.

314 As already explained in § 3.1 of this Part, the criteria for classifying a credit institution as significant are mandatory, with the only exception of that based on cross-border activity and unless particular circumstances occur.

315 This may be inferred a contrario from the French *Conseil d'Etat* judgement in the *Sieur D'André* case quoted in footnote No 79: "Cons., enfin, que, si l'inspection à laquelle il a été procédé en 1948, a permis de relever certaines irrégularités n'étaient pas de nature à compromettre la situation de l'établissement; que les sondages auxquelles il a été procédé à cette occasion pour vérifier la situation du portefeuille-titre n'ont révélé aucune irrégularité et qu'il n'est pas établi que, compte tenu des circonstances et de la mission confiée à l'inspecteur, ces sondages aient été insuffisants; qu'il ne résultait pas des constatations ainsi faites que la situation de l'établissement fût critique ni que ses dirigeants eussent commis des fautes de nature à la compromettre rapidement; que, dans ces conditions, le fait de n'avoir donné aucune suite à l'inspection susrappelée et de n'avoir fait procéder à aucun nouveau contrôle jusqu'en 1955, date à laquelle une inspection a fait apparaître les détournements de titres qui sont à l'origine du préjudice invoqué par le requérant, n'a pu constituer une faute lourde de nature à engager la responsabilité de l'Etat à l'égard des clients de l'établissement... ».

See also, though in the different field of securities regulation, the Italian *Corte di Cassazione*, case *Hotel Villaggio Santa Teresa di Gallura* quoted in § 5.3 and footnote No 91.

316 See *French Conseil d'Etat*, case *Achard*, quoted in footnote No 81: "Cons. qu'il résulte de l'instruction qu'une inspection opérée pour le compte de la Commission de contrôle des banques... en juin 1955, a permis de constater que cet établissement financier, outrepassant les limites de l'activité à laquelle il pouvait légalement se livrer, effectuait des opérations de banque en consentant des crédits à l'aide des sommes remises en dépôt par sa clientèle; qu'il ne tenait aucune comptabilité nominale des opérations à

(iii) was not consistent in its action (first ordered an institution to recapitalise, then softened its request).³¹⁷

8.3. The allocation of liability to the ECB and the NCAs in cases of macro-prudential supervisory activity

As indicated in § 4 of this part, the application of macro-prudential tools is under the remit of both the national (competent or designated) authorities and the ECB regardless of any distinction between significant and less significant credit institutions. National authorities have the initiative in applying macro-prudential tools whilst the ECB is empowered to intervene where the former are inactive or with the aim of applying higher buffers.

Both the national authorities and the ECB may therefore be held liable in cases of inaction.

This conclusion is confirmed by the fact that the ECB's macro-prudential decisions are basically national calibrated decisions.³¹⁸

terme et qu'il utilisait les titres appartenant à des clients qui ne pratiquaient pas le terme pour assurer chez les intermédiaires la couverture des ordre à terme passés par le directeur de l'établissement, sa famille et quelques-uns de ses principaux clients ; qu'ainsi informée de ces graves irrégularités, la commission, qui cependant avait déjà été amené antérieurement à adresser trois avertissements à l'établissement pour des insuffisances de liquidité, s'est bornée à lui envoyer le 27 juin 1955 une "mise en garde ultime" sans prendre aucune disposition pour s'assurer que ce rappel à l'ordre était suivi d'effet ni prescrire aucune mesure de contrôle complémentaire avant le 10 août 1956, date de la cessation de paiement de l'établissement; que ce défaut de surveillance à constitué, dans les circonstances de l'espèce, une faute lourde de nature à engager la responsabilité de l'Etat...".

317 See French *Conseil d'Etat*, case *Kechichian*, quoted in footnote No 83 : "Mais considérant qu'alors que par lettre du 6 octobre 1987, la Commission bancaire avait demandé au président-directeur général de la banque qu'une augmentation de capital de 50 millions de francs fût réalisée 'dans les meilleurs délais', elle a ensuite réduit de moitié le montant de l'augmentation de capital prescrite et a accordé à la banque un délai pour le réaliser allant jusqu'à fin mai 1988; qu'eu égard au caractère urgent que présentait, comme l'avait souligné le rapport d'inspection du 5 mai 1987, le rétablissement de la solvabilité de la Saudi Lebanese Bank, la Commission bancaire, si elle pouvait légitimement choisir de négocier avec les dirigeants une stratégie permettant le rétablissement de leur banque plutôt que d'engager sur le champ une procédure juridictionnelle, aurait dû toutefois adresser à ces dirigeants des prescriptions plus fermes et assortir celles-ci de délais contraignants; que, par ailleurs, revenant sur les exigences qu'elle avait formulées, la Commission bancaire a également admis, le 14 mars 1988, que soient analysés séparément et non ensemble, au regard de la réglementation prudentielle, les engagements de la Saudi Lebanese Bank sur l'Union nationale S.A.L. et le groupe Kairouz, alors que la première société était une filiale de la seconde; qu'alors même qu'en l'état des règles prudentielles alors applicables, elle avait seulement la faculté d'exiger le regroupement de ces créances, la Commission bancaire aurait dû maintenir, en considération de la situation dans laquelle se trouvait la banque, les exigences qu'elle avait formulées; que ces carences sont constitutives d'une faute lourde de nature à engager la responsabilité de l'Etat".

318 For further details on this issue see NAPOLETANO, G., "Legal aspects of macroprudential policy in the United States and in the European Union", p. 189. The author illustrates and criticizes the view in the text on the ground that "it should be possible to avoid the paradox of an EU institution empowered to take the place of the national authorities of a single Member State for risks affecting only State but not to intervene to counteract broader, hence more dangerous, risks potentially affecting the entire SSM area".

The wording of Article 5(4) and (5) SSMR is all the more clear in that sense. In the light of the provisions contained therein, the ECB, prior to proceeding with a macro-prudential decision, must take due account of:

(i) the NCAs' reasons and

(ii) "the specific situation of the financial system, economic situation and the economic cycle in individual member States or parts thereof".

A different situation occurs in the event of non-compliance by credit institutions with the buffers applied by the national authorities or by the ECB.

Here the allocation of competences should follow the general criterion based on the status of significant or less significant credit institutions.

For non-compliance with macro-prudential buffers by less significant credit institutions NCAs should be responsible and eventually liable, whilst where significant credit institutions are non-compliant, the ECB should be responsible and, as the case may be, also liable.

Moreover, it should be taken into account that bilateral coordination procedures under Article 5 SSMR are subject to multilateral coordination procedures under the ESRB regulation.

Consequently, if the ECB adopts a macro-prudential decision following an ESRB warning or recommendation, the concurrent liability of the Union (the ESRB has no legal personality and therefore cannot be held liable)³¹⁹ cannot be excluded.

All in all, liability in the field of macro-prudential supervision is *per se* a very tricky issue.

Macro-prudential decisions are basically, even though not exclusively, general decisions for the adoption of which supervisors enjoy broad discretion.

Though most of the macro-prudential tools have been expressly provided for recently and regulated under the CRD IV/CRR package, there are variables whose relevance still falls under the supervisor's margin of discretion.³²⁰ Moreover, to counter macro-prudential risks, supervisors may also adopt Pillar 2 measures.

As regards the ECB, this is clearly laid down in Article 16(2) SSMR. This stipulates that Pillar 2 measures may be adopted for the purposes of Article 9(1), which includes, in turn, both micro- and macro-prudential purposes, since it refers to Articles 4 and 5 SSMR.

319 See D'AMBROSIO, R., "Le Autorità di vigilanza finanziaria dell'Unione", in *La crisi dei mercati finanziari: analisi e prospettive* edited by Santoro, V., Milan, 2012, p. 55.

320 For a thorough analysis of macro-prudential tools in the EU context see NAPOLETANO, G., "Legal aspects of macroprudential policy in the United States and in the European Union", pp. 160 ff.

When adopting a Pillar 2 measure for macro-prudential purposes, the ECB therefore needs to counterbalance different public interests, which confirms again its broad margin of discretion.

8.4. The allocation of liability to the ECB and the NCAs depending on the latter's margin of manoeuvre where complying with the ECB's instructions and regulations

In the *Krohn v Commission* case³²¹ the CJEU ruled that where EU law empowers the Commission to give mandatory instructions to a national authority and this latter complies with the Commission's instructions, the Commission and not the national authority is liable in an action for damages.³²²

This case law has been confirmed over time by the Court.³²³

Consequently, where the ECB is empowered to give mandatory instructions to an NCA or to issue regulations under which NCAs shall perform their tasks and the relevant NCA acts in compliance with the ECB's instructions and regulations, the ECB may be held liable in an action for damages.

However, compliance with an ECB instruction or regulation will not necessarily trigger the ECB's liability where the NCA keeps a certain discretion over how such instructions should be followed or regulations implemented.

In the light of the conclusion under paragraphs 6 and 7 above:

(i) NCAs enjoy a certain discretion where complying with the ECB's instructions under Articles 6(5)(a), 7(4), second subparagraph, 9(1), third subparagraph, and 18(5) SSMR; similarly, the ECB's regulations under Article 6(5)(a) SSMR are expected to leave NCAs some margins of manoeuvre with regard to the modalities according to which they shall carry out the supervisory procedures and adopt the relevant decisions addressed to less significant credit institutions;

(ii) NCAs enjoy no discretion at all where complying with the ECB's instructions under Article 6(3) SSMR; similarly, ECB regulations foreseen under Article 4(3) SSMR are expected to leave NCAs very narrow margins of manoeuvre with regard to the modalities according to which they are eventually

321 See Case C-175/84, *Krohn & Co Import Export (GmbH & Co KG) v Commission*, 1986.

322 See *Krohn*, § 23: "moreover, the information submitted by the parties and their arguments before the Court make it clear that the Commission's telex messages of 23 November and 21 December 1982 were intended as an effective exercise of the power conferred upon it by the provisions and that their effect was to instruct the Bundesanstalt to refuse the import licences at issue if no satisfactory reply was given to the requests for information made to Krohn".

323 See, inter alia, ECJ, Case 126/76 *Dietz v Commission*, § 5; Joined Cases C-104/89 and C-37/90, *Mulder and Others v Council and Commission*, § 9. See also CFI, T-18/99, *Cordis v Commission*, § 26; T-30/99, *Bocchi Food Trade International v Commission*, § 31; Joined Cases T-481/93 and T-484/93, *Exporteurs in Levende Varkens and Others v Commission*, § 71.

called on to assist the ECB in the performance of its supervisory tasks in relation to significant credit institutions.

Following the *Krohn v Commission* ruling, whilst in cases under (i) both NCAs and the ECB should be liable, in cases under (ii) – apart from patent NCA violations of the ECB’s instructions/regulations - only the ECB should be liable.³²⁴

Nevertheless, in the absence of any CJEU judgments the question whether and to what extent the *Krone* rule could be applied to the relationship between the ECB and the SSM remains outstanding.

The relationship between the ECB and NCAs within the SSM may be different from the relationship between the Commission and national authorities.

Differently from what is provided for under the TFEU, under the SSMR no provision gives the ECB the right to bring NCAs before the CJEU that do not comply with its instructions.

Nevertheless, where an NCA is also a National Central Bank (NCB), the situation may differ again.

Indeed, Article 35(6) of the ESCB and ECB Statute stipulates that if the ECB considers that an NCB has failed to fulfill an obligation under the Treaties and the Statute, the ECB may bring the matter before the CJEU.

It is nonetheless not clear whether Article 35(6) of the ESCB and ECB Statute also applies to SSM tasks.³²⁵

324 In the same vein see in the literature CIRAULO, F., “Il regolamento UE n. 1024/2013 sul meccanismo unico di vigilanza e l’unione bancaria europea. Prime riflessioni”, pp. 30-31. It is worth noting that under Article 87(4) SRMR, “the Board shall compensate a national resolution authority for the damages which it has been ordered to pay by a national court, or which it has, in agreement with the Board, undertaken to pay pursuant to an amicable settlement, which are the consequences of an act or omission committed by that national resolution authority in the course of any resolution under this Regulation of entities and groups referred to in Article 7(2), and of entities and groups referred to in Article 7(4)(b) and (5) where the conditions for the application of those paragraphs are met or pursuant to the second subparagraph of Article 7(3). That obligation shall not apply where that act or omission constituted an infringement of this Regulation, of another provision of Union law, of a decision of the Board, of the Council, or of the Commission, committed intentionally or with manifest and serious error of judgement”.

325 As regards the allocation of liability in the context of indirect implementation of ECB law by NCBs, see ZILIOLI, C., and SELMAYR, M., *The Law of the European Central Bank*, pp. 129-130. In the authors’ view the ECB is liable “for damages incurred as a consequence of indirect implementation of ECB law through the national central banks in their capacity as ECB agents, in which they are subject to the supervision and to the instructions of the Executive Board of the ECB. It is submitted that this liability extends also to cases where the national central banks in question would incorrectly implement ECB law, as the ECB, in particular its Executive Board, has the obligation and the legal means to supervise and to control the implementation process; at any time, it could revise its decision under Article 9.2 of the Statute and correct, ‘by its own activities’, mistakes or improper implementations”. In the same vein, SMITS, R., *The European Central Bank. Institutional Aspects*, p. 108, underlines that “NCBs may point to the ECB when held liable for actions done or omitted to be done on instruction of the latter” .

8.5. Potential liability of the Member States for NCAs' non-compliance with the ECB's regulations

In the event of an NCA failing to comply with an ECB regulation the relevant Member States may be held liable towards a third party in an action for damages for non-compliance with EU law.

Under CJEU case law Member States may be liable for damages for breach of Union law under the same conditions as Union institutions.

As regards jurisdiction, in the absence of Union rules governing the matter, claims for liability of Member States for an NCA's infringements of ECB regulations would need to be lodged with the national courts.

It remains unclear whether, and on what basis, direct recourse to the EU Court after a previous exhaustion of national remedies would also be possible.

Since there is no provision entrenching a right of the ECB to bring an NCA to Court that does not comply with its instructions, a possible solution would be to have the Commission bring an infringement procedure against the Member State concerned.³²⁶

326 A mechanism to ensure compliance with EBA decisions in cases of breaches of Union law by national competent authorities is provided for under Article 17(4) to (6) of the EBA Regulation, which reads as follows:

“4. Where the competent authority has not complied with Union law within 1 month from receipt of the Authority's recommendation, the Commission may, after having been informed by the Authority, or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law. The Commission's formal opinion shall take into account the Authority's recommendation.

The Commission shall issue such a formal opinion no later than 3 months after the adoption of the recommendation. The Commission may extend this period by 1 month.

The Authority and the competent authorities shall provide the Commission with all necessary information.

5. The competent authority shall, within 10 working days of receipt of the formal opinion referred to in paragraph 4, inform the Commission and the Authority of the steps it has taken or intends to take to comply with that formal opinion.

6. Without prejudice to the powers of the Commission pursuant to Article 258 TFEU, where a competent authority does not comply with the formal opinion referred to in paragraph 4 within the period of time specified therein, and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the acts referred to in Article 1(2) are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice.

The decision of the Authority shall be in conformity with the formal opinion issued by the Commission pursuant to paragraph 4”.

8.6. *The distribution of the jurisdiction between the CJEU and national courts in cases of concurrence of ECB and NCA liability*

Whilst under Articles 268 and 340 TFEU the CJEU has exclusive jurisdiction to decide on the non-contractual liability of the ECB, national courts have jurisdiction to decide on the non-contractual liability of NCAs.³²⁷

As illustrated above, the allocation of liability to the ECB and NCAs is conditional upon the distribution of tasks, responsibilities and powers between them and upon which has effective control over their performance.

In the event of a concurrence of ECB and NCA tasks or of misalignment between ECB tasks and NCA powers, it may be difficult to ascertain whether it is the liability of the ECB, the NCA or both that has been incurred.³²⁸

As a consequence an applicant claiming damages may choose to bring an action against the ECB (before the CJEU), against the NCA (before the national court) or against both the ECB and the NCA in parallel.

Given the uncertainty about the application of most SSMR provisions, the latter solution is the most likely.

Under the CJUE *Kampffmeyer*³²⁹ judgment, in a situation of concurrent liability the applicant must first exhaust its alleged right to damages under national law and then seek damages for non-contractual liability against the EU.³³⁰

327 Differently from the SSMR preamble, that of the SRMR expressly illustrates the allocation of competencies between the CJEU and the national courts. Recital No 120 SRMR reads as follows: “the SRM brings together the Board, the Council, the Commission and the resolution authorities of the participating Member States. The Court of Justice has jurisdiction to review the legality of decisions adopted by the Board, the Council and the Commission, in accordance with Article 263 TFEU, as well as for determining their non-contractual liability. Furthermore, the Court of Justice has, in accordance with Article 267 TFEU, competence to give preliminary rulings upon request of national judicial authorities on the validity and interpretation of acts of the institutions, bodies or agencies of the Union. National judicial authorities should be competent, in accordance with their national law, to review the legality of decisions adopted by the resolution authorities of the participating Member States in the exercise of the powers conferred on them by this Regulation, as well as to determine their non-contractual liability”.

328 See § 8.4 of this part.

329 ECJ, Joined Cases 5, 7 and 13-24/66, *Kampffmeyer and Others v. Commission* [1967], ECR, 264: “during the oral procedure, the existence in the present case of the right to such repayment was put in doubt by the applicants. The court cannot, however, rely on such a statement to accept the conclusive nature of the alleged damage. It is proper, therefore, to ask the applicants concerned to prove that they have exhausted all methods of recourse both administrative and judicial under the relevant national law to obtain reimbursement of the sums improperly paid by way of levy. Only after production of such evidence would there be reason to consider whether any injury exists which the community should make good.”

330 In *Unifrex*, the EU Court referred to the need to exhaust national remedies where those remedies give effective protection to the individuals concerned and are capable of leading to compensation for the damage alleged. See Case ECJ, C-281/82, *Unifrex v. Commission and Council* [1984] ECR 1969, §§ 11 and 12:

“11. An established body of the case-law of the Court of Justice shows that the action for damages, pursuant to Articles 178 and 215 of the Treaty, was set up as an independent action, having its own particular place in the system of means of redress and subject to conditions for its use formulated in the light of its specific purpose. It must nevertheless be viewed in the context of the entire system established by the Treaty for the judicial protection of the individual. Where an individual considers that he has been injured by the

When an action for damages is brought before a national court against an NCA which acted on the basis of an ECB regulation or instruction, the national court may consider the need to require the CJEU to give a preliminary ruling under Article 267 TFEU, for the interpretation of the ECB act.

The national court may only rule on the non-contractual liability of the NCA, and not on that of the ECB, which is the exclusive competence of the CJEU.

application of a Community legislative measure that he considers illegal, he may, when the implementation of the measure is left to the national authorities, contest the validity of the measure, when it is implemented, before a national court in an action against the national authorities. That court may, or even must, as provided for in Article 177, refer the question of the validity of the Community measure in dispute to the Court of Justice. However, the existence of such a means of redress will be capable of ensuring the effective protection of the individuals concerned only if it may result in making good the alleged damage.

12. That is not so in this case. The applicant has shown, without being contradicted by the Commission, that proceedings for annulment in the national administrative courts could not, in this case, have effectively protected the applicant. Even if the disputed Community rules were declared invalid by a preliminary ruling of the Court given in the context of such proceedings and the national decision were annulled, that annulment could not have required the national authorities to pay higher monetary compensatory amounts to the applicant, without the prior intervention of the Community legislature”.

III

THE LIABILITY FOR DAMAGE CAUSED TO THIRD PARTIES BY ECB STAFF AND MEMBERS OF THE ECB'S BODIES

1. Outlook

In accordance with Article 340 TFEU, the ECB should make good any damage caused by its servants in the performance of their duties.

However, as a result of the interaction between the ECB and the NCAs within the SSM, situations may arise in which the staff of NCAs carry out their duties under the ECB's coordination.

A question arises here as to whether and to what extent the ECB may be held liable for damage caused by persons acting on its behalf, other than its own staff and members of its own bodies, such as Joint Supervisory Teams (JSTs) and on-site inspection team members appointed by NCAs.

Admittedly, an ECB liability may arise to the extent that the acts of JSTs or on-site inspection teams' national members are the necessary extension of an ECB task and are therefore imputable to the ECB.

The members of the ECB's organs and the ECB's staff enjoy the immunities from legal proceedings in the territory of EU Member States for all acts performed in their official capacity under Protocol 7 on the privileges and immunities of the EU.

In the light of the above, it is the ECB and not its staff or members of its bodies that is liable towards the injured third parties. Nevertheless, immunity may be waived by the ECB where the latter considers that the waiver is not contrary to its institutional interests.

Should immunity be waived, the ECB's staff and the members of its bodies may be directly asked for damages by the injured parties. Should immunity not be waived, the ECB's staff and the members of its bodies may be held liable towards the ECB, where this has been condemned to pay damages.

In this regard it should be noted that, whilst under the conditions of employment for ECB staff³³¹ their liability is limited to cases of gross negligence and wilful misconduct only; no specific provision is contained either in the SSMR or elsewhere on the limitation of the liability of members of the ECB's organs.

A final issue pertains to the distribution of liability between the ECB's organs. This is not crystal clear basically for the reasons given below. Whilst the ultimate formal ECB decision-making body remains the Governing Council,

³³¹ See § I.6., under which members of the ECB's staff "shall not be liable for any damages caused to the ECB or to third parties because of or in the due performance of their respective functions, unless such damages are due to gross negligence or wilful misconduct".

the Supervisory Board is responsible for the planning of the ECB's supervisory tasks and for submitting complete draft supervisory decisions to the Governing Council for its approval under a negative decision-making technique.³³²

Consequently, the liability of the Supervisory Board for the adoption of ECB supervisory decisions cannot be excluded by the fact that legally the Supervisory Board does not take any external binding decisions, since its contribution to the ECB supervisory decision may be decisive, at least in the field of micro-prudential supervision.

Whilst not vested with supervisory powers, the Executive Board is still the ECB's top administrative body, responsible for the internal organisation and staff of the ECB. A concurrent liability of the Executive Board may therefore arise where the alleged ECB inaction is the outcome of an inadequate internal allocation of staff, resources or information.

This part will deal with all the above issues, without any pretention to be conclusive, due to the novelty of the subject and the absence of any judgements on the liability of the ECB's staff and the members of its bodies in the performance of its new supervisory tasks.

2. The liability for acts and omissions of members of Joint Supervisory Teams and On-site Inspection Teams

2.1. The functioning of the Joint Supervisory Teams and On-site Inspection Teams

JSTs are operational units in charge of the day-to-day supervision of significant credit institutions or supervised groups.³³³

One JST will be established for each significant supervised entity or group.

³³² See Article 26 SSMR.

³³³ Under Article 3(2) SSMFR "the tasks of a joint supervisory team shall include, but are not limited to, the following:

(a) performing the supervisory review and evaluation process (SREP) referred to in Article 97 of Directive 2013/36/EU for the significant supervised entity or significant supervised group that it supervises;

(b) taking into account the SREP, participating in the preparation of a supervisory examination programme to be proposed to the Supervisory Board, including an on-site inspection plan, as laid down in Article 99 of Directive 2013/36/EC, for such a significant supervised entity or significant supervised group;

(c) implementing the supervisory examination programme approved by the ECB and any ECB supervisory decisions with respect to the significant supervised entity or significant supervised group that it supervises;

(d) ensuring coordination with the on-site inspection team referred to in Part XI as regards the implementation of the on-site inspection plan;

(e) liaising with NCAs where relevant".

On the role of the JST see: ECB, *SSM Quarterly Report*, 2014/1, pp. 9-10; ECB, *Guide to banking supervision*, November 2014, pp. 16-17.

Each JST will be composed of staff from both the ECB and NCAs, and will be coordinated by an ECB staff member (the ‘JST coordinator’).³³⁴

The JST coordinator ensures the coordination of the work within the joint supervisory team.³³⁵

For this purpose, JST members must follow the JST coordinator’s instructions as regards their tasks in the JST.³³⁶

Each NCA that appoints more than one staff member to the JST shall designate one of them as sub-coordinator (hereinafter an ‘NCA sub-coordinator’).³³⁷ The ECB may require NCAs to modify the appointments they have made if appropriate for the purpose of the composition of a JST.³³⁸

NCA sub-coordinators assist the JST coordinator in the organisation and coordination of the tasks of the joint supervisory team, in particular as regards the staff members that were appointed by the same NCA.³³⁹

NCA sub-coordinators may give instructions to the members of the joint supervisory team appointed by the same NCA, but these instructions may not conflict with the instructions given by the JST coordinator.³⁴⁰

As outlined in § 2.2 of Part II, the JST organizational model chosen in the SSMFR was not the only one possible.

Different models for JSTs could theoretically have been conceived.

Under a first model, staff from the NCAs would have become ECB staff.

Under a second model, coordination would have been achieved between the ECB and NCAs rather than between their respective staffs.

Under a combined model, the NCA staff involved in JSTs, though remaining employed by their own NCA, would have been directly subject to instructions from the ECB.

Though the SSMR is not crystal clear on the allocation of responsibilities pertaining to the day-to-day verification of credit institutions, a reading of Article 6(3) in conjunction with Recitals 28 and 37 SSMR suggests the idea, which has been followed in this paper, that the NCAs remain competent for the day-to-day verification of all credit institutions, including significant ones, though under the ECB’s coordination.

334 See Article 3(1) SSMFR.

335 See Article 6(1) SSMFR.

336 See Article 6(1) SSMFR.

337 See Article 6(2) SSMFR.

338 See Article 4(3) SSMFR.

339 See Article 6(2) SSMFR.

340 See Article 6(2) ECBFR.

Nevertheless, a different interpretation has been followed under the relevant provisions of the SSMFR where it is not the NCAs that are subject to the ECB's coordination but their staffs.

Indeed, national members of JSTs are subject to the instructions of the ECB coordinator, without any mediation of the relevant NCA.

Similarly to what was indicated above with regard to JSTs, the ECB is vested with the power to appoint on-site inspection teams "to conduct all necessary on-site inspections on the premises of a legal person as referred to in Article 10(1) SSM Regulation".³⁴¹

The head of the on-site inspection team is appointed by the ECB, but, differently from what is provided for as regards JSTs, he may be either an ECB or an NCA staff member.³⁴²

Those carrying out on-site inspections have to follow the instructions of the head of the on-site inspection team.³⁴³

2.2. Whether the ECB or NCAs are liable: the criterion of the necessary extension of an ECB or NCA task.

The organisational model adopted under the SSMFR for JSTs and on-site inspection teams has repercussions on the liability regime of their national members.

Under the CJEU judgement *Le Pen and the Front national v Puhl and others*³⁴⁴ an act of a person is imputable to an EU institution where there is a provision that empowers its author to act on behalf of such institution and that gives the latter the power to exercise effective control over the acts of that person.

341 See Article 143(1) SSMFR. On the on-site inspection teams see ECB, *Guide to banking supervision*, pp. 35-36.

342 See Article 144(2) SSMR.

343 See Article 146(1) SSMR.

344 See ECJ, case C-201/89, *Le Pen and le Front national v. Puhl and others*, §§ 12 to 15: "12. With regard to the second issue, namely whether the European Parliament may be liable for the actions of a political group, it should be recalled first that, according to Rule 26 of the Rules of Procedure of the European Parliament, members may form themselves into groups according to their political affinities. A political group is to be considered to have been set up after the President has been handed a statement to that effect containing the name of the group, the signatures of its members (of which the Rule requires a minimum number) and the composition of its Bureau. 13. The Rules of Procedure of the European Parliament grant certain powers to the political groups for the purpose of preparing decisions and positions to be adopted by the Parliament, for example that of handing in a motion of censure (Rule 30), or requesting a debate (Rules 32 to 35). The same powers are also accorded to a minimum number of members, that number varying in different situations. 14. However, no provision of the Rules of Procedure of the European Parliament empowers a political group to act on behalf of the Parliament with regard to other institutions or third parties. Moreover, there is no rule of Community law from which it may be inferred that the acts of a political group could be imputed to the European Parliament as an institution of the Communities. 15. It must be concluded that the distribution, by a political group, of a publication alleged to be defamatory does not give rise to the non-contractual liability of the Communities".

Moreover, under the CJEU judgement *Sayag v Leduc*, rather than focusing on the concept of servant, the Court focused on the element of the execution of a task of the institution, so that the EU is liable “for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions”.³⁴⁵

In the context of the liability of national members of JSTs and on-site inspection teams, the question is whether they will be empowered to act on behalf of the ECB or on behalf of the NCAs and whether the ECB or the NCAs will exercise control over them.

It is true that the national members of JSTs and on-site inspection teams appear to act on behalf of the ECB rather than on behalf of the NCAs and that their action appears to be an extension of an ECB task rather than an NCA task. In the light of the above the ECB and not the relevant NCA should be liable.

Nevertheless, the question is still open since it is doubtful whether the relationship between the ECB and the national members of JSTs and on-site inspection teams can be considered *internal* to the ECB.

2.3. The involvement of staff members from other NCAs in an NCA’s supervisory team and its consequence on the allocation of liability

In accordance with Article 31(2) of the SSMR, if the ECB considers that the participation of staff members from an NCA in another NCA’s supervisory team is appropriate, it may require the latter NCA to involve staff members of the former NCA in its supervisory team.

This provision has been interpreted under the SSMFR³⁴⁶ as applicable to the day-to-day supervision of less significant credit institutions only.³⁴⁷

Similarly to what has already been shown with regard to the liability for the acts or omissions of national members of JSTs, it is the NCA that accepts to involve staff members of the other NCA that should be liable in this case. Indeed, acts or omissions of staff members of the latter appear to be an extension of a task of the former.

Nevertheless, the question is still outstanding, since the relationship between the NCA that accepts to involve staff members of the other NCA and such staff should not be considered as *internal* to the former NCA.

345 See ECJ, Case 9/69, *Sayag and AG Zürich v Leduc and others* [1969] ECR 329, § 7.

346 See Article 7 SSMFR.

347 As already indicated in § 3.1 of Part II, the author has a different view.

3. The application of the immunities under Protocol 7 on the privileges and immunities of the EU annexed to the EU Treaties to ECB staff and members of the organs involved in supervisory tasks

Protocol No 7 on privileges and immunities of the EU is an integral part of the Treaties³⁴⁸ and gives all EU institutions and their staffs immunity from criminal, administrative and civil proceedings for all acts performed in their official capacity, if such proceedings are initiated against them in a Member State.³⁴⁹

Under CJEU case law,³⁵⁰ for an act to be considered as performed in an EU institution and in its staff's official capacity, it must directly serve the performance of the task of that institution.³⁵¹

It follows that activities outside the scope of the functions of an EU institution are fully subject to the jurisdiction of national courts.³⁵²

Moreover, as immunities are accorded solely in the interests of the Union, the EU institutions are required to waive immunity granted to their staff members wherever they consider that the waiver is not contrary to the interests of the Union.³⁵³

Under Article 22 of the Protocol, privileges and immunities granted to EU institutions and staff also apply to the ECB, the members of its organs and its staff.

348 Article 51 of the Treaty on European Union.

349 See Article 11(a) [ex Article 12(a)] of the Protocol on the privileges and immunities of the European Union in the territory of each Member State.

350 Case 5/68, *Sayag and AG Zürich v Leduc and others* [1968] ECR 589, 600 and Case 9/69, *Sayag and AG Zürich v Leduc and others*, quoted in footnote 345.

351 See GRUBER, G. and BENISCH, M., "Privileges and Immunities of the European Central Bank", *ECB Legal Paper Working Series* No 4, June 2007, pp. 25-26: "the purpose of this provision is to ensure that officials and other servants of the Communities (including ECB staff) can perform their tasks fully independently; judgements on their performance on the basis of national law would be incompatible with this purpose... The Court of Justice has defined the term 'acts performed by them in their official capacity' in two judgments concerning traffic accidents. According to the Court, the scope of the immunity is limited to acts which, by their nature, are part of the tasks to be performed by the official/servant concerned; the act in question must directly serve the performance of the task".

352 See GRUBER, G. and BENISCH, M., "Privileges and Immunities of the European Central Bank", p. 7: "the privileges and immunities granted to an international organisation are conditioned by the organisation's functions (principle of functional immunity). The reason underlying this principle is that international organisations are not sovereign entities like states. They are created by their member states for carrying out specific functions. Therefore, they enjoy privileges and immunities only to the extent necessary for the exercise of those functions. Activities outside the functions entrusted to an international organization (ultra vires activities) are not covered by its special status". See Case C-2/88, *J. J. Zwartveld and Others v Commission* [1990] ECR-I 3367, § 19: "... the privileges and immunities which the Protocol grants to the European Communities have a purely functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the Communities (see the order of the Court in Case C-1/88, *SA Générale de Banque v Commission* [1989] ECR 857, paragraph 9)".

353 Article 17 of the Protocol.

The ECB's organs should include not only those established by the Treaties but also those provided for under the SSMR and should encompass both the decision-making and the non-decision-making bodies.

This view is grounded on the wording of Article 22, which makes no distinction between the ECB's organs and is confirmed by the following arguments.

The purpose of the immunity is to protect the members of the ECB's organs and its staff from proceedings initiated against them in a Member State in order to preserve the acts adopted by them in their official capacity, i.e. while directly serving the performance of an ECB task.

This is in line with the principle of functional immunity whereby the effective performance of an organisation's task is ensured.

In this respect no distinction makes sense between the sources establishing ECB bodies (the Treaties or the SSMR). Nor is it relevant whether these bodies are vested with decision-making powers or not, the only criterion applicable being that of the performance of an ECB task.³⁵⁴

Moreover, it is worth noting that immunities under the Protocol also apply to the ECB's staff, which clearly does not enjoy any decision-making powers. There is therefore no reason to introduce such distinctions between the ECB's organs.

Furthermore, immunities should apply to all the members of the ECB's organs by virtue of Article 11(a) of the Protocol, irrespective of whether they were appointed by the ECB, the NCAs or according to a special and more complex procedure.³⁵⁵

There is nonetheless another way round.

Article 10 states that, in addition to the ECB's staff and the members of its organs, "customary privileges, immunities and facilities" are granted to representatives of Member States taking part in the work of the Union's institutions, their advisers and technical experts, and to members of the advisory bodies of the Union.

Against this backdrop, national members of ECB organs could be tantamount to "representatives of Member States taking part in the work of the Union's institutions".

³⁵⁴ It is noted that the German version of Article 22 of the Protocol refers to the "decision-making bodies" (*Beschlussorganen*) whilst the French one simply refers to "members of its organs" (*membres de ses organes*). Besides the arguments illustrated in the text, under CJEU case law, as a result of the need for uniform interpretation of Union law, texts are considered in isolation, but in the event of doubt are interpreted and applied in the light of the other authentic language versions: ECJ, Case 19/67, *Bestuur van de Sociale Verzekeringsbank*.

³⁵⁵ Rules on the appointment of the ECB representative to the Supervisory Board are contained in Article 26(5) SSMR and are complemented by the ECB's decision of 6 February 2014 (ECB/2014/4).

Nevertheless, the fact that some members of the Supervisory Board and the Governing Council were appointed by the NCAs and the NCBs respectively does not change their nature as members of ECB organs.

As regard the staff involved in SSM supervisory tasks, it is not clear whether immunities also apply to NCA members of JSTs and on-site inspection teams acting under the ECB's coordination and, as the case may be, by virtue of which provision, that under Article 11 of the Protocol or that under Article 10.

4. The allocation of decision-making powers among the ECB organs involved in supervisory tasks

4.1. The principle of separation between supervisory and monetary policy functions

The ECB is responsible for both (i) carrying out monetary policy functions with a view to maintaining price stability in accordance with Article 127(1) TFEU and (ii) exercising supervisory tasks with the objective of protecting the safety and soundness of credit institutions and the stability of the financial system.

The two tasks have to be carried out in complete separation, in order to avoid conflicts of interest and to ensure that each function is exercised in accordance with the applicable objectives.³⁵⁶

Indeed, Article 25(2) SSMR stipulates that “the ECB shall carry out the tasks conferred on it by this Regulation without prejudice to and separately from its tasks relating to monetary policy and any other tasks” and that “the tasks conferred on the ECB by this Regulation shall neither interfere with, nor be determined by, its tasks relating to monetary policy”.³⁵⁷

In the light of Article 25 SSMR, the outcomes of the principle of separation are the following:

³⁵⁶ See Recital No 65 SSMR. See also the Communication from the Commission to the European Parliament and the Council, *A Roadmap towards a Banking Union*, Brussels, 12.9.2012, § 3.1., p. 8: “the proposal lays down a number of organisational principles to ensure clear separation between monetary policy and supervision. This will mitigate potential conflicts between different policy objectives, while at the same time allowing full advantage to be taken of synergies. All preparatory activities and policy execution will therefore be carried out by bodies and administrative divisions separate from monetary policy functions through a supervisory board established within the ECB for this express purpose”.

³⁵⁷ See Article 13k, paragraph 1, of the ECB decision of 22 January 2014 amending Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2014/1) (hereinafter ECB RoP), “the ECB shall carry out the tasks conferred on it by Regulation (EU) No 1024/2013 without prejudice to and separately from its tasks relating to monetary policy and from any other tasks”.

(i) “the ECB shall ensure that the operation of the Governing Council is completely differentiated as regards monetary and supervisory functions. Such differentiation shall include strictly separated meetings and agendas”;³⁵⁸

(ii) “the staff involved in carrying out the tasks conferred on the ECB” by the SSMR “shall be organisationally separated from, and subject to, separate reporting lines from the staff involved in carrying out other tasks conferred on the ECB”;³⁵⁹

(iii) “the ECB shall adopt and make public any necessary internal rules, including rules regarding professional secrecy and information exchanges between the two functional areas”;³⁶⁰

(iv) “the ECB shall create a mediation panel. This panel shall resolve differences of views expressed by the competent authorities of participating Member States concerned regarding an objection of the Governing Council to a draft decision by the Supervisory Board”.³⁶¹

4.2. The utmost consequence of the principle of separation: the conferral on the Supervisory Board of de facto decision-making powers in the field of micro-prudential supervision

Nevertheless, the utmost consequence of the principle of separation is the setting up of the Supervisory Board and the conferral on it of *de facto* decision-making powers in the field of banking supervision.

This view is confirmed by Recitals 65 to 67 SSMR. Recitals 65 and 66 generally deal with the principle of separation between the monetary policy and supervisory tasks. Recital 67 stipulates in turn that “*in particular*, a Supervisory

358 Article 25(4) SSMR. See also Recital No 65, last sentence, SSMR, which reads as follows: “the ECB should be able to ensure that the Governing Council operates in a completely differentiated manner as regards monetary and supervisory functions. Such differentiation should at least include strictly separated meetings and agendas”. See Article 13l, paragraph 1, of the ECB decision of 22 January 2014 mentioned above: “the Governing Council meetings regarding the supervisory tasks shall take place separately from regular Governing Council meetings and shall have separate agendas”.

359 Article 25(2), second subparagraph, SSMR. See also Recital No 66 SSMR: “Organisational separation of staff should concern all services needed for independent monetary policy purposes and should ensure that the exercise of the tasks conferred by this Regulation is fully subject to democratic accountability and oversight as provided for by this Regulation. The staff involved in carrying out the tasks conferred on the ECB by this Regulation should report to the Chair of the Supervisory Board”.

360 See Article 25(4) SSMR. See also Article 13k, paragraphs 2 and 3, of the ECB RoP:

“2. The ECB shall take all necessary measures to ensure separation between the monetary policy and the supervisory functions.

3. The separation of monetary policy and the supervisory function shall not exclude the exchange between these two functional areas of the information necessary for the achievement of ECB and ESCB tasks”.

361 See Article 25(5) SSMR. See also Recital No 73 SSMR, which reads as follows: “with a view to ensuring separation between monetary policy and supervisory tasks, the ECB should be required to create a mediation panel. The setting up of the panel, and in particular its composition, should ensure that it resolves differences of views in a balanced way, in the interest of the Union as a whole”. The Rules of procedure of the Mediation Panel are contained in ECB Regulation No 673/2014.

Board responsible for preparing decisions on supervisory matters should be set up within the ECB”.

The sequence of these Recitals and the wording of Recital 67 underline the close relationship between the principle of separation and the role of the Supervisory Board.

Though the formal adoption of supervisory decisions lies with the Governing Council, the negative decision-making technique provided for under Article 26(8) confers effective responsibility in this field on the Supervisory Board.

Indeed, according to the above-mentioned provision, the Supervisory Board proposes complete draft decisions to the Governing Council, which the latter is deemed to have approved unless it objects within a period not exceeding 10 working days.

As clearly outlined in the literature, “the provisions of the Regulation spelling out the remit of the Supervisory Board have been framed in its relation with the Governing Council. In any case, the latter will – at least theoretically - maintain the final decision power, which is highlighted in several provisions of the Regulation. At the same time the relationship with the Supervisory board has been construed in such a way that for most practical purposes the latter will be the decision-making body... The decision of the Governing Council is a negative one: the proposal of the Supervisory Board will be considered adopted unless the Governing Council objects. This means that no action will be required from the Governing Council and that a ‘no objection’ or even a silent nod will suffice. In most cases there will be no formal decision, just a mere lapse of the objection period. Objections have to be stated within 10 days, leaving little time for further reflection or analysis, and moreover have to be based on a written argumentation, especially highlighting possible monetary considerations. As prudential supervisory matters regularly call for urgent decisions, the Governing Council will very often not be able to object in time”.³⁶²

Moreover, under Article 26(1) SSMR “the planning... of the tasks conferred on the ECB shall be fully undertaken” by the Supervisory Board so that the selection of the supervisory priorities should fall under the latter’s exclusive remit.

The specific provision contained in Article 13a of the ECB RoP fundamentally mimics that in Article 26(1) SSMR, the only difference being that the former specifies that “any tasks of the Supervisory Board shall be without prejudice to the

362 See WYMEERSCH, E., “The Single Supervisory Mechanism or SSM, Part One of the Banking Union”, pp. 55-56. See also CLARICH, M., “I poteri di vigilanza della Banca Centrale Europea”, p. 126, footnote No 45: “questo modello tende a concentrare il potere decisionale sostanziale nel consiglio di sorveglianza [Supervisory Board] nel quale sono rappresentati anche gli Stati membri che non hanno aderito all’euro e a coinvolgere il meno possibile il consiglio direttivo [Governing Council] nel quale questi ultimi non sono invece rappresentati”. In the same vein see TER KUILE, G., WISSINK, L. and BOVENSCHEN, W., “Tailor-Made Accountability within the Single Supervisory Mechanism”, in *Common Market Law Review*, 2015, p. 178.

competences of the ECB decision-making bodies”. The meaning of this wording is not crystal clear. In the author’s view it should be interpreted consistently with the principle of separation and the exclusive competence of the Supervisory Board in the planning of the ECB’s supervisory tasks.

In the light of the above, doubtful cases in the allocation of supervisory responsibilities under the SSMR to ECB bodies should be solved in favour of the Supervisory Board’s competence rather than of that of the Governing Council.

Consistently, under Article 5 of the RoP of the Supervisory Board,³⁶³ the latter’s members have general access to updated information on all significant credit institutions and not only to the key items of information “that enable a meaningful understanding” of the addressee of a specific ECB supervisory decision.

This mechanism, better known as the tacit consent procedure, is derogated by virtue of Article 26(8), for the adoption of the general framework under Article 6(7) SSMR³⁶⁴ and by virtue of Article 13h of the ECB RoP for the adoption of macro-prudential decisions.

Indeed, the role of the Governing Council under Article 13h of the ECB RoP, pertaining to the adoption of macro-prudential decisions, is broader than that under Article 26(8) SSMR, since not only does the Governing Council have the right to endorse, object to or amend a proposal from the Supervisory Board but it may even take a decision in the absence of such a proposal.³⁶⁵

³⁶³ See the ECB decision of 31 March 2014.

³⁶⁴ In the same vein see Article 13j of the ECB RoP: “the Governing Council shall adopt decisions establishing the general framework to organise the practical arrangements for the implementation of Article 6 of Regulation (EU) No 1024/2013, in consultation with national competent authorities and on the basis of a proposal from the Supervisory Board outside the scope of the non-objection procedure”. Recital No 6 of the ECB RoP suggests another view, as it stipulates that “non-objection procedure pursuant to Article 26(8) of Regulation (EU) No 1024/2013 should not apply to decisions relating to the general framework under which supervisory decisions will be taken like the organisational framework referred to in Article 6(7) of Regulation (EU) No 1024/2013”. Nevertheless, given that under Article 26(8) SSMR the tacit consent procedure applies to all supervisory decisions “without prejudice [only] to Article 6” and given that this procedure is, in turn, the logical outcome of the overarching principle of separation between monetary policy and supervisory functions, exceptions to the tacit consent procedure should be interpreted strictly.

³⁶⁵ Article 13h of the ECB RoP reads as follows:

“1. If a national competent or designated authority notifies the ECB of its intention to apply requirements for capital buffers or any other measures aimed at addressing systemic or macro-prudential risks pursuant to Article 5(1) of Regulation (EU) No 1024/2013, the notification, upon receipt by the Secretary of the Supervisory Board, shall be transmitted to the Governing Council and the Supervisory Board without delay. Upon a proposal prepared by the Supervisory Board based on the initiative and taking into account the input of the relevant committee and of the relevant internal structure, the Governing Council shall decide about the matter within three working days. Where the Governing Council objects to the notified measure, it shall explain its reasons in writing to the national competent or designated authority concerned within five working days of the notification to the ECB.

2. If the Governing Council, upon a proposal prepared by the Supervisory Board based on the initiative and taking into account the input of the relevant committee and of the relevant internal structure, intends to apply higher requirements for capital buffers or to apply more stringent measures aimed at addressing systemic or macro-prudential risks pursuant to Article 5(2) of Regulation (EU) No 1024/2013, such intention

It is worth noting that macro-prudential decisions are not only those expressly provided for and regulated under the CRD IV/CRR package. Indeed Pillar 2 decisions may also be adopted for macro-prudential purposes.³⁶⁶

In the light of the above the derogation to the tacit consent procedure for the adoption of macro-prudential decisions is broader than would be expected from the mere wording of Article 26(8) SSMR.

4.3. The purely internal role of the other bodies of the ECB in its capacity as supervisory authority

As regards the other organs of the ECB in its new capacity as supervisory authority one may observe the following.

The Steering Committee is to have no decision-making powers since its only task is that of supporting the Supervisory Board's activity, including preparing its meetings.³⁶⁷

The Mediation Panel is vested with the task of resolving "differences of views expressed by the competent authorities of the participating Member States concerned regarding an objection of the Governing Council to a draft decision of the Supervisory Board",³⁶⁸ but its opinion "shall not be binding on the Supervisory Board and the Governing Council".³⁶⁹

The Administrative Board of Review (ABoR) is charged with carrying out an internal administrative review of the decisions taken by the ECB in the exercise of its supervisory powers, but at the end of the review process the Board will only express an opinion that the Supervisory Board shall take into account with the aim of promptly submitting a new draft decision to the Governing Council's

shall be notified to the concerned national competent or designated authority at least ten working days prior to taking such a decision. If the concerned national competent or designated authority notifies the ECB in writing of its reasoned objection within five working days of the receipt of the notification, this objection, upon receipt by the Secretary of the Supervisory Board, shall be transmitted to the Governing Council and the Supervisory Board without delay. The Governing Council shall decide on the matter on the basis of a proposal prepared by the Supervisory Board based on the initiative and taking into account the input of the relevant committee and of the relevant internal structure. This decision shall be transmitted to the national competent or designated authority concerned.

3. The Governing Council shall have the right to endorse, object to or amend proposals of the Supervisory Board within the meaning of paragraphs 1 and 2. The Governing Council shall also have the right to request the Supervisory Board to submit a proposal within the meaning of paragraphs 1 and 2 or to undertake specific analysis. If the Supervisory Board submits no proposals addressing such requests, the Governing Council, taking into account the input of the relevant committee and of the relevant internal structure, may take a decision in the absence of a proposal from the Supervisory Board".

³⁶⁶ See Part II, § 4.

³⁶⁷ See Article 26(10) SSMR and Article 10(1) of the Rules of Procedure of the Supervisory Board of the European Central Bank adopted by the Supervisory Board on 31 March 2014.

³⁶⁸ See Article 25(5) SSMR.

³⁶⁹ See Article 10(3) of ECB regulation No 673/2014 concerning the establishment of a Mediation Panel and its Rules of Procedure (ECB/2014/26).

tacit consent. This new draft decision “shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision”.

Differently from what is provided for with regard to the obligation of the EBA and the SRM Board to comply with the ESAs’ Board of Appeal and the SRM Appeal Panel,³⁷⁰ the Governing Council is not bound by the decision of the Administrative Board of Review.³⁷¹

Moreover, as clarified in Recital 64 SSMR, the scope of the ABoR review, though pertaining to “the procedural and substantial conformity” with the SSMR, has to respect “the margin of discretion left to the ECB to decide on the opportunity to take those decisions”.

Furthermore, “the Supervisory Board’s assessment shall not be limited to examination of the grounds relied upon by the applicant as set forth in the notice of review, but may also take other elements into account in its proposal for a new draft decision”.³⁷²

4.4. The organisational role of the Executive Board

Whilst not vested with supervisory powers, the Executive Board’s competence in respect of the ECB’s internal structure and staff encompasses supervisory tasks, as clearly laid down in Article 13m(1) of the ECB RoP, titled “Internal structure regarding the supervisory tasks”.

Though the Executive Board must consult the Chair and the Vice Chair of the Supervisory Board on the internal structure, it is clear that the only body vested with decision-making powers on the organization and competences of the ECB’s staff charged with supervisory tasks is the Executive Board.

Moreover, in the light of Article 13m(1) above, Articles 10 and 11 of the ECB RoP apply accordingly. Consequently, all the work units of the ECB, including those devoted to supervisory tasks, are placed under the exclusive managing direction of the Executive Board.³⁷³

370 Under Article 60(5) of the EBA Regulation “the Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned”. The same provision is contained in Article 85(8) SSMR.

371 See Article 24(7) of the SSMR. See also Article 16(5) of the ECB decision of 14 April 2014 concerning the establishment of the Administrative Board of Review and its Operating Rules (ECB/2014/16), which reads as follows: “the [ABoR] opinion shall not be binding on the Supervisory Board or the Governing Council”.

372 See Article 17(1) of the ECB decision of 14 April 2014.

373 Article 10 (Internal structure) of the ECB RoP reads as follows:

“10.1. Having consulted the Governing Council, the Executive Board shall decide upon the number, name and respective competence of each of the work units of the ECB. This decision shall be made public.

10.2. All work units of the ECB shall be placed under the managing direction of the Executive Board. The Executive Board shall decide upon the individual responsibilities of its members with respect to the work units of the ECB, and shall inform the Governing Council, the General Council and the staff of the

This allocation of competences between the Executive Board and the Supervisory Board is certainly in line with the administrative role of the Executive Board under the ESCB and ECB Statute.

Nevertheless, it is questionable whether it is compatible with the principle of separation between the monetary and supervisory functions.

The ECB decision of 17 September 2014 on the implementation of separation between the monetary policy and supervisory functions of 17 September 2014 seems to take the view that the Executive Board's responsibility for the staff involved in supervisory tasks and its organization is compatible with the principle of separation.³⁷⁴

Under Article 13m(2) of the ECB RoP the Supervisory Board maintains, in agreement with the Executive Board, the only limited power to “establish and dissolve substructures of a temporary nature, such as working groups or task forces”.

Moreover, as emerges from the ECB's decision on the implementation of separation between the monetary policy and supervisory functions, only the Executive Board is vested with the power to authorize the exchange of confidential information between the two functions,³⁷⁵ which again seems not perfectly in line with the principle of separation.

ECB thereof. Any such decision shall be taken only in the presence of all the members of the Executive Board, and may not be taken against the vote of the President”.

Article 11 (Staff of the ECB) of the ECB RoP reads as follows:

“11.1. Each member of the staff of the ECB shall be informed of his/her position within the structure of the ECB, his/her reporting line and his/her professional responsibilities.

11.2. Without prejudice to Articles 36 and 47 of the Statute, the Executive Board shall enact organisational rules (hereinafter referred to as Administrative Circulars) which are binding on the staff of the ECB.

11.3. The Executive Board shall adopt and up-date a Code of Conduct for the guidance of its members and of the members of staff of the ECB”.

374 See Article 3(2) and (3) of the ECB's decision on the implementation of separation between the monetary policy and supervisory functions (ECB/2014/39), which reads as follows:

“2. All work units of the ECB shall be placed under the managing direction of the Executive Board. The competence of the Executive Board in respect of the ECB's internal structure and the staff of the ECB shall encompass the supervisory tasks. The Executive Board shall consult the Chair and the Vice Chair of the Supervisory Board on such internal structure.

3. ECB staff involved in carrying out supervisory tasks shall be organisationally separated from the staff involved in carrying out other tasks conferred on the ECB. Staff involved in carrying out supervisory tasks shall report to the Executive Board in respect of organisational, human resources and administrative issues, but shall be subject to functional reporting to the Chair and the Vice Chair of the Supervisory Board, subject to the exception in paragraph 4”.

In the ECB view this would suffice to ensure compliance with the principle of separation between the monetary policy and supervisory functions.

375 See Article 6(1) and (2) of the ECB's decision of 17 September 2014:

“1. The ECB's policy functions shall disclose confidential information in the form of non-anonymised common reporting (COREP) and financial reporting (FINREP) data as well as other raw data to the respective other policy function of the ECB upon request on a need to know basis, subject to Executive Board approval, except where Union law provides otherwise. The ECB's supervisory function shall disclose confidential

4.5. Some conclusions on the liability of the Governing Council, the Supervisory Board and the Executive Board

In the light of the above the following conclusions can be drawn on the liability of the Governing Council, the Supervisory Board and the Executive Board respectively.

As already indicated in paragraph 3 of this part such liability may arise:

(i) towards third parties, where immunities provided for under Protocol 7 annexed to the Treaties are waived by the ECB;

(ii) towards the ECB, where immunities are not waived.

Since the Governing Council is the only formal decision-making body of the ECB it cannot avoid its liability in the event of injury caused to third parties by an ECB supervisory decision.

Nevertheless, as already mentioned, the negative decision-making technique provided for under Article 26(8) SSMR leaves the de facto decision-making power in the field of banking supervision under the remit of the Supervisory Board, with the only exceptions of decisions concerning the adoption of the framework under Article 6(7) SSMR and macro-prudential decisions.

Consequently, the liability of the Supervisory Board for the adoption of the ECB's supervisory decisions cannot be excluded by the fact that legally the Supervisory Board does not take binding external decisions.

Indeed, the content of the ECB's supervisory decisions is predetermined by the Supervisory Board and the Governing Council cannot, as a rule, amend it, but only object to it fundamentally (though not exclusively) on monetary policy grounds.

Whilst this is certainly true for micro-prudential decisions, it is less true for macro-prudential ones. Indeed, in this field the role of the Governing Council includes the possibility to amend the Supervisory Board's proposals and even to take decisions in the absence of these proposals.

Moreover, since even Pillar 2 decisions may be adopted for macro-prudential purposes, both the substantial and the formal involvement of the Governing

information in the form of anonymised COREP and FINREP data to the monetary policy function of the ECB upon request on a need to know basis, except where Union law provides otherwise.

2. The ECB's policy functions shall not disclose confidential information containing assessments or policy recommendations to the respective other policy function, except upon request on a need to know basis, and ensuring that each policy function is exercised in accordance with the applicable objectives, and where such disclosure has been expressly authorised by the Executive Board. The ECB's policy functions may disclose confidential aggregated information containing neither individual banking information nor policy-sensitive information related to the preparation of decisions to the respective other policy function upon request on a need to know basis, and ensuring that each policy function is exercised in accordance with the applicable objectives".

For further details on the decision see ECB, *SSM Quarterly Report*, 2014/4, pp. 11-12.

Council in the supervisory decision-making process – and, as the case may be, in the consequent liability³⁷⁶ – appears broader than expected.

Against this backdrop one may conclude that the Supervisory Board's contribution to the ECB's final decision may be less or more material depending on the features (general or particular) and the purpose (micro- or macro-prudential) of the decision.

Moreover, it is worth noting that under CJEU case law, deficiencies in the procedure, including deficiencies pertaining to preparatory acts are tantamount to a breach of an essential procedural requirement, which, as such, may affect the validity of the final decision.³⁷⁷

Thus, where the unlawfulness of an ECB supervisory decision is due to a Supervisory Board's proposal and that decision caused damage to its addressee or to third parties, the Supervisory Board cannot avoid its liability to the extent that it concurred in the adoption of the decision.

Apart from the Supervisory Board, the other new ECB internal bodies are unlikely to be held liable since their activity is a mere internal one and/or their assessment is not binding on either the Supervisory Board or the Governing Council.³⁷⁸

Nevertheless, to the extent that the Supervisory Board would take into account the opinion of the ABoR and this were affected by a patent error of law, a concurrent liability of the ABoR cannot be excluded.

Whilst not vested with supervisory powers, the Executive Board is still the ECB's top administrative body responsible for the internal organisation and staff of the ECB.

This is all the more true in the light of the organisational framework pertaining to the ECB's supervisory tasks resulting from the ECB provisions implementing the SSMR.

³⁷⁶ See Part II, § 8.3.

³⁷⁷ See CFI, Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, *Artogodan GmbH and Others v Commission of the European Communities*, § 197: "the procedure established in Article 15a of Directive 75/319 is characterised by the vital role accorded to an objective and detailed scientific assessment by the CPMP [Committee for Proprietary Medicinal Products] of the substances in question. Although the CPMP's opinion does not bind the Commission, it is none the less extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission's decision unlawful".

³⁷⁸ As per Article 8 (2) of the Rules of Procedure of the Supervisory Board, this latter "may ask the Chair or the Vice-Chair to adopt ... (ii) final decisions, where such delegation of powers involves limited and clearly defined executive powers, the exercise of which is subject to strict review in the light of objective criteria established by the Supervisory Board". It is not crystal clear what "final decisions" refer to. Nevertheless, to the extent that the Chair or the Vice-Chair of Supervisory Board depart from those criteria, their concurrent, individual, liability cannot be excluded.

Indeed, under these provisions the role of the Supervisory Board in the internal structure devoted to the supervisory tasks is very limited, whilst in this field the decision-making power basically remains under the remit of the Executive Board.

It is beyond the scope of this paper to ascertain whether or not this internal allocation of responsibilities would be in line with the provisions of the SSMR on the principle of separation between the monetary and supervisory functions and the overarching role of the Supervisory Board in the field of banking supervision.

Irrespective of the answer one may give to this question, to the extent that alleged ECB inaction is the outcome of a defective organisation or, more specifically, the effect of an inadequate allocation of staff, resources or information, the Executive Board cannot avoid its liability.

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