



## EUROPEAN POLICY ANALYSIS

# The ECB's power over non-euro countries in the banking union

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### Summary

Sweden and other non-euro countries are currently pondering membership of the European banking union, a membership that would require them to enter into a close cooperation with the European Central Bank (ECB). This analysis aims to demonstrate how non-euro countries would be bound by legal acts adopted by the ECB within the framework of the Single Supervisory Mechanism (SSM). However, the ECB's role in the SSM leads to two peculiarities for non-euro countries. First, the close cooperation would include mechanisms for disagreement, under which non-euro countries would not be bound by ECB acts should they object to them. Second, the ECB lacks directly applicable powers over supervised banks established in non-euro countries. Its acts must therefore be carried out by a national competent authority (NCA).

The paper also discusses how and by whom the performance of supervisory tasks might be challenged in non-euro countries. The established solutions would apply with adjustments, since all ECB acts must be channelled through an NCA's acts. While it is likely that an internal administrative review of the ECB's decisions would also be available in non-euro countries, the legality of the ECB's acts and the NCA's decisions could be reviewed in the EU courts and in the national courts, respectively. Lastly, liability will have to be allocated between the ECB and the relevant NCA when compensation is sought for damage suffered as a result of a supervisory procedure.

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## 1 Introduction

The European banking union gathers together all Member States whose currency is the euro. Non-euro area Member States may join the banking union using an opt-in facility provided for in the relevant legal framework.

Several non-euro Member States are currently envisaging participating in the banking union or wondering whether they should. The Danish central bank has advocated an application for banking union membership.<sup>1</sup> Bulgaria filed a request on 18 July 2018 to establish a so-called *close cooperation* between the ECB and the central bank of Bulgaria.<sup>2</sup> Croatia did the same on 27 May 2019.<sup>3</sup> A public inquiry in Sweden has recently been published about the pros and cons of joining the banking union, and a debate on this issue is expected to take place in the coming months.<sup>4</sup>

“[...] the EU banking union already affects non-euro Member States whose banks have developed extensive cross-border activities in euro Member States [...]”

A number of advantages have been put forward for the participation of non-euro Member States in the banking union.<sup>5</sup> It is submitted that, *inter alia*, the centralisation of prudential banking supervision at EU level will improve supervision by enhancing the consistency of supervisory practices and avoiding possible home bias in supervision, hence bringing credibility benefits for the domestic banking sector. Moreover, the EU banking union already affects non-euro Member States whose banks have developed extensive cross-border activities in euro Member States, so that, instead of a “banking union through the back door”,<sup>6</sup> it would be preferable for these states to participate so that they get a say in the decision-making process of the banking union. Last, non-euro Member States will feel greater loneliness after Brexit, given the size and the power of the British banking sector. On the other hand, participation in the banking union also brings disadvantages. Non-euro countries would lose sovereignty with respect to the supervision of their banking systems. Moreover, even if participation in the banking union would give them a say in the decision-making process, they

would not be put on an equal footing as regards the decision-making process within the integrated supervision system.

Against that background, the aim of this analysis is not to take a position as to whether non-euro countries should join the European banking union or remain outside. It is to point out some of the legal implications of participation in the banking union. More precisely, the aim of this analysis is to assess the extent to which a Member State whose currency is not the euro and that chooses to become a member of the banking union will be bound by legal acts adopted by the ECB for the purposes of its supervisory tasks. It is worth assessing this because, pursuant to Article 139(2) (e) TFEU, legal acts of the ECB do not, as a rule, apply to such a Member State. The purpose of this analysis is also to envisage how and by whom the performance of supervisory tasks might be challenged in non-euro area Member States. However, it is necessary first to give a brief outline of the banking union and the situation facing Member States whose currency is not the euro and that wish to join the banking union.

## 2 The banking union and the non-euro area Member States

### 2.1 Objectives and elements of the banking union

The first responses to the financial crisis that unfolded in Europe in the summer of 2007 and reached its peak after the fall of Lehman Brothers in September 2008 consisted largely of unilateral actions by Member States; they included actions such as bank rescues and guarantees, which sought to protect the Member States’ own financial systems and institutions from spillover effects. A major consequence of these unilateral actions was that the soundness of a financial institution then became dependent on the budgetary capacity of the Member State backing it, and the Member State in turn incurred large liabilities that affected the soundness of its public finances. The financial crisis turned into a sovereign debt crisis.

The banking union has been designed to break the ‘doom loop’ between euro-area sovereign debt and the banking system (as the market lost faith in the ability of Member States encumbered by the costs of bank rescues to repay sovereign debt and as the banks became further weakened by exposure to

sovereign debt). Its aim is to restore financial stability while minimising costs to taxpayers, to complete the Economic and Monetary Union (EMU), and ultimately to contribute to economic recovery.<sup>7</sup>

The banking union consists of three pillars. There is a Single Supervision Mechanism (SSM), a Single Resolution Mechanism (SRM) backed by a Single Resolution Fund (SRF), and a common system for deposit protection, the European Deposit Insurance Scheme (EDIS), which is still awaiting completion.

The SSM was intended to create “an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution” and to ensure “the consistent application of the single rulebook to credit institutions”.<sup>8</sup> To that end, banking supervision, which until then had been performed at the national level under the coordination of the European System of Financial Supervision (ESFS), was shifted to the EU level, with supervision being exercised by the European Central Bank (ECB), whether directly or by national supervisors under the oversight of the ECB. The centralisation of banking supervision is designed to avoid the systemic risks inherent in the previous system in which the national supervision of credit institutions operated within an integrated banking market, and to safeguard financial stability in the EU and in each Member State.

“The centralisation of banking supervision is designed to avoid the systemic risks inherent in the previous system [...]”

The SRM brings the resolution of euro area banks within the control of a new European agency, the Single Resolution Board (SRB), and puts in place a Single Resolution Fund (SRF) composed of contributions from credit institutions to support resolution across the participating Member States.<sup>9</sup> Its goal is to ensure an orderly resolution of failing banks with minimum impact on the real economy and fiscal stance of Member States.

The EDIS aims to reduce depositors’ vulnerability to large shocks by providing strong and uniform insurance coverage for all depositors, regardless of their geographical location within the Union.

This goal is to be achieved through the progressive transfer of funds and of the management of pay-out events to the EDIS from national deposit guarantee schemes.<sup>10</sup>

This banking union structure with three pillars is founded on the Single Rulebook,<sup>11</sup> a set of legislative and non-legislative harmonised rules applicable in all 28 Member States as part of the single market for financial services. The Single Rulebook lays down stronger prudential requirements for credit institutions, enhanced protection for depositors and common rules for managing failing credit institutions. In other words, the Single Rulebook provides the substantive regulatory framework for the banking union,<sup>12</sup> while the common implementation of these rules is provided by the SSM and the SRM.

## 2.2 Division of powers between the ECB and national competent authorities (NCAs) within the SSM<sup>13</sup>

Under Article 127(6) TFEU,<sup>14</sup> the SSM Regulation assigns to the ECB an extensive range of “specific tasks” concerning policies relating to the prudential supervision of credit institutions established in the participating Member States. The supervisory tasks not conferred on the ECB by the SSM Regulation remain within the remit of the competent authorities of the participating Member States,<sup>15</sup> which accordingly retain the power to:

- receive notifications from credit institutions in relation to the right of establishment and the free provision of services;
- supervise bodies which are not covered by the definition of credit institutions under Union law;
- supervise credit institutions from third countries establishing branches or providing cross-border services in the Union;
- supervise payments services;
- carry out day-to-day verifications of credit institutions,
- carry out the function of competent authorities over credit institutions in relation to markets in financial instruments; and
- prevent the use of the financial system for the purposes of money laundering and terrorist financing
- ensure consumer protection.<sup>16</sup>

By virtue of Article 4(1) of the SSM Regulation, “the ECB shall ... be exclusively competent to carry out” the tasks conferred on it by the SSM Regulation

for micro-prudential purposes. Pursuant to Article 6(1) of the SSM Regulation, those exclusive tasks are, however, to be performed by the ECB “within a single supervisory mechanism composed of the ECB and national competent authorities”, with the ECB being responsible for the effective and consistent functioning of that mechanism.

**“The banking union is intended to prevent national budgets (i.e. domestic taxpayers) from being used to bail out failing banks.”**

It follows from the overall scheme of Articles 6(4) to 6(6) of the SSM Regulation that, within the SSM, the ECB is exclusively competent to grant and withdraw banking licences and to assess notifications of disposals and acquisitions for all credit institutions. With respect to the other tasks relating to micro-prudential supervision listed in Article 4(1) of the SSM Regulation, a distinction is made between “significant” and “less significant” banks.<sup>17</sup>

The ECB is to carry out the direct supervision of “significant” entities, but the NCAs must assist the ECB with the direct prudential supervision of significant banks by submitting draft decisions, and by preparing, implementing and enforcing the ECB’s decisions. When assisting the ECB, they must follow the ECB’s instructions.<sup>18</sup> The assistance role of the NCAs consists, in particular, of the participation of NCA agents in the joint supervisory teams (JSTs) whose task it is to perform the day-to-day supervision of the significant entities.<sup>19</sup>

The direct supervision of “less significant” entities falls to the national authorities.<sup>20</sup> However, the national authorities must conduct the direct prudential supervision of smaller banks under the oversight of the ECB, which has the competence to issue to those authorities regulations, guidelines or general instructions on how to perform the supervisory tasks, and to decide that it will itself directly exercise all the relevant powers for one or more less significant credit institutions “to ensure consistent application of high supervisory standards”.<sup>21</sup>

Finally, the ECB has also been granted some macro-prudential powers, which enable it to impose more

stringent measures if macro-prudential concerns are not adequately addressed at the national level.<sup>22</sup>

### **2.3 The banking union, the internal market and non-euro Member States**

The banking union primarily concerns euro Member States because its establishment was closely linked to the objective of consolidating the EMU by severing the link between banks and their sovereign states.<sup>23</sup> The banking union is intended to prevent national budgets (i.e. domestic taxpayers) from being used to bail out failing banks. In particular, the centralisation of banking supervision was considered necessary in order to repair the banking sector, since the ineffective and weak pre-crisis supervisory practices in many euro Member States had contributed to the European banking and sovereign debt crisis. The ECB was deemed to be the appropriate body for the centralisation of bank supervision.<sup>24</sup> However, entrusting banking supervision to the ECB on the basis of Article 127(6) TFEU, when the nature of the ECB is that of an institution of the EMU, seemed to imply that the jurisdiction of the SSM was confined to the euro Member States.<sup>25</sup>

At the same time, the banking union also relates to the internal market and the provision of banking services across the Union. The legislative acts forming part of the Single Rulebook, as well as the SRM regulation, have thus been adopted on the basis of Article 114 or Article 53 TFEU. Unified banking supervision, at the very least, reduces the compliance costs in the provision of banking services within the SSM. Article 127(6) TFEU is therefore serving the purposes of both the EMU and the single market, the double nature of Article 127(6) TFEU as an EMU provision and a single market clause being confirmed by the fact that it applies to all Member States and requires an unanimous decision from all of them if a decision vesting tasks of prudential supervision with the ECB is to be adopted.

In order to prevent the fragmentation of the financial internal market that could result from the mismatch between the SSM and the single market, it was therefore decided to leave the banking union open to the participation of Member States whose currency is not the euro. Thus, the SSM Regulation provides for the possibility that a non-euro Member State could become part of the SSM on a voluntary basis by entering into a so-called *close cooperation*

with the ECB. Participation in the SSM by virtue of a close cooperation also entails participation in the single resolution mechanism.<sup>26</sup>

## 2.4 Precondition for the establishment of a close cooperation with the ECB

Close cooperation between the ECB and the NCA of a Member State whose currency is not the euro is set up by a decision of the ECB at the request of the Member State concerned. The request must be accompanied by the Member State's undertaking to abide by all the ECB's acts relating to its prudential tasks. The general system for this opt-in facility is set forth in Article 7 of the SSM Regulation, and further specified in Articles 106 to 119 of the SSM Framework Regulation and in a decision adopted by the ECB on the basis of Article 7 of the SSM Regulation.<sup>27</sup>

This ECB decision, in particular, provides that the application of the requesting Member State shall include undertakings "that its national competent authority and its national designated authority will adhere to any instructions, guidelines or requests issued by the ECB" and "that it will adopt the relevant national legislation to ensure that legal acts adopted by the ECB (...) 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".<sup>28</sup> Such commitments are regarded as a "necessary pre-condition for an effective exercise of supervisory tasks" in that they make sure that "supervisory decisions are implemented fully and without delay".<sup>29</sup>

However, the question that immediately arises is how to reconcile those secondary law demands with the primary law exclusion of the applicability of the ECB's legal acts to non-euro area Member States. This question is addressed below.

## 3 Binding force of ECB's legal acts on non-euro area Member States

### 3.1 The rule: The ECB's legal acts are not binding on non-euro area Member States

The ECB's legal acts shall not be binding upon non-euro Member States. This limitation is explicitly laid down in primary EU law. Under Article 139(2) (e) TFEU, Article 132 TFEU, which empowers

the ECB to adopt legal acts (regulations, decisions, recommendations and opinions), "shall not apply" to Member States whose currency is not the euro. Likewise, Article 42 of the European System of Central Banks (ESCB) Statute states that Article 34 of the ESCB Statute, which reiterates Article 132 TFEU, "shall not confer any rights or impose any obligations" on non-euro Member States.

This limitation seems to conflict with the close cooperation design, under which non-euro Member States wishing to join the banking union must undertake to comply with ECB's acts. However, several arguments may be put forward to refute the existence of a conflict of norms. Even if all of these arguments are not equally convincing, they ultimately impel us to acknowledge the legality and legal value of the pre-condition to the establishment of a close cooperation.

**"Close cooperation between the ECB and the NCA of a Member State whose currency is not the euro is set up by a decision of the ECB at the request of the Member State concerned."**

The first way to negate any contradiction would be to focus on the wording of the respective provisions and hence to point out that the primary law limitation is about the ECB's regulations, decisions, recommendations and opinions, whereas the commitment required by the close cooperation scheme concerns the ECB's instructions, guidelines and requests. This argument is not convincing. It amounts to paying too much attention to the name of the act concerned, whilst the Court of Justice constantly holds that in order to determine the legal nature of an act taken by an institution, the focus must be on the content and scope of the act concerned, whatever its form or designation.<sup>30</sup> In line with the settled case law, the ECB has therefore rightly underlined that it follows from Articles 139(2)(e) TFEU and 42 of the ESCB Statute that it is not only the legal acts mentioned in Article 132 TFEU but also the other legal instruments used by the ECB (such as guidelines and instructions) that are not binding on Member States whose currency is not the euro.<sup>31</sup>

It might also be argued that the exclusion of any binding character of the ECB's acts on non-euro Member States, as stated in primary law, only applies for the purposes of the definition and implementation of monetary policy. As Article 127(6) TFEU is applicable to all Member States,<sup>32</sup> it would follow, according to this line of argument, that the prohibition on the ECB from adopting acts that are binding on non-euro Member States does not apply as regards its prudential supervisory tasks. However, this argument proves too simple. As already pointed out, Article 127(6) TFEU is a provision that is actually part of the monetary policy,<sup>33</sup> even if its subject matter also relates to the internal market. Furthermore, and more importantly, the reason why it cannot be inferred from the Treaty alone that legal acts adopted by the ECB within the SSM are applicable to non-euro Member States as soon as those states have entered into a close cooperation is an *institutional* one:<sup>34</sup> the ultimate decision-maker for the ECB, even with respect to its prudential supervisory mandate, is the Governing Council, on which Member States whose currency is not the euro are not represented.

**“[...] the voluntary character of the close cooperation provides the most compelling argument in favour of the binding force of the ECB's legal acts on non-euro participating Member States.”**

Finally, the voluntary character of the close cooperation provides the most compelling argument in favour of the binding force of the ECB's legal acts on non-euro participating Member States. In accordance with the legal device provided by the SSM Regulation agreed by all Member States, a Member State whose currency is not the euro chooses freely to participate in the banking union and to undertake to abide by the legal acts taken by the ECB within the SSM. It is thus on this voluntary basis that the binding force of the ECB's legal acts on the Member State concerned rests, notwithstanding what is laid down in Article 139(2)(e) TFEU and Article 42 of the ESCB Statute. Whilst the binding force of the ECB's acts on euro Member States derives directly from the SSM Regulation, Article 132 TFEU and Article 34 of the ESCB Statute, this mediation or channel

is required where non-euro participating Member States are concerned. And the close cooperation scheme provided for in the SSM Regulation cannot be viewed as a breach of primary law, because the free participation of non-euro countries in the banking union allowed by this scheme serves the primary law objective of “an ever closer union”.<sup>35</sup>

### **3.2 Peculiarities of the binding force of ECB's legal acts on Member States in close cooperation**

Legal acts adopted by the ECB within the framework of the SSM are binding on non-euro participating Member States as well as on euro Member States, but the binding force of the ECB's legal acts on the former presents several peculiarities.

The first of these pertains to the way in which sanctions may be applied to non-compliance with the ECB's legal acts. If a violation of an act of the ECB has been perpetrated by a euro Member State, the enforcement action takes the usual form of an infringement procedure, following the regime set out in Articles 258 to 260 TFEU.<sup>36</sup> For non-euro participating Member States, by contrast, the SSM Regulation provides for a specific enforcement mechanism, which may lead to the termination of the close cooperation. Pursuant to Article 7(5) of the SSM Regulation, where a national competent authority from a Member State in close cooperation does not abide by an act of the ECB, the ECB may decide to issue a warning to the Member State concerned, notifying it that it may suspend or terminate the close cooperation if no decisive corrective action is undertaken within fifteen days.

The effectiveness of the binding force of the ECB's acts on Member States in close cooperation is thereby ensured. However, a second peculiarity relating to the decision-making process tends to ensure that Member States in close cooperation will, in principle, not be compelled to comply with the ECB's acts to which they have not assented. Indeed, in order to respect the Treaty requirement for the Governing Council to be the ultimate decision-making body of the ECB,<sup>37</sup> the Supervisory Board of the SSM may only propose “complete draft decisions” to the Governing Council, and these shall be deemed adopted unless the latter objects.<sup>38</sup> Should a Member State in close cooperation disagree with the objection of the Governing Council, it may notify the ECB that it will not

be bound by the possibly amended decision, in which case the ECB shall then consider whether to suspend or terminate the close cooperation with that Member State.<sup>39</sup> In addition, if a non-euro participating Member State disagrees with a draft decision of the Supervisory Board in relation to a supervised entity located on its territory, and the Governing Council confirms the draft decision, the Member State may request that the ECB terminates the close cooperation with immediate effect, and it is then not bound by the ensuing decision of the Governing Council.<sup>40</sup> These “safeguards” are meant to compensate for the asymmetry in the decision-making process of the ECB within the SSM between euro Member States and non-euro Member States that results from the fact that, although they are represented on the Supervisory Board, the latter are not members of the Governing Council.<sup>41</sup> Of course the opt-out facility offered by those safeguards for a non-euro participating Member State wishing to depart from an act of the ECB may be said to come at a high price, particularly as the Member State concerned may not enter into close cooperation again before three years has elapsed since the close cooperation was terminated.<sup>42</sup>

**“[...] the ECB’s legal acts are not directly applicable *in* Member States that are in close cooperation. To have a domestic effect, they need the medium of national law.”**

A last peculiarity of the binding force of the ECB’s acts on Member States in close cooperation ensues from the fact that “the ECB does not have directly applicable powers”<sup>43</sup> over supervised entities established in those Member States. This statement was deemed necessary because of the exclusion by primary law of the applicability of the ECB’s legal acts to Member States whose currency is not the euro. It means, first, that the ECB’s legal acts cannot produce a direct effect; that is, they cannot of themselves impose any obligation or confer any right on an individual, here a supervised entity, which may be invoked before the national courts. It means, moreover, that the ECB’s legal acts are not directly applicable *in* Member States that are in close cooperation. To have a domestic effect, they need the medium of national law. That is why, according to the ECB decision on close

cooperation, a Member State whose currency is not the euro and that wishes to enter into a close cooperation must pass a national legislation “to ensure that legal acts adopted by the ECB (...) are binding and enforceable in the requesting Member State”, so that not only will its NCA “adhere to any instructions, guidelines, measures and requests issued by the ECB” but also that its NCA will “be obliged to adopt any measure in relation to supervised entities requested by the ECB”.<sup>44</sup> Thus it emerges from the SSM legal framework that, whereas the ECB is empowered for the purposes of its supervisory tasks to take measures of a general or individual scope directly applicable in euro Member States, it may only address general or specific instructions, guidelines or requests to an NCA in close cooperation, and these instructions, guidelines or requests must then be implemented on the national level.<sup>45</sup> Pursuant to Article 108(4) of the SSM Framework Regulation, the ECB must specify, in the instruction, request or guideline, a relevant time limit for the adoption of the measure by the NCA in close cooperation, and this time limit must be no less than 48 hours unless earlier adoption is necessary to prevent irreparable damage.<sup>46</sup> In particular, in cases where the ECB is vested with the power to address decisions to supervised entities established in euro Member States, it shall instead instruct the NCA in close cooperation to address such decisions to supervised entities located in the territory of the Member State concerned.<sup>47</sup> Even regulations enacted by the ECB on the basis of the SSM Regulation,<sup>48</sup> which under Article 288 TFEU are in principle “directly applicable in all Member States”, will have to go through the channel of national law to produce legal effects in Member States in close cooperation.

In brief, what is required is a kind of dualist solution, where there must be national measures to implement the ECB’s legal acts in order for them to have legal effect in the domestic legal order. This is obviously at odds with the specific characteristics of EU law. The Court of Justice has long ago asserted the direct applicability of EU law,<sup>49</sup> meaning that EU norms become a source of law and have legal effect in the domestic legal orders from the date of their entry into force at the EU level.<sup>50</sup> The Court of Justice has, accordingly, discarded any dualist solution of reception, introduction or transformation of EU norms into national law.<sup>51</sup> However, the direct applicability of the ECB’s supervisory measures was not deemed

possible without full EMU participation.<sup>52</sup> The devices enshrined in the close cooperation scheme thus mark out the peculiar feature of EU legal acts within the SSM as acts emanating from an institution specific to the Eurosystem.

### 3.3 Do all the ECB's legal acts have binding force?

The question to examine here is whether any legal act of the ECB, be that in the form of a regulation, a recommendation, a guideline, an instruction or a request, will be binding on Member States in close cooperation. A positive answer seems to flow from the very terms of the commitments made by a non-euro Member State wishing to participate in the SSM. With a view to meeting the conditions on the establishment of a close cooperation, a non-euro Member State consents to “adhere to any instructions, guidelines, measures or requests issued by the ECB” and undertakes to adopt a national legislation ensuring that “legal acts adopted by the ECB (...) are binding and enforceable”.<sup>53</sup> However, in reality the obligation to comply with a legal act of the ECB and the duty to respect its binding force only exists – and hence may only be breached – if the legal act concerned is intended to be binding.

If the Treaty is given credence, a regulation is, pursuant to Article 288 TFEU, “binding in its entirety”, while recommendations are described by the same provision as having “no binding force”. With respect to the scope of the guidelines and instructions issued by the ECB within the SSM, the legal framework of the SSM indicates that, in principle, they have binding force. Article 6(5) of the SSM Regulation provides that the ECB shall issue guidelines and general instructions on how the NCAs are to perform their tasks and adopt supervisory decisions, and Article 6(3) states that the NCAs “shall follow the instructions given by the ECB”.<sup>54</sup>

It is, however, well known that, to determine whether legal acts “are intended to have binding legal effects”,<sup>55</sup> one must ultimately rely, whatever the form or designation of the act, on its wording and context, its substance and the intention of its authors. The assessment of those criteria will reveal whether the act concerned has a mandatory nature. This is the lesson that transpires from the consistent case law about the admissibility of an action for annulment. To give but one telling example, the Court of Justice recently had to rule

on the classification of a “recommendation” as a challengeable act for the purposes of Article 263 TFEU. Although Article 263 TFEU expressly excludes recommendations from the class of acts amenable to an action for annulment in connection with the failure of Article 288 TFEU to confer binding force on that type of act, the Court found it necessary to examine whether the contested recommendation constituted a genuine recommendation or was in fact an act producing a binding effect and hence was an actionable measure within the meaning of Article 263 TFEU. The Court came to the conclusion that the challenged recommendation was not intended to have binding legal effects on the basis of the following considerations: it was drafted in an essentially non-binding manner; the content revealed that the Commission that authored the act had no intention to confer such effects on that recommendation; and it emerged from the context that there was an absence of will to legislate on the subject matter.<sup>56</sup>

It should nonetheless be noted that even if a properly conducted analysis leads to the conclusion that a legal act does not have binding legal effect, that does not mean that it must be regarded as having no legal effect at all. The Court of Justice has held that genuine recommendations are the expression of “a power to exhort and to persuade”,<sup>57</sup> and national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted to implement them, or where they are designed to supplement binding EU provisions.<sup>58</sup> Guidelines issued by EU bodies on the interpretation of certain EU law provisions may also be taken into account by EU courts (the General Court and the European Court of Justice) but do not bind them, because these courts remain the authoritative interpreters of EU law.<sup>59</sup>

## 4 How to challenge the performance of supervisory tasks

### 4.1 Internal administrative review by the Administrative Board of Review

#### 4.1.1 The general scheme

Article 24 of the SSM Regulation allows for an internal administrative review of a decision taken by the ECB within the framework of the SSM. The

review is to be carried out by the Administrative Board of Review, which is composed of five persons of high repute who shall act independently and in the public interest.<sup>60</sup> The Board shall ensure the procedural and substantive conformity of such decisions with the SSM Regulation.<sup>61</sup> A claimant may be any natural or legal person who is the addressee of the decision or who is directly and individually affected by it.<sup>62</sup> A notice of review shall be lodged within one month of the notification of the decision to the applicant or, in the absence of such notification, of the day on which the decision came to the applicant's knowledge.<sup>63</sup>

If the application is deemed admissible, the Administrative Board of Review shall carry out a review that is limited to an assessment of the grounds invoked in the request; at the end of the review and no later than two months from the receipt of the request it shall issue a reasoned opinion and remit the case to the Supervisory Board for the preparation of a new draft decision.<sup>64</sup>

The opinion expressed by the Administrative Board of Review is not binding, but the Supervisory Board shall take it into account and promptly submit a new draft decision to the Governing Council, proposing to abrogate the initial decision, to replace it with a decision of identical content, or to replace it with an amended decision. The new draft decision shall be deemed adopted unless the Governing Council objects, within a maximum period of ten working days.<sup>65</sup>

The review by the Administrative Board of Review is "optional".<sup>66</sup> Moreover, it is said to be "without prejudice to the right to bring proceedings before the CJEU".<sup>67</sup> Nothing therefore rules out the possibility of the applicant appealing to the General Court after having sought an internal administrative review. Nor is a review a precondition to an action before the EU courts, the party affected by a supervisory decision of the ECB being entitled to immediately bring an action for annulment under Article 263 TFEU.

#### 4.1.2 Application to Member States in close cooperation

As has already been outlined, the ECB "does not have directly applicable powers"<sup>68</sup> over supervised entities established in non-euro participating Member States. As a consequence, in cases where the ECB is endowed with the power to address

decisions to supervised entities established in euro Member States, it must instead instruct the NCA in close cooperation to adopt such decisions and to give notice of them to supervised entities located in the territory of the Member State concerned.<sup>69</sup>

The question then arises as to whether the internal administrative review provided in Article 24 of the SSM Regulation is also open to supervised entities established in Member States in close cooperation. To stick to the wording of the relevant provision, the answer would be negative: it is the review of a "decision" of the ECB that may be requested by the person who is the addressee of that decision or who is individually and directly concerned by it, and not the review of an "instruction" of the ECB addressed to an NCA or of a decision taken by an NCA in accordance with an instruction of the ECB. However, such an interpretation would result in a deficit of legal protection for all credit institutions established in non-euro participating Member States.

**"As has already been outlined, the ECB 'does not have directly applicable powers' over supervised entities established in non-euro participating Member States."**

Another interpretation, starting from the aim of the internal review mechanism (which is to offer an administrative remedy to every person negatively affected by a supervisory decision of the ECB), should thus be favoured. According to this interpretation, supervised entities located in Member States in close cooperation should also be entitled to make use of the review mechanism provided in Article 24 of the SSM Regulation. Such a request would be made not in order to challenge the NCA's decision to comply with the ECB's instruction, because for this the Administrative Board of Review would lack *ratione personae* jurisdiction,<sup>70</sup> but in order to contest the instruction of the ECB. Instructions of the ECB requesting an NCA in close cooperation to address a supervisory decision to a credit institution have indeed exactly the same function as a supervisory decision of the ECB addressed to a credit institution established in a euro Member State, and they certainly will have the same content. The only difference is that they have to be made through the

channel of the decision-making power of the NCA, to overcome the ECB's lack of directly applicable powers.

It is certainly true that specific instructions from the ECB are not “decisions” in formal terms, but the word “decision” should rather be understood in a substantive way, and, in line with settled case law, designate all measures that are intended to have binding legal effects capable of affecting the interests of the applicant.<sup>71</sup>

Moreover, although the specific instructions of the ECB are not addressed to the supervised entities located in the Member States in close cooperation, they are of individual and direct concern to those entities, so that the latter have the standing to challenge them before the Administrative Board of Review. Indeed, the admissibility requirements of a request for administrative review mirror the *locus standi* conditions set out in Article 263(4) TFEU for an action for annulment before the Court of Justice, and, accordingly, should be applied and interpreted in the light of the relevant case law.<sup>72</sup> As will be shown below, the supervised entity which is the target of a specific instruction addressed by the ECB to an NCA in close cooperation is individually and directly concerned by it within the meaning of Article 263(4) TFEU.

If the administrative remedy is thus in all likelihood also available to supervised entities established in Member States in close cooperation, it goes without saying that an NCA is not entitled to file a request for review before the Administrative Board of Review, irrespective of whether it is the authority of a participating non-euro Member State or the authority of a euro Member State.

A last issue concerns the scope of the review. Article 24(1) of the SSM Regulation states that the review “shall pertain to the procedural and substantive conformity” of the ECB's supervisory decision with the SSM Regulation. Article 22 of the SSM Regulation subjects the decision-making procedures of the ECB to due process requirements, especially the rights of defence of the persons concerned. The difficulty regarding supervised entities established in Member States in close cooperation arises from the ECB instructing NCAs to take supervisory decisions addressed to credit institutions instead of taking those decisions itself. Who is to respect the rights of defence? Since the content of the decision will already be predetermined by the instruction of

the ECB, with no margin of discretion left for the NCA, I am of the view that respect for the rights of defence shall fall to the ECB if it is to be of some utility and possibly to influence the outcome of the decision-making process.

## 4.2 Judicial remedies

As a rule, the implementation of EU law is incumbent on national authorities<sup>73</sup> following administrative procedures governed by domestic law. The judicial control of those cases of indirect administration falls within the jurisdiction of the national courts. In some areas, the implementation of EU law is a matter for EU institutions, agencies or bodies which carry out their own administrative procedures, subject to the review of the EU courts.

“[...] there are a growing number of situations of “co-administration” in which EU and national bodies cooperate with the aim of implementing EU law.”

Apart from these traditional schemes of direct or indirect administration, there are a growing number of situations of “co-administration”<sup>74</sup> in which EU and national bodies cooperate with the aim of implementing EU law. The prudential supervision as designed within the framework of the SSM constitutes a telling example of co-administration. Cases of co-administration in which the final decision is issued by an authority of either the EU or the Member State under “composite administrative procedures”<sup>75</sup> (involving the participation to various degrees of institutions, bodies and agencies of both the EU and the Member State) may pose problems of judicial accountability.<sup>76</sup> As will be shown, difficulties such as these may increase in situations concerning Member States in close cooperation, whether the legality of an administrative action is disputed or a ruling on liability is sought.

### 4.2.1 Challenging the legality of a supervisory decision

As noted before, the making of supervisory decisions in Member States in close cooperation will follow the pattern of a decision being adopted by an NCA in accordance with a guideline, instruction or request issued by the ECB. More

precisely, if significant supervised entities are the target of a supervisory decision, the ECB may issue a general or specific instruction, request or guideline, whereas it may only issue a general instruction or guideline where less significant supervised entities are concerned.<sup>77</sup>

In the case of a supervisory decision adopted by an NCA in accordance with a *general* instruction given by the ECB, and supposing that this instruction is amenable to an action for annulment as an act having binding legal effect, the supervised entities concerned will not fulfil the *locus standi* conditions set out in Article 263(4) TFEU<sup>78</sup> to allow them to contest the legality of the instruction directly before the General Court. Only the indirect review route of Article 267 TFEU will be open to them. They will have to challenge the legality of the NCA's supervisory decision before the national judge in accordance with the conditions laid down by the national rules<sup>79</sup> and, in the course of these national proceedings, raise the invalidity of the ECB's general instruction in compliance with which the NCA adopted the supervisory decision. Pursuant to the decision in the *Foto-Frost* case,<sup>80</sup> the national court in charge of the main proceedings will then be bound to request the Court of Justice to make a preliminary ruling under Article 267 TFEU if there is doubt about the validity of the ECB's instruction, and will be entitled, under strict conditions, to grant interim relief.<sup>81</sup>

In contrast to the supervised entities, the NCA which is the addressee of the ECB's general instruction will meet the admissibility requirements set out in Article 263(4) TFEU to challenge the legality of the instruction directly before the General Court. An instruction of the ECB would not be regarded as merely a preparatory act and, as such, unreviewable.<sup>82</sup> In our scenario, an instruction of the ECB expresses the definitive position of the deciding authority and has the legal effect of predetermining the content of the final decision in the procedure,<sup>83</sup> and hence it is open to challenge through an action for annulment.

In the case of a supervisory decision adopted by an NCA in accordance with a *specific* instruction of the ECB, and supposing that instruction to be amenable to an action for annulment as an act having binding legal effect, it is not only the NCA to which the specific instruction is addressed but also the supervised entities concerned<sup>84</sup> that may

have standing under Article 263(4) TFEU to seek a direct review of the legality before the General Court. Provided that the credit institution has been the target of the specific instruction, it will be able to prove an individual concern in accordance with the *Plaumann* test.<sup>85</sup> It will also be able to show that the specific instruction of the ECB is of direct concern to it. According to established case law, the criterion of direct concern requires that the contested measure affects the legal situation of the applicant and leaves no discretion to the addressees of that measure who are entrusted with the task of implementing it.<sup>86</sup> Thus, where the national supervisor had no leeway in how to implement the ECB's instruction, the instruction will be regarded as being of direct concern to the supervised entity.<sup>87</sup> That will often be the case with specific instructions, which will predetermine the content of the national supervisory decision.

**“Those guarantees include, in particular, the duty of the ECB to provide adequate reasons for its decisions and the principle of sound administration [...]”**

The General Court will only conduct a light touch review, confining itself to verifying whether the procedural requirements were complied with, whether the statement of reasons was sufficient, whether the facts were accurately stated, and whether there was a manifest error of assessment or a misuse of power.<sup>88</sup> Indeed, the performance by the ECB of its banking supervisory tasks involves complex economic assessments, so that it must be allowed a margin of discretion.<sup>89</sup> Moreover, as in any case in which an EU authority has a broad discretion, EU courts will attach great importance to the respect for the rights guaranteed by the legal order of the European Union in administrative procedures. Those guarantees include, in particular, the duty of the ECB to provide adequate reasons for its decisions<sup>90</sup> and the principle of sound administration, which entails the duty to examine, carefully and impartially, all the relevant aspects of the individual case.<sup>91</sup>

Of course, the supervised entity may also indirectly raise the illegality of the ECB's specific instruction in the course of an action brought before the national courts to challenge the legality of the

national supervisory decision. However, if the supervised entity undoubtedly had standing to challenge the ECB's instruction under Article 263(4) TFEU but failed to do so within the two-month time limit, it cannot subsequently ask for an indirect review of legality through the preliminary ruling procedure.<sup>92</sup>

The last point to be dealt with concerns the transposition of the solution given in the *Berlusconi* ruling to the situation of a Member State in close cooperation.<sup>93</sup> In that case, the ECB had, pursuant to Article 15(2) of the SSM Regulation, opposed the acquisition by Mr Berlusconi of a qualified holding in a credit institution, following a proposal of the NCA, on the grounds that he did not meet the reputation requirement laid down in the national legislation. In parallel with an action for the annulment of the ECB's decision, brought before the General Court, Mr Berlusconi sought an annulment of the NCA's preparatory act before the Consiglio di Stato. The latter stayed the proceedings and referred to the Court of Justice the question of whether the exclusive jurisdiction conferred on the Court of Justice by Article 263 TFEU to review the legality of Union acts prevents national courts from reviewing the legality of national non-binding preparatory acts, which are part of a procedure under the SSM Regulation culminating in a binding decision of the ECB. The Court answered in the affirmative. In such a situation, where the decision-making power rests exclusively with the ECB and the ECB is not bound by the national preparatory acts, it is only the EU courts that are able to rule on the legality of the final decision adopted by the ECB and to examine, in order to ensure the effective judicial protection of the persons concerned, any defects vitiating the national preparatory acts that could affect the validity of that final decision.<sup>94</sup> In this scenario, national remedies against preparatory acts of Member State NCAs cannot exist alongside an action, as provided for in Article 263 TFEU, against the decision of the ECB bringing the administrative procedure established by the EU legislature to an end.<sup>95</sup>

When transposed to the situation of a Member State in close cooperation, the decision on the authorisation of the acquisition of a qualified holding would be adopted by the NCA in accordance with an instruction of the ECB and following a proposal from the NCA. Thus, the

*Berlusconi* solution means that the NCA's proposal, on the basis of which the ECB would issue its instruction, could not be subject to review by the national courts, but the legality of the ECB's instruction could be directly challenged before the EU courts by applicants having standing under Article 263(4) TFEU, and the EU courts would examine whether the NCA's proposal was vitiated by defects such as to affect the legality of the ECB's instruction. Such defects could result from a breach of national rules.<sup>96</sup> Moreover, the natural or legal person whose interests had been adversely affected would also be entitled to seek a review of the decision taken by the NCA in the national court under the national procedural rules, but he or she would be prevented from pleading the invalidity of the ECB's instruction before that national court, inasmuch as he or she had had, beyond any doubt, the right to seek its annulment before the General Court and had failed to do so within the time limit. The claim would be rejected as inadmissible.<sup>97</sup>

#### 4.2.2 Looking for liability<sup>98</sup>

Credit institutions<sup>99</sup> that have suffered damage in the course of a supervisory procedure may wish to claim compensation. Should they turn to the ECB or to the NCA in close cooperation? Should they sue the ECB before the Court of Justice in accordance with the liability conditions laid down in EU law?<sup>100</sup> Or should they instead bring an action against the Member State in the national court, an action that will be governed by national law, albeit to some degree Europeanised?<sup>101</sup> Recital 61 of the SSM Regulation states that,

... 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.

However, the difficulty with composite administrative procedures, like the ones provided for in the SSM legal framework, in which EU and national bodies contribute to the making of the decision, is that of joint or concurrent liability:<sup>102</sup> situations where both an EU institution and a Member State may be held liable. It raises the

thorny issue of the allocation of liability between the ECB and the NCA for losses incurred.

**“Credit institutions that have suffered damage in the course of a supervisory procedure may wish to claim compensation. Should they turn to the ECB or to the NCA in close cooperation?”**

It transpires from the case law that three situations are to be distinguished.

1. The first situation is that of the unlawful implementation of the legal act of an EU body. For instance, on request of the ECB pursuant to Article 18(5) of the SSM Regulation, the NCA in close cooperation imposes administrative penalties in breach of the enabling national legislation; or, in accordance with an instruction issued by the ECB under Article 9(1), subparagraph 3 of the SSM Regulation and Article 22 of the SSM Framework Regulation, the NCA makes use of the supervisory powers conferred on it by national law but disregards the conditions set out in the national law. In such a situation, since the NCA still has leeway in determining the content of the measure to be adopted, the damage does not result from a measure or from unlawful conduct attributable to the ECB. As a consequence, the supervised entity that claims to have been injured has to proceed against the NCA in the national court.<sup>103</sup>
2. The second situation is that of the correct application of an unlawful EU act. Suppose that the ECB gives an NCA in close cooperation an instruction that violates relevant Union law or even relevant national legislation, contrary to the requirements of Article 4(3) of the SSM Regulation. With respect to the allocation of liability in such a situation, the principle is that any damage ensuing from the implementation of the EU legislation by the national authority, which had no discretion in that regard, would therefore be attributable to the Union.<sup>104</sup> So, if the ECB’s instruction is worded in mandatory terms, the NCA in close cooperation has to abide by it. In that case, the damage suffered can in principle only give rise to non-contractual liability of the ECB on an action brought before

the General Court. The fact, as illustrated by the *Berlusconi* case, that the ECB’s instruction requiring the NCA in close cooperation to take a particular decision was based on a draft from the NCA would not change the solution, since the ECB was not bound to follow the draft. However, if the ECB’s allegedly unlawful mandatory instruction leaves the NCA in close cooperation a margin of discretion on how to implement it, there is no direct causality between the instruction and the loss; the harmful conduct must be regarded as attributable to the NCA, and the national courts retain sole jurisdiction to order compensation for such a loss.<sup>105</sup>

3. The third situation is when an EU institution confirms or approves an illegal national action or fails to perform its task of overseeing the proper national implementation of EU law provisions. Conduct of this nature by an EU institution may give rise to liability for the Union.<sup>106</sup> Such a situation could, for example, arise from the failure of the ECB to perform its duty<sup>107</sup> to oversee the supervisory procedures concerning less significant entities that are conducted by an NCA in close cooperation. Here there are two instances of harmful conduct, one attributable to the ECB, and the other to the NCA in close cooperation. To obtain compensation for the loss, the credit institution that has suffered harm would therefore have to bring two separate damages actions, one against the NCA in the national courts and the other against the ECB before the General Court. If the credit institution has simultaneously brought these two actions for compensation for the same damage, the EU court will wait until the national court has given judgment before ruling on the amount of the damage for which the ECB will be held liable, in order to avoid the applicant’s being insufficiently or excessively compensated because of the different assessment of that damage by the two different courts.<sup>108</sup>

## 5 Conclusion

Non-euro countries that choose to participate in the banking union will have to comply with the legal acts adopted by the ECB as part of its prudential supervision of credit institutions. However, the binding force on non-euro participating Member States of the legal acts of the ECB within the framework of the SSM presents several peculiarities.

- First, the close cooperation design provides for disagreement mechanisms that ensure that non-euro participating Member States will not be bound by acts of the ECB to which they object.
- Second, in order not to infringe the exclusion of the applicability of the legal acts of the ECB to non-euro-countries that is set out in EU primary law, the SSM legal framework provides that the ECB does not have directly applicable powers over supervised banks established in non-euro participating Member States. It follows that the ECB may only address requests, guidelines or instructions to an NCA in close cooperation and that this NCA must then take the supervisory decisions requested and address them to the banks concerned.

The fact that all the acts of the ECB must thus be channelled through national measures if they are to have legal effect in non-euro participating Member States also has consequences as regards the way in which the performance of supervisory tasks within the SSM may be challenged in those countries.

First, it is unlikely that this fact would prevent an internal administrative review of the ECB's decisions, as provided for by the SSM regulation, also being available in non-euro participating Member States. Second, not only may a review of the legality of the ECB's acts be sought before the EU courts but also a review of the legality of decisions adopted by the NCA to implement the ECB's acts may be sought in the national court. Third, as regards compensation for damage suffered as a result of a supervisory procedure, different situations will have to be distinguished in order to allocate liability between the ECB and the NCA.

“Non-euro countries that choose to participate in the banking union will have to comply with the legal acts adopted by the ECB as part of its prudential supervision of credit institutions.”

## Notes

<sup>1</sup> See Danmarks Nationalbank, Danish participation in the banking union, *Danmarks Nationalbank Monetary Review*, 4th Quarter, 2014.

<sup>2</sup> See Opinion of the ECB of 9 November 2018 on national legislation to be adopted for the purpose of establishing close cooperation between the European Central Bank and Bulgarian National Bank (CON/2018/49).

<sup>3</sup> See Opinion of the ECB of 8 July 2019 on national legislation to be adopted for the purpose of establishing close cooperation between the European Central Bank and Hrvatska narodna banks (CON/2019/25).

<sup>4</sup> Sverige och bankunionen, SOU 2019:52 (available at <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2019/12/sou-201952/>). See also P. E. Jansson, EU:s Bankunion och Sverige, *Europarättslig Tidskrift* (2017)3, 461. See very recently, T. Beck, Better In or Better Out: Weighing Sweden's options vis-à-vis the Banking Union, *SIEPS Report*, 2019:2.

<sup>5</sup> See Z. Darvas and G. Wolff, Should non-euro area countries join the Single Supervisory Mechanism?, *DANUBE: Law and Economics Review*, (2013) 2, 141; P. Hüttel and D. Schoenmaker, Should the 'outs' join the European banking union?, *Bruegel Policy Contribution*, Issue 3/2016 February 2016.

<sup>6</sup> A. B. Spendzharova and I. Emre Bayram, Banking union through the back door? How European banking union affects Sweden and the Baltic States, *West European Politics* (2016)39, 565.

<sup>7</sup> Commission, European financial stability and integration report 2013 (2014), SWD(2014) 170, at 76.

<sup>8</sup> Recital 87 of the Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM Regulation). The Single Rulebook is described below.

<sup>9</sup> See Regulation n° 806/2014 of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund.

<sup>10</sup> See Communication from the Commission on completing the Banking Union, COM(2017) 592 final.

<sup>11</sup> On the Single Rulebook, see V. Babis, Single Rulebook for prudential regulation of banks: Mission accomplished? *European Business Law Review*, (2015) 26, 779–803; A. Lefterov, The Single Rulebook: Legal issues and relevance in the SSM context. *ECB Legal Working Paper Series* n°15 (2015).

<sup>12</sup> The main legislative acts of the Single Rulebook are: 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 (CRD IV); Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (CRR); and Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD).

<sup>13</sup> See Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank*, 2017, ECLI:EU:T:2017:337, paras 20–28 and 54–64; this judgment was confirmed on appeal (see Case 450/17 P, *Landeskreditbank Baden-Württemberg – Förderbank*, 2019, ECLI:EU:C:2019:372). See also C. Gortsos, Competence sharing between the ECB and the national competent supervisory authorities within the Single Supervision Mechanism, *European Business Organization Law Review* (2015) 16, 401; J. P. Kovar, La Banque centrale européenne et les autorités nationales de surveillance, in F. Martucci (Ed.), *L'Union bancaire*, Bruylant 2016, 231.

<sup>14</sup> Art. 127(6) TFEU: “the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings”.

<sup>15</sup> See Art. 1, fifth sub-paragraph of the SSM Regulation.

<sup>16</sup> See Recital 28 of the SSM Regulation.

<sup>17</sup> According to Article 39 of the SSM Framework Regulation, the classification of a supervised entity as significant falls within the remit of the ECB. The assessment is to be made under the criteria laid down in Article 6(4) of the SSM Regulation and recalled in Article 39 of the SSM Framework Regulation. On 1 September 2019, the number of significant supervised entities was 116 (according to the list that is updated by the ECB every month).

<sup>18</sup> See Article 90(2) of the SSM Framework Regulation.

<sup>19</sup> See Articles 3 to 6 of the SSM Framework Regulation.

<sup>20</sup> The performance of the direct supervision of less significant banks by national supervisors should be regarded as the “decentralised implementation of an exclusive competence of the Union” (Case T-122/15, *Landeskreditbank Baden-Württemberg*, para 72).

<sup>21</sup> See Article 6(5)(a) and (b) of the SSM Regulation.

<sup>22</sup> See Article 5 of the SSM Regulation.

<sup>23</sup> See, for instance, the statement made by the Commission (Communication from the Commission, Towards the completion of the Banking Union, COM (2015) 587 final, p. 2): “Completing the Banking Union is an indispensable element of that plan (the plan for deepening Economic and Monetary Union). EMU needs a fully-functioning Banking Union to ensure effective transmission of the single monetary policy, better risk diversification across Member States and adequate financing of the economy. In addition, the completion of the Banking Union will reinforce financial stability in EMU by restoring confidence in the banking sector

through a combination of measures designed to both share and reduce risks”. See also, Five Presidents’ Report, Completing Europe’s Economic and Monetary Union, 2015 at 11: “In a Monetary Union, the financial system must be truly single or else the impulses from monetary policy decisions (e.g. changes in policy interest rates) will not be transmitted uniformly across its Member States. This is what happened during the crisis, which in turn aggravated economic divergence. Also, a single banking system is the mirror image of a single money. As the vast majority of money is bank deposits, money can only be truly single if confidence in the safety of bank deposits is the same irrespective of the Member State in which a bank operates. This requires single bank supervision, single bank resolution and single deposit insurance. This is also crucial to address the bank–sovereign negative feedback loops which were at the heart of the crisis.”

<sup>24</sup> See Report by the President of the European Council, Towards a genuine economic and monetary union, 26 June 2012, EUCO 120/12, at 4.

<sup>25</sup> See E. Wymeersch, The Single Supervisory Mechanism or “SSM”, Part One of the Banking Union, *ECGI Law Working Paper*, n° 240/2014, at 19.

<sup>26</sup> See Article 4 of the Regulation of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation).

<sup>27</sup> See Decision ECB/2014/5 of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro.

<sup>28</sup> Articles 3(1)(a) and(2)(a) of Decision ECB/2014/5 of 31 January 2014. See also Article 7(2)(b) and(c) of the SSM Regulation.

<sup>29</sup> Recital 42 of the SSM Regulation.

<sup>30</sup> See for example, ECJ, Case C-303/90, *France/Commission*, [1991], ECLI:EU:C:1991:424 (regarding a ‘code of conduct’); Case C-325/91, *France/Commission*, [1993], ECLI:EU:C:1993:245 (regarding a ‘communication’).

<sup>31</sup> See ECB, Legal instruments of the ECB, ECB Monthly Bulletin, November 1999, 53–59, at 54. On recourse to guidelines and instructions, see Article 12(1) ESCB Statute.

<sup>32</sup> This emerges from a reading *a contrario* of Article 139(2)(c) TFEU.

<sup>33</sup> It pertains to Chapter 2, Monetary policy, of Title VIII, Economic and monetary policy, of the Treaty.

<sup>34</sup> See J. V. Louis, *Coopération rapprochée, un nouveau mode de coopération renforcée*, in *L'identité du droit de l'Union européenne. Mélanges en l'honneur de Claude Blumann*, Bruylant 2015, 213, at 219.

<sup>35</sup> See TEU and TFEU Preambles and Article 1 TEU.

<sup>36</sup> Within the Eurosystem, a specific infringement procedure is provided in Article 35(6) ESCB Statute, under which, in the case of a breach of EU law by a national central bank, the initiation of the proceedings falls to the ECB.

<sup>37</sup> See Article 12(1) ESCB Statute.

<sup>38</sup> See Article 26(8) of the SSM Regulation.

<sup>39</sup> See Articles 7(7) and 26(8) of the SSM Regulation and Article 119 of the SSM Framework Regulation.

<sup>40</sup> See Articles 7(8) and 26(8) of the SSM Regulation and Article 118 of the SSM Framework Regulation.

<sup>41</sup> See Recital 43 of the SSM Regulation.

<sup>42</sup> See Article 7(9) of the SSM Regulation.

<sup>43</sup> Article 107(2) of the SSM Framework Regulation.

<sup>44</sup> Articles 3(1)(a) and (2)(a) of Decision ECB/2014/5 of 31 January 2014.

<sup>45</sup> See Article 108 of the SSM Framework Regulation.

<sup>46</sup> See also Article 7(4) of the SSM Regulation.

<sup>47</sup> See Articles 110(3) (qualification of a credit institution as significant or less significant), 111(3) (authorisation to take up the business of a credit institution), 113(2) (administrative penalties), and 116 (decisions with respect to significant supervised entities) of the SSM Framework Regulation.

<sup>48</sup> See Article 4(3) of the SSM Regulation.

<sup>49</sup> Or what is sometime called its ‘immediate effect’ (see ECJ, Case 34/73, *Fratelli Variola*, [1973], ECLI:EU:C:1973:101, para 8).

<sup>50</sup> ECJ, Case 6/64, *Costa/Enel*, [1964], ECLI:EU:C:1964:66.

<sup>51</sup> See for example, regarding EU regulations, ECJ, Case 39/72, *Commission/Italy*, [1973], ECLI:EU:C:1973:13.

<sup>52</sup> See J. V. Louis, *Coopération rapprochée, un nouveau mode de coopération renforcée*, at 219.

<sup>53</sup> See Annex I, Template request to enter into a close cooperation pursuant to Article 7 of Regulation (EU) n° 1024/2013, to the Decision ECB/2014/5 of 31 January 2014.

<sup>54</sup> See also Article 90(2) of the SSM Framework Regulation.

<sup>55</sup> See ECJ, Case C-599/15 P, *Romania/Commission*, EU:C:2017:801, para 47; ECJ, Case 22/70, *Commission/Council (ERTA)*, [1971], ECLI:EU:C:1971:32, para 42.

<sup>56</sup> See ECJ, Case C-16/16 P, *Belgium/Commission*, [2016], ECLI:EU:C:2018:79. For a comment, see A. Arnull, EU recommendations and judicial review, *ECLR* (2018) 14, 609.

<sup>57</sup> ECJ, Case C-16/16 P, *Belgium/Commission*, para 26.

<sup>58</sup> See ECJ, Case C-322/88, *Grimaldi*, [1989], EU:C:1989:646, para 18. For a comment, see A. Arnull, The legal status of recommendations, *European Law Review* (1990) 15, 318.

<sup>59</sup> GC, Case T-712/15, *Crédit Mutuel Arkéa/ECB*, [2017]ECLI:EU:T:2017:900, paras 71-75 (about guidelines of the ECBS, the predecessor of the European Banking Authority). The General Court added in this ruling that guidelines issued by the EBA may be taken into account to interpret EU law, provided that this body was competent to adopt them and adopted them at the request of the EU legislator.

<sup>60</sup> See Articles 24(2) and (4) of the SSM Regulation. For more detail on the composition of the Board, see Article 24(2) of the SSM Regulation and Article 3 of the Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its operating rules (ECB/2014/16).

<sup>61</sup> See Article 24(1) of the SSM Regulation.

<sup>62</sup> See Article 24(5) of the SSM Regulation.

<sup>63</sup> See Article 24(6) of the SSM Regulation and Article 7 of Decision ECB/2014/16.

<sup>64</sup> See Article 24(7) of the SSM Regulation

<sup>65</sup> See Article 24(9) of the SSM Regulation and Articles 16 and 17 of Decision ECB/2014/16.

<sup>66</sup> Recital 4 of Decision ECB/2014/16. Over a period of four years (2014-2017), the Administrative Board of Review was seized 25 times (see ECB Annual Report on supervisory activities, 2017, at 90).

<sup>67</sup> Article 24(11) of the SSM Regulation and Article 19 of Decision ECB/2014/16.

<sup>68</sup> Article 107(2) of the SSM Framework Regulation.

<sup>69</sup> See Articles 110(3) (qualification of a credit institution as significant or less significant), 111(3) (authorisation to take up the business of a credit institution), 113(2) (administrative penalties), and 116 (decisions with respect to significant supervised entities) of the SSM Framework Regulation.

<sup>70</sup> That is, jurisdiction over the NCA.

<sup>71</sup> See, for instance, ECJ, Case C521/06 *P Athinaiki Techniki Commission* [2008], ECLI:EU:C:2008:422, para 42; Case C-370/07, *Commission/Council*, [2009], ECLI:EU:C:2009:590, para 42.

<sup>72</sup> See C. Brescia Morra, R. Smits and A. Magliari, The Administrative Board of Review of the European Central Bank: Experience after two years, *European Business Organization Law Review* (2017)18, 567, at 575.

<sup>73</sup> See Articles 4(3) TEU and 291(1) TFEU.

<sup>74</sup> See J. Ziller, 'Les concepts d'administration directe, d'administration indirecte et de coadministration et les fondements du droit administratif européen', in J. B. Auby and J. Dutheil de la Rochère (Eds.), *Traité de Droit Administratif Européen*, Bruylant, 2014, 327.

<sup>75</sup> See S. Alonso de León, *Composite administrative procedures in the European Union*, Iustel 2017; H. C. H. Hofmann, Decision making in EU administrative law – The problem of composite procedures, *Administrative Law Review* (2009), 221.

<sup>76</sup> See M. Eliantonio, Judicial review in an integrated administration: The case of 'composite procedures', *Review of European Administrative Law* (2014)2, 65.

<sup>77</sup> See Articles 107(3) and 108(2) of the SSM Framework Regulation.

<sup>78</sup> Especially the condition of being individually concerned by the challenged measure, as interpreted by the Court of Justice (see ECJ, Case 25/62, *Plaumann*, [1963], ECLI:EU:C:1963:17, para 107).

<sup>79</sup> Provided that they respect the principles of equivalence and effectiveness and the right to effective judicial protection enshrined in Article 47 of the EU Charter (for a reminder, see ECJ, Case C-12/08, *Mono-Car Styling*, [2009], ECLI:EU:C:2009:466, para 49).

<sup>80</sup> ECJ, Case 314/85, *Foto-Frost*, [1963], ECLI:EU:C:1987:452, para 17.

<sup>81</sup> In particular, it may order the suspension of enforcement of the national supervisory decision based on the contested instruction (see ECJ, Case C-465/93, *Atlanta Fruchthandelsgesellschaft*, [1995], ECLI:EU:C:1995:369; Cases C-143/88 and 92/89, *Zuckerfabrik Süderdithmarschen*, [1991], ECLI:EU:C:1991:65).

<sup>82</sup> See ECJ, Case 60/81, *IBM*, [1981], ECLI:EU:C:1981:264, para 12; CFI, Joined Cases T-10-12 & 15/92, *Cimenteries CBR*, [1992], ECLI:EU:T:1992:123, para 28.

<sup>83</sup> See F. Brito Bastos, The Borelli doctrine revisited: Three issues of coherence in a landmark ruling for EU administrative justice, *Review of European Administrative Law*, (2015)8, 269, 293–295.

<sup>84</sup> And certainly also their investors, creditors and depositors.

<sup>85</sup> According to which a legal act of an EU institution is of individual concern to natural or legal persons within the meaning of Article 263(4) TFEU when it affects them by reason of certain attributes peculiar to them, or by reason of a factual situation that differentiates them from all other persons and distinguishes them individually in the same way as the addressee (see ECJ, Case 25/62, *Plaumann*, para 107).

<sup>86</sup> See, for instance, ECJ, Case 15/06 P, *Regione Siciliana*, [2007], ECLI:EU:C:2007:183, para 31; GC, Case T-368/15, *Alcimos Consulting*, [2016], ECLI:EU:T:2016:438, para 29.

<sup>87</sup> See T. M. C. Arons, Judicial protection of supervised credit institutions in the European Banking Union, in D. Busch and G. Ferrarini (Eds.), *European Banking Union*, OUP 2015, 433, at 445–447.

<sup>88</sup> See GC, Case T-733/16, *La Banque Postale*, [2018], ECLI:EU:T:2018:477, paras 69–70.

<sup>89</sup> See GC, Case T-52/16, *Crédit Mutuel Arkéa*, ECLI:EU:T:2017:902, para 177; see also C. Brescia Morra, The administrative and judicial review of decisions of the ECB in the supervisory field. Scritti sull'Unione Bancaria, *Quaderni di Ricerca Giuridica della Banca d'Italia*, (2016) 81, 109, at 133–134.

<sup>90</sup> See GC, Case T-52/16, *Crédit Mutuel Arkéa*, para 179.

<sup>91</sup> See GC, Case T-122/15, *Landeskreditbank Baden-Württemberg*, paras 146–148.

<sup>92</sup> See ECJ, Case C-188/92, *TWD*, [1994], ECLI:EU:C:1994:90, para 24; Case C-343/09, *Afton Chemical*, [2010], ECLI:EU:C:2010:419, paras 19–26; Case C-207/17, *Rotho Blaas*, [2018], ECLI:EU:C:2018:840, para 28.

<sup>93</sup> See ECJ, Case C-219/17, *Berlusconi*, [2018], ECLI:EU:C:2018:1023.

<sup>94</sup> *Ibid.*, para 44.

<sup>95</sup> *Ibid.*, para 50.

<sup>96</sup> See Article 4(3) of the SSM Regulation. On the questions raised by such a scenario, see F. Brito Bastos, Derivative illegality in European composite administrative procedures, *CMLR* (2018)55, 101; L. Boucon and D. Jaros, The application of national law by the European Central Bank within the EU banking union's single supervisory mechanism, *European Journal of Legal Studies* 2018, special issue, 155.

<sup>97</sup> See footnote 93; ECJ, Case C-72/15, *Rosneft*, [2017], ECLI:EU:C:2017:236, para 128.

<sup>98</sup> For in-depth studies, see P. L. Athanassiou, Non-contractual liability under the single supervisory mechanism: Key features and grey areas, *Journal of International Banking Law and Regulation* 2015, 30(7), 382; R. D'Ambrosio, The ECB and NCA liability within the Single Supervisory Mechanism, *Quaderni di Ricerca Giuridica della Consulenza Legale*, (January 2015)78, Bank of Italy.

<sup>99</sup> And also their creditors, investors and depositors.

<sup>100</sup> For those conditions, see ECJ, Case C-352/98 P, *Bergaderm*, [2000], ECLI:EU:C:2000:361. For an application of those conditions to the ECB's liability relating to its monetary policy mandate, see GC, Case T-7913, *Accorinti*, [2015], ECLI:EU:T:2015:756, paras 64–67. In favour of a stringent understanding of those conditions in order to limit the ECB's liability relating to its supervisory tasks, see R. D'Ambrosio, footnote 99.

<sup>101</sup> See ECJ, Joined Cases C-46 and 48/93, *Brasserie du pêcheur*, [1996], ECLI:EU:C:1996:79.

<sup>102</sup> See T. C. Hartley, Concurrent liability in EEC law: A critical review of the cases, 2 *European Law Review* (1977), 249; W. Wils, Concurrent liability of the Community and a Member State, 17 *European Law Review* (1992), 191; P. Oliver, Joint liability of the Community and the Member States, in T. Heukels and A. McDonnell (Eds.), *The Action for Damages in Community Law*, Kluwer, 1997, ch. 16.

<sup>103</sup> ECJ, Case 101/78, *Granaria*, [1979], ECLI:EU:C:1979:38, para 14; See also Case 12/79, *Wagner*, [1979], ECLI:EU:C:1979:286.

<sup>104</sup> See GC, Case T-174/00, *Biret*, [2002], ECLI:EU:T:2002:2, para 33; ECJ, Case 175/84, *Krohn*, [1986], ECLI:EU:C:1986:85, paras 18–23: a situation where the decision adversely affecting the claimant was adopted by the national body in accordance with an allegedly unlawful instruction of the Commission; for a recent reminder, in a case concerning the role of the ECB and other EU institutions in the award of conditional financial assistance, see GC, Case T-786/14, *Bourdouvali*, [2018], ECLI:EU:T:2018:487, paras 80 and 99.

<sup>105</sup> See CFI, Case T-54/96, *Oleifici Italiani*, [1998], ECLI:EU:T:1998:204, para 67.

<sup>106</sup> See ECJ, Joined Cases, 5, 7 and 13–24/66, *Kampffmeyer*, [1967], ECLI:EU:C:1967:31; GC, Case T-546/13, *Šumelj and Others/Commission* [2016] ECLI:EU:T:2016:107; GC, Case T-786/14, *Bourdouvali*, paras 197–203.

<sup>107</sup> See Article 6(5)c of the SSM Regulation and Article 97 of the SSM Framework Regulation.

<sup>108</sup> See ECJ, *Kampffmeyer*, at 344; GC, Case T-786/14 *Bourdouvali*, para 240; GC, Case T-138/03, *É. R. and Others/Council and Commission*, [2006], ECLI:EU:T:2006:390, para 42.