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### Composite administrative procedures in the European Union

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Raffaele D'Ambrosio

Composite administrative  
procedures in the European Union

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# Abstract

The two contributions in this legal working paper discuss the various aspects of composite administrative procedures in the context of both Single Supervisory Mechanism (SSM) and Single Resolution Mechanism (SRM) decision-making procedures. It addresses the definition of such procedures, their relevance in the SSM and SRM context, the allocation of powers in such procedures, differences between composite procedures in the SSM and SRM spheres and differences between composite procedures and mere cooperation or exchange of information procedures. They were originally presented at the ECB legal colloquium on 'Composite administrative procedures in the European Union', which took place in Frankfurt am Main in 2020.

The first paper focuses on composite procedures – characterised by a decision-making process that has stages at both the national and the Union level. The final decision in such procedures requires the active participation of both levels. Such procedures result in an entity's or an individual's interests being affected by one uniform act (the final decision), however, the decision-making process itself is regulated during its different stages by different procedural rules and managed by different administrations – both national and European. The participation of different administrations acting within their own legal framework and fulfilling their own responsibilities raises salient issues, which are addressed in this paper, relating to the commitment of the Union and the Member States to the rule of law, good administration and judicial protection.

In particular, the paper focuses on the following procedural and defence rights: (a) legal professional privilege; (b) the privilege against self-incrimination; (c) the right to be heard; and (d) due process requirements.

These rights may be reduced in strength or even eliminated altogether either due to the interconnectedness in composite procedures of the Union and national law spheres, or when punitive law enforcement takes precedence over non-punitive procedures. In this context the paper also examines the established interpretations of procedural and defence rights by both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The allocation of jurisdiction between the CJEU and national courts on acts emanating from SSM and SRM composite procedures is also considered.

In conclusion, the paper aims to identify potential gaps and contradictions that may arise from the close and mutually dependent cooperation under composite procedures, which result in a uniform final act but which lack an overarching procedural framework.

The second paper considers what falls within the category of actual composite procedures and focuses on composite procedures within the SSM and the SRM, as well as on those composite procedures involving both (national and Union) supervisory and resolution authorities. Subsequently, the paper turns to a number of

problems related to the interpretation of certain specific rules regarding SSM and SRM procedures. In particular, the author addresses: (a) the scope of the protection granted to due process rights in the two different systems, as a result of the different balance of interests at stake; (b) the powers that the ECB and the SRB enjoy, when necessary, to remedy at an early stage any prejudicial consequences that may arise from the national phase; and (c) the side effects of the allocation of jurisdiction between the Court of Justice of the European Union (CJEU) and the national courts.

**Keywords:** European Central Bank; composite administrative procedures; Single Supervisory Mechanism (SSM); Single Resolution Mechanism (SRM); Due process requirements; national competent authorities (NCAs); national resolution authorities (NRAs), the Single Resolution Board (SRB); procedural and defence rights; legal professional privilege; the privilege against self-incrimination; the right to be heard; national punitive proceedings; admissibility in national proceedings of materials gathered by Union bodies; punitive and non-punitive; allocation of jurisdiction between the Court of Justice of the European Union (CJEU) and the national courts.

**JEL codes:** K (law and economics);G2 Financial Institutions and Services; G21 Banks • Depository Institutions • Micro Finance Institutions • Mortgages; K2 Regulation and Business Law; K23 Regulated Industries and Administrative Law

# Procedural rights in composite administrative procedures

By Christina Eckes<sup>1</sup>

## 1 Introduction

Composite procedures are characterised by a decision-making process involving both national and Union administrations. The final decision in such procedures requires the active participation of both levels. In the context of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), the relevant administrations are the national competent authorities (NCAs) or the national resolution authorities (NRAs), at the national level, and the European Central Bank (ECB) or the Single Resolution Board (SRB), at the European level.

Composite procedures result in interests being affected by one uniform act (the final decision); however the decision-making process itself is regulated during its different stages or legs by different procedural rules and managed by different administrations – both national and European. The participation of different administrations acting within their own legal framework and fulfilling their own responsibilities raises salient issues relating to the commitment of the Union and the Member States to the rule of law, good administration and judicial protection.

This paper will focus more specifically on the generally accepted procedural and defence rights, which may lose their bite, first as a result of the interconnectedness in composite procedures of the Union and national law spheres, and second when punitive law enforcement builds on non-punitive procedures. Particular attention is given to legal professional privilege, the privilege against self-incrimination and the right to be heard. The paper aims to identify potential gaps and contradictions that may arise from the close and mutually dependent cooperation under composite procedures that result in a uniform final act but lack an overarching procedural framework.

Section 2 of the paper briefly highlights the relevance of composite procedures in the SSM and SRM context. Section 3 identifies and explains how and why the protection of certain rights may come under pressure in composite procedures. In particular, Section 3.1 discusses problems arising from the interlocking legal spheres. Section 3.2 focuses on composite procedures with interlocking punitive and non-punitive legs. It also sets out the established interpretations of procedural and defence rights by the European Court of Human Rights (ECtHR). Section 4 focuses entirely on the right to be heard, identified as one of the most pressing issues in the context of composite procedures in the SSM and SRM context. Section 4.1 highlights

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the relevance of this right. Section 4.2 traces its development in the case-law of the Court of Justice of the European Union (CJEU) comprising both the General Court (GC), formerly known as the Court of First Instance (CFI), and the Court of Justice (ECJ). Section 4.3 spells out the criteria that need to be met for the right to be heard to be effectively protected. It also discusses which administration should offer an opportunity to be heard. Finally, Section 5 contains some concluding remarks.

## 2 Relevance of composite procedures

Composite procedures could result in a lowering or circumvention of the protection of procedural rights. SSM and SRM proceedings contain a number of compelling examples of composite procedures.<sup>2</sup> The actual enjoyment of the protection of a party's procedural rights may be reduced, on the one hand, when the national administration does the preparatory work and the European administration takes the final decision based on the information provided to it in that national preparatory work. For example, this situation arises when the ECB exercises its banking supervision competences following preparatory work by the relevant NCA. On the other hand, the protection of procedural rights may not be guaranteed when the European administration carries out preparatory work and this information feeds into the decision-making of the national administration. Such a situation arises when the ECB carries out an investigation and the results of this investigation are used as the basis for punitive sanctions being imposed at the national level.

In the context of banking supervision (SSM), the ECB has direct law enforcement powers. It exercises significant competences with far-reaching consequences following preparatory work by the relevant NCA, when it grants authorisations, withdraws authorisations, or opposes the acquisition or reinforcement of a qualifying holding in the capital of a credit institution. The substance of the final decision in these procedures depends to a significant extent on the expertise and powers of the NCAs.

In the context of ECB investigations, the results of Union administrative investigations may be used as evidence in national punitive proceedings. The ECB carries out its own investigations and the concomitant results of these investigations may – as a matter of principle – be used as evidence when imposing punitive sanctions at the national level. In the absence of Union rules providing clear guidance on the procedural admissibility in national proceedings of materials gathered by Union bodies, such admissibility remains unclear. This raises crucial questions concerning the protection of defence rights in such a composite law enforcement setting. In the SSM context for example, NCAs deal with a large part of sanctioning banks (punitive sanctioning). They do so at the ECB's request.<sup>3</sup>

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<sup>2</sup> See for more details the contribution by Raffaele D'Ambrosio.

<sup>3</sup> See Article 18(5) of 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 (OJ L 287, 29.10.2013, p. 63) (hereinafter the 'SSM Regulation' or 'SSMR'), which concerns, *inter alia*, the imposition of sanctions on significant credit institutions for violations of national law.

## 3 Procedural and defence rights in composite procedures

In composite procedures the national and European legal spheres interlock to make the decision-making process hinge on activities carried out in both spheres. Divergent rules apply in this case to the Union and national legs of the procedure.

### 3.1 Interlocking legal spheres

On a constitutional and hence more abstract level, the Union and its Member States commit to comparable guarantees of fundamental rights. All Member States are bound by the EU Charter of Fundamental Rights (CFR) when they give effect to Union law.<sup>4</sup> This would therefore apply when an NCA sanctions a bank following a request from the ECB or when an NRA implements a decision of the SRB.

Nonetheless, the level of procedural protection provided, the specific procedural safeguards, and the precise interpretation of what a fundamental right means in a specific situation, differ considerably between Union law and different national laws. This leads to a different level of protection for procedural rights in the 27 different national and the Union legal spheres. Generally, this is an accepted result of different legal cultures and histories.<sup>5</sup>

Different rules may apply, for example, to the gathering of evidence. The far-reaching interference with interests or even rights in the second part of the procedure may not be foreseeable at the time that the preparatory work takes place and the level of procedural protection during this preparatory work may be lower for this reason. Examples of such differences are: (i) legal professional privilege, which is subject to different rules in different legal contexts; (ii) defence rights, which depend on the gravity of interference; and (iii) the privilege against self-incrimination, which may be undermined by composite procedures with interlocking punitive and non-punitive legs.

The relevant difference in composite administrative procedures is that these divergences in the levels of protection and actual enjoyment of a party's rights may lower standards in the procedure as a whole when compared with the standards guaranteed in the component parts of the procedure. Similarly, the fact that the different legs of the procedure may have very different implications for the rights of individuals, i.e. punitive or non-punitive proceedings, may lower the level of protection to the level guaranteed for less invasive (non-punitive) proceedings.

A well-known example is the privilege accorded to legal professionals. This privilege generally prevents lawyers from being compelled to testify with regard to communications they have had with their clients. As a result, the ECJ does not allow the Union institutions to require access to documents protected by legal professional

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<sup>4</sup> Article 51(1) of the CFR refers to 'implementing EU law', however, the ECJ considers the CFR to be applicable within the scope of Union law.

<sup>5</sup> Christina Eckes, 'Integrated Rights Protection in the European and International Context: Some Reflections About Limits and Consequences' in: Inge Govaere and Sacha Garben (eds.), *Interfaces between EU and International Law*, Hart Publishing, 2019.



privilege.<sup>6</sup> Under Union law, however, in-house lawyers (employed by the party to a case) are not protected by legal professional privilege. The ECJ considers the ‘independence’ of the lawyer to be one of the boundaries that delimit the scope of legal professional privilege.<sup>7</sup> The distinction made between in-house and external (‘independent’) lawyers ‘is based on a conception of the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose’.<sup>8</sup> The Court added that such a conception ‘reflects the legal traditions common to the Member States and is also to be found in [the] legal order of the [Union], as is demonstrated by Article [19] of the Protocols on the Statutes of the Court of Justice ...’.<sup>9</sup>

The fifth paragraph of Article 19 of the Statute of the Court of Justice reads: ‘Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.’ The provision does not single out lawyers but instead refers to (national) agents, advisers and lawyers. This inclusive formulation does not justify a distinction between in-house and external lawyers but appears to assume an ‘independent’ exercise of their duties for all three categories to which it refers.

By contrast, in-house lawyers are not protected by legal professional privilege in the majority of national jurisdictions of the Member States. Thus, it may be correct to consider independence a boundary of legal professional privilege in the ‘legal traditions common to the Member States’. However, in certain Member States there is a different approach. In common law jurisdictions and also in the Netherlands, where in-house lawyers are admitted to the bar, legal professional privilege covers the communications between in-house lawyers and their clients.<sup>10</sup>

Recital 48 of the SSMR reads: ‘Legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the [CJEU]’. Article 10(1)(f) of the SSMR even states that the ECB may request all information necessary from ‘third parties to whom the entities referred to in points (a) to (d) [these are credit institutions, financial holding companies, etc.] have outsourced functions or activities [such as for example internal control, compliance,

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<sup>6</sup> See the judgment of the Court of Justice of 18 May 1982, *AM & S Europe Limited v Commission*, 155/79, EU:C:1982:157.

<sup>7</sup> *Ibid.*, paragraphs 21 and 22: Legal professional privilege protects the confidentiality of written communications between lawyers and their clients, ‘provided that, on the one hand, such communications are made for the purposes and in the interests of the client’s rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment’.

<sup>8</sup> *Ibid.*, paragraph 24.

<sup>9</sup> *Ibid.*

<sup>10</sup> See, for example, the judgment of the Court of Justice of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, C-550/07 P, EU:C:2010:512.

etc.]. Thus, it appears that legal professional privilege is limited to the strict professional relationship between banks and their lawyers. Other parties are subject to the ECB's investigatory powers without any restriction.

This difference would become salient, for example, in the (hypothetical) situation where a Union actor, i.e. the ECB, carries out investigations in the context of a procedure to impose a punitive administrative fine on a national central bank. In the SSM setting for example, the ECB enjoys far-reaching powers to gather information.

The ECB may in the SSM context seize copies of internal communication between a Dutch (or UK) bank and its in-house lawyers. This information could be transmitted by the Union supervisor as evidence to the Dutch NCA – De Nederlandsche Bank (DNB). If the ECB then asks DNB to open sanctioning proceedings,<sup>11</sup> documents that otherwise would be procedurally excluded as evidence might become part of the proceedings.

How is DNB to assess the critical piece of evidence? It was gathered on the basis of powers provided for by Union law and was subsequently introduced in a legal order that provides for a higher level of protection. No common rules exist on what evidence from the Union investigation is admissible in national proceedings. As a result, the interlocking of legal spheres, with different standards of protection, may undermine in this hypothetical situation the legal professional privilege that the Dutch in-house lawyer is used to enjoying under national law.

### 3.2 Composite procedures with interlocking punitive and non-punitive legs

As a general rule, those subject to administrative procedures enjoy less extensive protection than those subject to punitive procedures. This is reflected in Article 6 of the European Convention on Human Rights (ECHR) and Articles 47 and 48 of the CFR. It is also settled case-law of the ECtHR.

One aspect of the strengthened procedural protection available to those subject to punitive procedures is the privilege against self-incrimination.<sup>12</sup> Neither the CFR nor the ECHR expressly provide for the privilege against self-incrimination. However, it is settled case-law of the ECtHR.<sup>13</sup> As such, it is also the basis for interpreting Articles 47 and 48 of the CFR. The privilege against self-incrimination concerns both the right not to incriminate oneself and the overlapping right to remain silent.<sup>14</sup> It also prohibits law enforcement authorities from using significant compulsion against a person to obtain information in order to use it as evidence to incriminate them. The

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<sup>11</sup> See the SSMR.

<sup>12</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

<sup>13</sup> See the ECtHR judgments of 9 February 2016, *Shlychkov v Russia*, (application no. 40852/05), paragraph 81; and of 17 December 1996, *Saunders v UK*, (application no. 19187/91), paragraph 68.

<sup>14</sup> Stijn Lamberigts, 'The Privilege against Self-Incrimination: A Chameleon of Criminal Procedure', *New Journal of European Criminal Law*, 2016, pp. 418-438.

privilege against self-incrimination is only available once an individual is subject to punitive proceedings.

Supervised persons, for example, banks, are in principle obliged to cooperate with the ECB and provide all requested information. The privilege against self-incrimination is not codified in either the SSM Regulation or the SSM Framework Regulation.<sup>15</sup> A norm similar to Article 9(2) of the OLAF Regulation, imposing a duty to inform the persons subject to an investigation of their rights, including the privilege against self-incrimination, does not exist in the SSM legal framework.<sup>16</sup>

However, Article 29(2) of the SSM Framework Regulation recognises that the duty of the parties to an ECB procedure to 'state truthfully the facts known to them' is 'subject to the limits relating to sanctioning procedures under Union law'.<sup>17</sup> Based on this, it appears that the ECB may sanction a credit institution's refusal to provide information only within these limits. The objective appears to be to reconcile preserving the effectiveness of the ECB's supervisory powers without prejudice to the core aspects of the privilege against self-incrimination.

However, when different non-punitive and punitive procedures, conducted by the Union and national administrations, closely interlock and information and evidence gathered by the ECB is transferred from the Union leg of the procedure to another national leg of the procedure the privilege against self-incrimination may be lost. Information gathered in the SSM context may, at the request of national criminal investigation authorities, even be transferred to other national criminal proceedings.<sup>18</sup>

In this context, the Italian Constitutional Court requested a preliminary ruling from the ECJ in May 2019 on whether, under Union law, the right to remain silent can also be invoked in proceedings before the National Commission for Companies and the Stock Exchange (*Commissione Nazionale per le Società e la Borsa – CONSOB*).<sup>19</sup> The Constitutional Court maintained that Union law requires Member States to punish failure to cooperate with financial market supervisory authorities. Thus, before deciding the question of (national) constitutionality, the Constitutional Court considered it appropriate to seek the ECJ's view on whether this duty to punish a failure to cooperate also applies vis-à-vis individuals who are suspected of committing an offence, and whether this can be considered compatible with the right to remain

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<sup>15</sup> Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

<sup>16</sup> Article 9(2) of the OLAF Regulation (Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1)) reads: 'The Office may interview a person concerned or a witness at any time during an investigation. Any person interviewed shall have the right to avoid self-incrimination.'

<sup>17</sup> Article 29(2) of the SSM Framework Regulation reads: 'The parties shall, subject to Union law, assist the ECB in ascertaining the facts of the case. In particular, subject to the limits relating to sanctioning procedures under Union law, the parties shall state truthfully the facts known to them.'

<sup>18</sup> See Article 3 of Decision (EU) 2016/1162 of the European Central Bank of 30 June 2016 on disclosure of confidential information in the context of criminal investigations (ECB/2016/19) (OJ L 192, 16.7.2016, p. 73).

<sup>19</sup> Case C-481/19 *Consob*.

silent as this may lead the national administration to force a person to make self-incriminating statements.

Without common Union rules on the scope of the privilege against self-incrimination it remains unclear how the privilege is upheld in the context of interlocking non-punitive investigations and punitive procedures. This is highly problematic in the light of the settled case-law of the ECtHR.

The ECtHR protects the privilege against self-incrimination in settled case-law.<sup>20</sup> When two legs of the procedure are closely interlinked, the privilege against self-incrimination may be protected in two ways: (i) the element of significant compulsion is removed in the non-punitive leg of the procedure; or (ii) the use of information or evidence obtained under compulsion is restricted such that it cannot incriminate in the punitive leg.<sup>21</sup>

Procedures with interlocking non-punitive and punitive legs also exist in a purely national context. One example being tax procedures, which may either run in parallel or have different legs that follow each other. The ECtHR has held in this context that the lower protection in the non-punitive leg of the procedure must not undermine the protection in the punitive leg of the procedure (option (ii)).<sup>22</sup> Implementing option (i) entails more practical difficulties when the punitive leg is not yet known and follows on from the non-punitive leg of the procedure. It would require a general change to the practices for gathering information in the non-punitive leg.

In any event, in both of the highlighted scenarios, namely legal professional privilege and the privilege against self-incrimination, the lack of common rules and standards may result in the higher level of protection in part of the composite procedure being circumvented.

## 4 The right to be heard

The right to be heard is another highly relevant procedural right that comes under pressure in composite procedures within the Union. It is enshrined in Article 41(2)(a) of the CFR as part of the right to good administration. The provision confers upon 'every person' 'the right ... to be heard, before any individual measure which would affect him or her adversely is taken'. The right of adversely affected parties to express their views on the likely outcome before a procedure is concluded serves two purposes. It protects the individual and the rule of law and aims to ensure rational decision-making by providing the administration with information that it may otherwise not have. Thus, it incorporates both an individual rights dimension and a substantive dimension aimed at improving decision-making.

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<sup>20</sup> See the ECtHR judgment of 5 April 2012, *Chambaz v Switzerland*, (application no. 11663/04).

<sup>21</sup> The latter option was indicated by the ECtHR in *Saunders*, cited above.

<sup>22</sup> See the ECtHR judgment of 24 November 1993, *Imbrioscia v Switzerland*, (application no. 13972/88).

## 4.1 Relevance of the right to be heard in SRM procedures

A body of case-law on composite procedures under the SRM is currently emerging. Relevant cases are the *Portigon* and *Hypo Vorarlberg Bank* cases<sup>23</sup>, which concerned ex ante contributions to the Single Resolution Fund (SRF). These ex ante contributions to the SRF are calculated by the SRB, after consulting the ECB or the NCA and in close cooperation with the NRAs.<sup>24</sup> The SRB then forwards the decision to the NRAs, which are responsible for collecting the relevant contributions from the banks concerned in their jurisdiction. Thus, the procedure concerned is a composite procedure consisting of multiple phases, with an actionable decision that definitively determines the position of the institution at the end of the procedure.

In all of these cases, violations of the right to be heard and of other essential procedural requirements have been alleged with regard to the SRB's decision. In the first *Portigon* case, decided in 2019,<sup>25</sup> the right to be heard was raised but not discussed by the General Court because the SRM decisions challenged had other procedural flaws; inter alia, the lack of an electronic signature and insufficient reasoning. The General Court declared them void without examining the alleged violation of the right to be heard.

In the admissibility section of its judgment, the General Court identified a 'direct link' between the SRB and the bank concerned. The Court justified this link by stating that the NRAs do not have any discretion in implementing the SRB's decisions, but are under an execution obligation.<sup>26</sup> This will become relevant in the context of the criteria discussed in Section 4.3 regarding where and how the right to be heard should be protected.

## 4.2 Development of the right to be heard in the CJEU's case-law<sup>27</sup>

The CJEU has developed a relevant body of case-law on the right to be heard in composite procedures. The first and foremost point emerging from this body of case-law is that, even in the absence of any rules governing the procedure in question, protection of the right to be heard should not suffer.<sup>28</sup> In other words, if codified

<sup>23</sup> On the issue of ex ante contributions in 2016 to the SRF, see the judgment of the General Court of 28 November 2019, *Portigon AG v SRB*, T-365/16, EU:T:2019:824. Actions are also pending challenging ex ante contributions for the years 2017, 2018, and 2019: see *Portigon v SRB*, T-420/17; *Portigon v SRB*, T-413/18; *Portigon v SRB*, T-481/19; *Hypo Vorarlberg Bank v SRB*, T-414/18; and *Hypo Vorarlberg Bank v SRB*, T-479/19 – all specifically alleging an infringement of the right to be heard.

<sup>24</sup> Article 70(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1) (hereinafter the 'SRMR').

<sup>25</sup> See the judgment in *Portigon AG v SRB*, T-365/16, cited above.

<sup>26</sup> *Ibid.*, paragraph 64 et seq.

<sup>27</sup> This section draws on: Christina Eckes and Joana Mendes, 'The Right to Be Heard in Composite Administrative Procedures: Lost in between Protection?', *European Law Review*, 2011, Vol. 36, pp. 651-670.

<sup>28</sup> See the judgments of the General Court of 19 February 1998, *Eyckeler & Malt AG v Commission*, T-42/96, EU:T:1998:40, paragraph 77; and of 17 September 1998, *Primex Produkte Import-Export GmbH & Co and Others v Commission*, T-50/96, EU:T:1998:223, paragraph 59.

specialised rules, such as the SRMR, do not (sufficiently) accommodate the right to be heard, individuals can still rely on the general principle.

The fundamentally relevant case-law has emerged in four policy areas that involve composite procedures, namely the remission of import duties, the European Social Fund, individual sanctions, and state aid. The leading case concerning the remission of import duties is *France Aviation*.<sup>29</sup> The procedure for the remission of import duties begins and ends with the national administration. However, in between the start and the end of the procedure an intermediate supranational stage takes place. The applicant applies to the competent national administration. In certain cases, defined in the applicable regulation, the competent national administrative body must then send the application to the Commission. The Commission in turn decides whether the application is justified, after consulting a group of experts. The competent national administration is then responsible for communicating the decision to the applicant.

*France Aviation* turned on an alleged failure by the French administration to share all the relevant documents with the Commission. The General Court held that ‘the applicant’s right to be heard in a procedure such as that to which these proceedings relate must actually be secured in the first place in the relations between the person concerned and the national administration’.<sup>30</sup> The General Court also stated that even in situations where the preparatory act does not adversely affect the applicant but is positive, the Commission ‘had a duty to arrange for the applicant to be heard by the [national] authorities’ if it diverged from the decision of the national administration.<sup>31</sup> The latter was the case in *France Aviation*. The Commission should have used its right to inquire to ensure that the requirements of the right to be heard were met by the national administration.

Importantly, where no direct contact takes place between the Union administration (Commission) and the person concerned (applicant) the right to be heard should ‘in the first place’<sup>32</sup> be discharged before the national authority.

Another line of cases emerged in the context of financial assistance provided by the European Social Fund. In these procedures, the Commission determines the reduction of financial assistance after giving the Member State concerned (not the beneficiary) an opportunity to be heard. The financial assistance to be repaid is then requested by the Member States from the beneficiaries (legal entities). While national administrations are the sole actor in contact with the beneficiaries when financial assistance granted under the European Social Fund is reduced, the Commission’s decisions directly affect the private parties concerned.

In the leading case of *Lisrestal*,<sup>33</sup> the General Court, and on appeal also the ECJ, held that a direct link is in fact established between the beneficiary and the Commission –

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<sup>29</sup> See the judgment of the General Court of 9 November 1995, *France Aviation v Commission*, T-346/94, EU:T:1995:187.

<sup>30</sup> *Ibid.*, paragraph 30.

<sup>31</sup> *Ibid.*, paragraph 36.

<sup>32</sup> *Ibid.*, paragraph 30.

irrespective of the lack of contact – because first, the Commission is legally fully liable for its decisions; second, national administrations, despite their formal role, do not have a formal power to make an assessment of their own; and third, the Commission's decisions directly concern the beneficiaries of the financial assistance, who assume primary liability for the repayment of the sums at issue.

The General Court concluded that the Commission must itself ensure compliance with the right to be heard. The Commission is obliged either to hear directly the persons concerned or to ensure 'that they had had the possibility, of effectively setting forth their views on the proposed reduction in assistance'.<sup>34</sup>

The procedural circumstances in *Lisrestal* concerning the lack of contact and the direct relevance of the decision of the Union administration appear comparable to the situation in cases already discussed concerning ex ante contributions to the SRF. As the General Court concluded in *Portigon*, the determination of ex ante contributions to the SRF by the SRB directly affects the institution concerned and the NRA does not exercise discretion when implementing the SRB's decision.<sup>35</sup> This also led the General Court to conclude that the SRB's decision is not a preparatory act.<sup>36</sup>

Another case concerning the reduction of financial assistance is *Vlaams Fonds*.<sup>37</sup> Here, the right to be heard was exercised before the Member State concerned. However, the final decision was based on Commission documents of which the beneficiary had not been informed. The General Court held that if the Union body continues to investigate and gathers additional information it is patently clear that only having a hearing in the preceding national leg of the composite procedure cannot be regarded as sufficient.

It is now settled case-law that a direct link between the Union administration and the person concerned can be established even when the two have not had direct contact. This is the case when the person is directly affected by the decision of the Union administration because the national administration does not exercise discretion when implementing that decision.

In 1991, in the case of *Technische Universität München*,<sup>38</sup> the ECJ confirmed that the right to be heard is guaranteed in both legs of a composite procedure. The Commission had rejected the University of Munich's application for the duty-free import of certain scientific instruments into the internal market without granting the university an opportunity for a hearing. The Commission argued that any such hearing would have to take place before the national administration because the (institutional)

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<sup>33</sup> See the judgments of the General Court of 6 December 1994, *Lisrestal – Organização Gestão de Restaurantes Colectivos Lda and Others v Commission*, T-450/93, EU:T:1994:290; and of the Court of Justice of 24 October 1996, *Commission v Lisrestal – Organização Gestão de Restaurantes Colectivos Lda*, C-32/95 P, EU:C:1996:402.

<sup>34</sup> See the judgment in *Lisrestal v Commission*, T-450/93, cited above, paragraph 49.

<sup>35</sup> See the judgment in *Portigon AG v Commission*, T-365/16, cited above, paragraph 70 et seq.

<sup>36</sup> *Ibid.*, paragraph 73.

<sup>37</sup> See the judgment of the General Court of 9 July 2003, *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap v Commission*, T-102/00, EU:T:2003:192.

<sup>38</sup> See the judgment of the Court of Justice of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438.

interaction took place between the Union and the national administration and not between the Union administration and the applicant. The ECJ rejected that point and held that the Union and national administrations must coordinate and ensure that the right to be heard is protected throughout the procedure. It emphasised that those concerned should not be confronted with a lowering of their right to be heard because a decision is taken in a composite procedure.

One common denominator of the different strands of case-law in the different policy areas is that they take the perspective of the protection of the individuals concerned. This perspective differs only in the context of state aid law. Here, the CJEU continues to rely on an institutional interaction perspective. This is also the perspective relied on by the SRB in the *Portigon* case.<sup>39</sup> However, the General Court specifically rejected this perspective for the SRM procedures at stake.<sup>40</sup>

Finally, an important limitation of the right to be heard was developed in the case-law concerning restrictive measures against individuals, i.e. counter-terrorist sanctions against individuals consisting of the freezing of assets and travel bans. The *People's Mojahedin Organization of Iran (PMOI)* cases are also cases in point.<sup>41</sup> The General Court held in these cases that the particular urgency of individual sanctions justified the fact that PMOI could only be heard in relation to subsequent listings and not in relation to their inclusion on the list concerned. This is similar to the approach taken, for example, in the context of dawn raids in competition law.

### 4.3 Criteria for and possibilities to discharge the obligation to offer a hearing

The criteria that emerge from the case-law discussed and which are relevant for the legal assessment of composite procedures in the context of the SSM or SRM concern the establishment of a direct link between the Union administration and the person concerned. The *first question* to be asked is: Does a direct link exist between the Union administration and the person/institution concerned because direct contact is foreseen between the Union administration and the person concerned? If this is not the case, the *second question* is: Is there nonetheless a direct link because the person concerned is directly affected by the decision of the Union administration? This is the case if the national administration does not have any discretion or power of appraisal or assessment, i.e. it cannot deviate from the findings of the Union administration.

In other words, if the lack of direct contact does not establish a direct link (first), the fact that the national administration has no power of appraisal and cannot determine the outcome (second) can nonetheless establish a direct link (*Lisrestal*).

<sup>39</sup> See the judgment in *Portigon AG v SRB*, T-365/16, cited above, paragraph 59.

<sup>40</sup> *Ibid.*, paragraph 69, referring to the opinion of Advocate General Wathelet in *Stichting Woonpunt and Others v Commission*, C-132/12 P, EU:C:2013:335.

<sup>41</sup> See the judgments of the General Court of 4 December 2008, *People's Mojahedin Organization of Iran v Council (PMOI III)*, T-284/08, EU:T:2008:550; of 23 October 2008, *People's Mojahedin Organization of Iran v Council (PMOI II)*, T-256/07, EU:T:2008:461; and of 12 December 2006, *Organisation des Modjahedines du peuple d'Iran v Council and UK (PMOI I)*, T-228/02, EU:T:2006:384.



If such a *direct link* is established the hearing is supposed to be most effective if it is ensured by the Union administration. The Union administration is responsible that a hearing is organised. However, the Union administration may in such cases rely on the national administration to comply with the right to be heard. It does not have to organise the hearing itself. Relying on the national administration follows the institutional interaction logic of a procedure, in which the only contact of the person concerned is foreseen to take place with the national administration. In some cases, a hearing in both legs of the procedure may be necessary (*Technische Universität München*).<sup>42</sup>

In other words, no preference exists for meeting the requirements of the right to be heard either directly or indirectly, i.e. for organising the hearing before the Union administration or for the Union administration to rely on the national administration to discharge the obligation to organise a hearing (on the Union's behalf). The requirements for a hearing can either be met by requesting the national authority to hold the hearing (*France Aviation*) or by referring to an earlier hearing by the national administration, as long as (*Vlaams Fonds*) no additional information has been taken into account.

In contrast with earlier case-law, there is currently no preference for holding a hearing either before the national or the Union administration, as long as an effective hearing is offered. Whether the obligation to provide a hearing is discharged directly or indirectly, and in the latter case without any interaction with the person concerned, is immaterial.

The standard requirement is to have a coordinated approach in which the Union and the national administration ensure together that the requirements of the right to be heard are met throughout the procedure. The Union administration remains accountable for ensuring the hearing, even if it decides to discharge its obligation indirectly.

## 5 Concluding remarks

Composite procedures constitute a particular challenge for the effective protection of procedural and defence rights. The general rule is that individual rights should not suffer as a consequence of the particular institutional arrangements in any given policy area.

We have seen that a sufficient level of protection can be reached in different ways. In relation to legal professional privilege and the privilege against self-incrimination problems have arisen due to differences in procedural rules and standards of protection. The initial reaction may be to propose the adoption of common procedural rules for these situations.

Indeed, defining procedural rules, for example, for the admissibility of information specifically for the SSM, at the Union level may be strongly desirable from an

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<sup>42</sup> See also the judgment of the General Court of 18 January 2000, *Mehibas v Commission*, T-290/97, EU:T:2000:8.

individual rights perspective. However, it will come at the cost of national procedural autonomy, which could very well trigger follow-up tensions in other substantive areas of national law, and would include laws governing evidence within the scope of the CFR. This would be a classic example of a spill-over effect as a result of 'inefficiencies' in the protection of rights. Therefore, a degree of caution should be exercised in this regard.

The right to be heard raises difficulties for a number of reasons. The different legs of the composite procedure may have a direct adverse effect on the person concerned without there being any direct contact between the administration and the person concerned.

The core issue is that the Union administration, even if it is not required to have direct contact with the persons concerned must nonetheless ensure an effective opportunity to be heard if a direct link is established because its decisions directly affect the person concerned. In such cases, the CJEU accepts that the actual hearing may take place before the national administration. The Union administration may decide to meet its own obligation to provide a hearing by relying on the national administration to comply with the right to be heard, i.e. provide an indirect hearing. It may do so either by referring to a past hearing, if the factual basis of the decision has not changed, or by requesting a new hearing. The Union administration may also hold the hearing itself. The relevant issue remains that the rights of the person concerned do not suffer from the particular institutional arrangements of the procedure.

# Composite Procedures within the SSM and the SRM

By Raffaele D'Ambrosio<sup>1</sup>

## Introduction

After identifying the different forms of cooperation between SSM and SRM authorities that do not qualify as composite procedures, this paper will focus on actual composite procedures.

It is the author's view that any discretion that the decision-making authority enjoys in the adoption of the final decision is not relevant for the purpose of identifying what actually represents a composite administrative procedure.

Such discretion only impinges on the issues of:

1. when the right to be heard must be granted; and
2. which court is empowered to review both the final decisions and the endo-procedural or preparatory acts related to the procedure.

This clarified, the paper will focus on composite procedures within the SSM (Part 2) and the SRM (Part 3), as well as on those composite procedures involving both (national and Union) supervisory and resolution authorities (Part 4).<sup>2</sup>

Following these descriptions of various composite procedures, the paper will shift its focus to a number of problems related to the interpretation of certain specific rules regarding SSM and SRM procedures.

The following issues will be addressed:

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<sup>2</sup> In the field of monetary policy the principle of decentralisation applies. Here the national central banks (NCBs) enter into a legal relationship with their counterparties and are vested with the task of carrying out (almost) all day-to-day operations and implementing the related ECB guidelines or instructions (see Articles 12.1 and 14.3 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') and Article 1(2) and (3) of Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) (OJ L 91, 2.4.2015, p. 3)). In some cases, decisions are taken by the Eurosystem, which implies the joint involvement of the ECB and the relevant NCB. However, the qualification of each procedure as a composite procedure depends on whether the ECB's act is a punctual instruction, and whether the NCB's act implementing that instruction is an administrative act. For situations where an ECB decision may follow an NCB's proposal see Article 3 of Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions (OJ L 318, 27.11.1998, p. 4). Here only the Executive Board has the power to decide that there has been an infringement of an obligation arising from an ECB regulation or decision; however, the decision on whether to initiate an infringement procedure may be taken by the ECB or the NCB of the Member State in whose jurisdiction the alleged infringement has occurred.

1. the scope of the protection granted to due process rights in the two different systems, as a result of the different balance of interests at stake (Part 5);
2. the powers that the ECB and the SRB enjoy, when necessary, to remedy at an early stage any prejudicial consequences that may arise from the national phase (Part 6);
3. the side effects of the allocation of jurisdiction between the Court of Justice of the European Union (CJEU) and the national courts (Part 7).

## 1 Definition of composite procedures and distinction from other forms of cooperation within the SSM and the SRM

### 1.1 Definition of composite procedures

The aim of this contribution is to provide an overview of the composite procedures within the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM).

In this context, a problem arises as regards the meaning of composite procedure.

Composite procedures are those administrative procedures where final decisions require a decision-making process, involving a number of stages aimed towards the same purpose, in which both national (the national competent authorities (NCAs) or the national resolution authorities (NRAs)) and Union administrations (the European Central Bank (ECB) or the Single Resolution Board (SRB)) participate.<sup>3</sup>

In the light of the definition mentioned above, composite procedures are kept separate from other forms of cooperation between national and Union authorities of the SSM and the SRM,<sup>4</sup> which result in:

1. a particular composition of the SSM or the SRM authorities and their bodies;

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<sup>3</sup> The author has borrowed this definition from Filipe Brito Bastos' presentation 'Composite administrative procedures: a conceptual introduction' at the ECB's Legal Colloquium of 26 February 2020 on composite administrative procedures. The author prefers this definition to the broader one contained in Article I-4 (Definitions) of the 2014 ReNEUAL Model Rules on EU Administrative Procedure, which reads as follows: "Composite procedure" means an administrative procedure where EU authorities and the authorities of a Member State or of different Member States have distinct functions which are inter-dependent. A composite procedure may also mean the combination of two administrative procedures that are directly linked.'

<sup>4</sup> The distinction between composite procedures and other forms of cooperation between authorities does not rely solely on their definitions. The differences that exist also serve to identify the acts that concern the administrative and judicial protection of the addressees of the final decision. The fact that acts are adopted by both Union and national authorities poses a problem, peculiar to this type of procedure, of determining at what level – whether Union or national – such protections must be afforded. However, this assessment depends, as the author will explain in this paper, on other factors such as the nature – whether Union or national – of the authority responsible for adopting the final decision and the discretion it enjoys in departing from the preparatory acts.

2. the exchange of information between the ECB and the NCAs or the SRB and the NRAs; or
3. the facilitation of functions between the ECB and the NCAs or between the SRB and the NRAs.<sup>5</sup>

## 1.2 Distinction from the procedures for adopting ECB and SRB decisions by bodies composed of both Union and national representatives

Against this background, the adoption of decisions (or draft decisions) by the Union bodies composed of both Union and national representatives (e.g. the SRB and the ECB's Supervisory Board or Governing Council) does not give rise to composite procedures.

Indeed, in this context, no acts formally attributable to NCAs or NRAs as such can be identified in the ECB's or the SRB's decision-making process.

It is not relevant that certain members of the ECB's bodies or of the SRB are representatives of the NCAs or the NRAs respectively.<sup>6</sup>

Nevertheless, a specific question arises in this context as to whether the mediation procedure between the ECB's Supervisory Board (SB) and its Governing Council (GC) provided for in Article 25(5) of the SSMR<sup>7</sup> and governed by Regulation (EU) No 673/2014 of the European Central Bank<sup>8</sup> on the establishment of a mediation panel (MP) is a composite procedure or not.

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<sup>5</sup> In addition, in distinguishing between composite proceedings and other forms of cooperation between Union and national authorities, the author follows the classification provided by Filipe Brito Bastos in his presentation at the ECB's Legal Colloquium of 26 February 2020 on composite administrative procedures.

<sup>6</sup> This reasoning is confirmed by the fact that the members of the ECB's Supervisory Board act in the interest of the Union and not of the national authorities of the participating Member States. See Article 19(1) of the SSMR, which reads as follows: '...The members of the Supervisory Board and the steering committee shall act independently and objectively in the interest of the Union as a whole and shall neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or from any other public or private body'. Furthermore, Article 26(1) of the SSMR clarifies that: 'all members of the Supervisory Board [i.e. not only those appointed by the ECB] shall act in the interest of the Union as a whole'. The position with regard to the SRB is less clear. Although the full-time members of the SRB must act in the interest of the Union, such an obligation does not apply to the members appointed by the NRAs.

<sup>7</sup> 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 (OJ L 287, 29.10.2013, p. 63) (hereinafter the 'SSM Regulation' or 'SSMR').

<sup>8</sup> Regulation (EU) No 673/2014 of the European Central Bank of 2 June 2014 concerning the establishment of a Mediation Panel and its Rules of Procedure (ECB/2014/26) (OJ L 179, 19.6.2014, p. 72).

Despite the fact that the MP is an internal ECB body, the mediation procedure is structured in such a way that the NCAs, rather than acting as members of the ECB's internal bodies, appear to play an autonomous role in the procedure.<sup>9</sup>

Indeed, although the final decision is taken by the ECB's decision-making bodies following an opinion expressed by the MP, the procedure itself is activated by the NCAs concerned, whether or not this is done by their representatives in the ECB's bodies is not relevant, and may therefore be qualified as a composite procedure.<sup>10</sup>

However, no composite procedure arises when the staff of both national and Union authorities participate in joint supervisory teams (JSTs) and internal resolution teams (IRTs).

The JSTs' preparation of proposals for supervisory decisions and their transmission to the SB are not composite procedures, as JSTs are ECB and not SSM bodies.

Indeed, pursuant to Article 4 of the SSM Framework Regulation<sup>11</sup> (hereinafter the 'FR') the ECB, and not the ECB together with the NCAs, is in charge of the establishment and the composition of the JSTs.

The JST task of liaising with NCAs, where relevant, provided for in Article 3(2)(e) of the FR does not contradict this view.

Where a JST liaises with the NCAs this does not give rise to a series of acts that can be imputed to the ECB and the NCA respectively, instead it represents a mere informal exchange of views between the internal structures of the ECB and the NCAs.

This may also be inferred from the provision laid down in Article 91(2) of the FR, which entitles the NCAs to submit draft supervisory decisions to the ECB through the JSTs.

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<sup>9</sup> Under Article 25(5) of the SSMR: 'With a view to ensuring separation between monetary policy and supervisory tasks, 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...'. Moreover, under Article 8(1) and (2) of Regulation (EU) No 673/2014 (ECB/2014/26) establishing the MP: '1. Competent authorities of participating Member States which are concerned by and have different views regarding an objection by the Governing Council to a draft decision of the Supervisory Board may ask the Supervisory Board, within five working days from receipt of the objection, including the reasons for the objection, to request mediation in order to resolve such differences, with a view to ensuring separation between monetary policy and supervisory tasks. Each competent authority concerned shall do so by submitting a notice requesting mediation to the Supervisory Board, identifying the objection by the Governing Council, and including a statement on the reasons for requesting mediation. The Secretariat will notify such requests for mediation to the Supervisory Board members. 2. Any other competent authority of a participating Member State concerned by and having different views regarding the same objection may submit a separate notice requesting mediation or join an existing request for mediation within five working days of the notification of the first request for mediation and express its difference of view'.

<sup>10</sup> Disagreements by participating Member States outside the euro area to the SB's draft decisions and the GC's objections are regulated by Articles 7(7) and (8) and 26(8) of the SSMR. Here, however, the outcome of the procedure, which is triggered by the Member State and not by the NCA, may go beyond the adoption of the individual decision concerned and result in a suspension or termination of close cooperation.

<sup>11</sup> Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) (OJ L 141, 14.5.2014, p. 1).

In such a case, contrary to the situation under Article 3(2)(e), there is indeed a series of acts – the NCA's proposal to the ECB and the subsequent ECB decision – which thus gives rise to a composite procedure.

However, once again in this situation the JST is merely a platform for the transmission of the NCA's proposal to the ECB rather than a body charged with an act in a composite procedure.

The IRTs' assistance to the SRB cannot be qualified as a composite procedure either, as the IRTs are the SRB's and not the SRM's bodies, as the wording of Article 83(3) of the SRMR<sup>12</sup> clearly shows.

Indeed, under Article 83(3) SRMR 'the Board may establish *internal* resolution teams composed of its own staff and staff of the national resolution authorities, as well as observers from non-participating Member States' resolution authorities, where appropriate' (emphasis added).<sup>13</sup>

### 1.3 Composite procedure or mere exchange of information between the SSM and the SRM authorities?

The mere exchange of information between authorities of a unique multilevel system, for example, the exchange of information between the ECB and the NCAs within the SSM,<sup>14</sup> or the SRB and the NRAs within the SRM<sup>15</sup>, is, once again, not a composite procedure.<sup>16</sup>

Recital 47 of the SSMR states that 'the ECB and the national competent authorities should have access to the same information without credit institutions being subject to double reporting requirements'.

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<sup>12</sup> Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1) (hereinafter the 'SRMR').

<sup>13</sup> Moreover, the SRB may decide to modify the staffing of the IRT when it deems it necessary and appropriate in the light of the circumstances of the case (see Article 25 of the Decision of the Single Resolution Board of 17 December 2018 establishing the framework for the practical arrangements for the cooperation within the Single Resolution Mechanism between the Single Resolution Board and National Resolution Authorities (SRB/PS/2018/15) (hereinafter the 'SRB Decision on the framework for cooperation', available on the [SRB's website](#))).

<sup>14</sup> See Article 6(2) of the SSMR and Article 21 of the FR.

<sup>15</sup> See Article 30(2) of the SRMR and Article 3(7) of the SRB Decision on the framework for cooperation.

<sup>16</sup> The same holds true with regard to the exchange of information between (national and/or Union) authorities of the SSM and the SRM. Article 30(7) of the SRMR specifies that, where necessary, the SRB must conclude a memorandum of understanding (MoU) with the ECB, the NCAs and the NRAs describing how they will cooperate when exercising their respective responsibilities, particularly as regards resolution planning, early intervention and the resolution phases. To date an MoU has only been concluded between the ECB and the SRB – Memorandum of Understanding between the Single Resolution Board and the European Central Bank of 22 December 2015 in respect of cooperation and information exchange, available on the [SRB's website](#). This MoU aims to avoid an unnecessary increase in the reporting burden of the institutions. Recital 10 of this MoU states that: 'information received from the SRB by the ECB can be shared with the national competent authorities involved in the respective joint supervisory team and information received from the ECB by the SRB can be shared with the national resolution authorities involved in the respective internal resolution team'.

In the light of the above, within the SSM, the NCAs are the point of entry for any information reported by the credit institutions, whether significant or less significant.

Indeed, pursuant to Article 140(3) of the FR 'each supervised entity shall communicate to its relevant NCA the information to be reported on a regular basis in accordance with relevant Union law. Unless specifically otherwise provided for, all information reported by supervised entities shall be submitted to the NCAs. They shall perform the initial data checks and make the information available to the ECB'.

This initial and general checking of data by NCAs is not an act of a composite administrative procedure, as it is not specifically aimed at the adoption of a particular supervisory decision by the ECB. The fact that the ECB in its role as competent authority might subsequently exercise one of its supervisory powers upon receiving the submitted information is purely incidental.

In other words, there is no sequence of acts aimed at the adoption of a certain specific measure, as the initial assessment of the supervisory information made by the national authority is neutral with regard to the subsequent steps in the ECB's administrative action, since this action, if any is needed, will be based on an autonomous assessment by the ECB of the information received.

## 1.4 A composite procedure is more than mere cooperation between SSM and SRM authorities

Simple cooperation in good faith between the NCAs/NRAs and the ECB/SRB cannot give rise per se to a composite procedure.<sup>17</sup>

There are cases where the national authority is called upon to remove impediments to the proper exercise of powers by the Union authority. See, for example, Articles 11(2)<sup>18</sup> and 12(5) of the SSMR<sup>19</sup>. Similar provisions are contained in Articles 35(2) and 36(5) of the SRMR.

However, even in these cases, the assistance that the national authority, the relevant NCA or NRA, provides to the Union authority, whether the ECB or the SRB, is

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<sup>17</sup> The same holds true with regard to the cooperation between the SSM and the SRM authorities and the cooperation between the JSTs and the IRTs. Under Article 24(4)(o) of the SRB Decision on the framework for cooperation, an IRT's tasks include: 'cooperating with competent authorities and Joint Supervisory Teams ("JSTs") where relevant'.

<sup>18</sup> When a person obstructs the conduct of the investigation, the NCA of the participating Member State where the relevant premises are located must afford, in compliance with national law, the necessary assistance including, in the cases referred to in Articles 12 and 13 of the SSMR, facilitating the access by the ECB to the business premises of the legal persons referred to in Article 10(1) of the SSMR, so that the aforementioned rights can be exercised.

<sup>19</sup> The provision reads as follows: 'where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this Article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records. Where that power is not available to the national competent authority concerned, it shall use its powers to request the necessary assistance of other national authorities.'



instrumental in exercising the investigative or inspection powers and is not part of a series of acts aimed at the adoption of a final supervisory or resolution decision.

A separate phenomenon is the transmission, to the ECB by the NCA, of information or applications submitted by the credit institutions in order to activate an ECB administrative procedure.

Here a distinction must be made between the mere transmission of information or the application (see Articles 11(1),<sup>20</sup> 12(1),<sup>21</sup> 17(1)<sup>22</sup> and Article 79<sup>23</sup> of the FR) and the transmission of a proper assessment by the national authorities of facts which are relevant for the Union authority's final decision (see Articles 43(4) and (5)<sup>24</sup> and 58(1)<sup>25</sup> of the FR). In the first case, no composite procedure is involved, in the second case it is.

## 2 Composite procedures within the SSM

### 2.1 Allocation of powers, decisions and procedures within the SSM

Supervisory powers within the SSM fall under the remit of either the ECB or the NCAs according to the general criteria on the allocation of tasks under Article 6 of the SSMR, essentially, whether the relevant credit institution is a significant credit institution (hereinafter 'SI') or a less significant credit institution (hereinafter 'LSI').

Consequently, the authority responsible for each task must also be, as a rule, the one responsible for the relevant supervisory decisions and the related administrative procedures.

Theoretically, this should lead to the exclusion of composite procedures within the SSM.

Nevertheless, there are several cases where final decisions are adopted in a more complex fashion, as both the ECB and the NCA are involved in a unique procedure aimed at adopting a final decision.

Such situations are the result of two factors:

1. when establishing the SSM a balance had to be struck between overcoming national bias and the need not to disperse the NCAs' expertise;

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<sup>20</sup> Right of establishment of credit institutions within the SSM.

<sup>21</sup> Exercise of the freedom to provide services by credit institutions within the SSM.

<sup>22</sup> Right of establishment and exercise of the freedom to provide services in relation to non-participating Member States.

<sup>23</sup> Procedure for the lapsing of the authorisation.

<sup>24</sup> Review of the status of a supervised entity.

<sup>25</sup> Determining significance on the basis of importance for the economy of any participating Member State at the request of an NCA.

2. since the substantive law on which the SSM is based comprised a multitude of supervisory rules, both Union and national, it was necessary to place the ECB on an equal footing with national authorities by providing it with an equally powerful set of supervisory tools.

In the light of this, when drafting the SSM Regulation, the Union legislative authorities introduced so-called ‘common procedures’, in which the NCAs provide their qualified technical input and the ECB takes the final decision.

Moreover, the Union legislative authorities sought, as far as possible, to give the ECB the power to make direct or indirect use of the NCAs’ powers, by equating the ECB with the NCAs<sup>26</sup> or by allowing the ECB to require the NCAs to exercise their purely national powers.<sup>27</sup>

## 2.2 The common procedures as types of composite procedures

First, there are tasks exclusive to the ECB, such as authorising licences and the assessment of the acquisition or disposal of qualifying holdings, where decisions are taken by the ECB and the NCAs carry out the preparatory phase and propose to the ECB the content of the final decision (Articles 14 and 15 of the SSMR).

The FR refers to the cooperation between the ECB and the NCAs with regard to these tasks as to ‘common procedures’ (Articles 73 to 88).

(a) Authorisation to take up the business of a credit institution – Under Article 14(1) of the SSMR, ‘any application for an authorisation to take up the business of a credit institution to be established in a participating Member State shall be submitted to the national competent authorities of the Member State where the credit institution is to be established in accordance with the requirements set out in relevant national law’.

If the applicant does not comply with the authorisation requirements, the NCA rejects the application and the procedure ends at the national level (Article 14(2) of the SSMR).

No composite procedure occurs in this case.

If the applicant complies with these requirements, the NCA takes a draft decision to propose to the ECB to grant the authorisation and the draft is deemed to be adopted if

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<sup>26</sup> See recital 45 of the SSMR: ‘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.’

<sup>27</sup> See recital 35 of the SSMR: ‘Within the scope of the tasks conferred on the ECB, national law confers on national competent authorities certain powers which are currently not required by Union law, including certain early intervention and precautionary powers. The ECB should be able to require national authorities in the participating Member States to make use of those powers in order to ensure the performance of full and effective supervision within the SSM.’

the ECB does not object within 10 working days (Article 14(2) and (3) of the SSMR), thus giving rise to a composite procedure.<sup>28</sup>

The withdrawal of an authorisation is adopted by the ECB (Article 14(5) of the SSMR) following consultations with the NCA or on a proposal from the NCA, giving rise in both cases to a composite procedure.<sup>29</sup>

At a later stage of the procedure, Article 14(6) of the SSMR provides for the involvement of the resolution authority. The case will be illustrated in Part 4 of this paper together with those composite procedures that involve both SSM and SRM authorities.

(b) Assessment of the acquisition or disposal of qualifying holdings – Similar to the authorisation of licences procedure, the ECB is the only competent authority that may authorise the acquisition and disposal of qualifying holdings.

Once again, the NCAs are competent to make a prior assessment and submit a proposal for a decision to the ECB, which gives rise to a composite procedure.<sup>30</sup>

Under Article 15(2) of the 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 ... 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'.

Article 15(3) of the SSMR specifies that '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'.<sup>31</sup>

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<sup>28</sup> The scope of the ECB's authorisation is not crystal clear. While under Article 14(1) of the SSMR the ECB's authorisation relates to the taking up of the banking business of a credit institution, Article 78(5) of the FR stipulates that 'the decision granting authorisation shall cover the applicant's activities as a credit institution as provided for in the relevant national law, without prejudice to any additional requirements for authorisation under the relevant national law for activities other than the business of taking deposits or other repayable funds from the public and granting credits for its own account'. The author favours a restrictive reading of the ECB's licensing power. In the light of recital 28 of the SSMR, this power should in fact be limited to traditional banking activities. Following the ECB's approach, it is worth noting that the licensing procedure may also involve the consultation of the national Financial Market Authority. Under Article 19(4) of the Italian Consolidated Law on Finance, 'the Banca d'Italia, having consulted CONSOB, authorises the provision of investment services and activities by Italian banks and of Italian branches of banks of non-Union countries, as well as the provision of the services and activities indicated in Article 18, paragraph 3, by financial intermediaries in the register specified in Article 106 of the consolidated banking law'. In the light of Article 78(5) of the FR this rule should be presumably read as allowing the Banca d'Italia to consult the Italian financial market supervisory authority (Commissione nazionale per le società e la borsa – CONSOB) prior to notifying its draft decision to the ECB under Article 14(1) of the SSMR.

<sup>29</sup> See also Article 82 of the FR.

<sup>30</sup> Contrary to what is provided for within the authorisation of licences procedure, the NCAs cannot autonomously oppose the acquisition based on a negative assessment of the fitness and propriety of the qualifying shareholder.

## 2.3 Other forms of SSM composite procedures

Outside the field of common procedures there are a number of other SSM composite procedures that start with a request from an NCA and end with a decision by the ECB or that involve the consultation of the NCAs by the ECB.

In Part 1 of this paper, the review of the status of a credit institution (Article 43(4) and (5) of the FR) was classified as a composite procedure, where the procedure is triggered by an NCA assessment or an NCA request to cooperate with the ECB.

However, there are also other cases.

The ECB decision to assume the direct supervision of a less significant credit institution may be adopted not only on the ECB's own initiative, but also on a request from the relevant NCA,<sup>32</sup> giving rise to a composite procedure.

Moreover, the ECB decision under the second subparagraph of Article 6(4) of the SSMR and Articles 70 to 72 of the FR, concerning the classification of a credit institution as less significant although the criteria for classification as significant are fulfilled, is adopted in compliance with the procedure under Article 44 of the FR.

This procedure also requires the consultation of the relevant NCAs<sup>33</sup> and therefore gives rise to a composite procedure.

As regards the review of the assessment of the particular circumstances under Article 72 of the FR, it is not clear whether this involves a composite procedure.

Whilst Article 72(1) merely requires the 'support' of the relevant NCA, without specifying any further detail, Article 72(4) provides that Title 2 of Part IV applies accordingly.

As Title 2 of Part IV refers to several forms of NCA involvement in the procedure, the review under Article 72 may, in certain situations, become a composite procedure.

## 2.4 Misalignment between the ECB's tasks and the NCAs' powers: NCA decisions following an ECB request

In other situations, the NCAs may adopt decisions concerning significant credit institutions following an instruction or request from the ECB.

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<sup>31</sup> Article 4(1)(c), read in conjunction with recital 22, of the SSMR expressly excludes from the ECB's competences the authorisation of new significant shareholders in the context of a bank's resolution. With regard to the sale of business tool and the bail-in tool, see Articles 38(8) and 47(4) respectively of 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 and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2012/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2011/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190) (hereinafter the 'BRRD'). Since only the NCAs are competent in such cases they do not involve a composite procedure.

<sup>32</sup> See Article 6(5)(b) of the SSMR and Article 68 of the FR.

<sup>33</sup> See Article 44(5) in conjunction with Article 39(6) of the FR.

This is particularly clear when the ECB exercises its supervisory powers over credit institutions established in participating Member States whose currency is not the euro, where the misalignment<sup>34</sup> between the ECB's tasks and the NCAs' powers is the rule (see the second subparagraph of Article 7(1) of the SSMR).<sup>35</sup>

With regard to credit institutions established in the euro area, cases of misalignment between the ECB's tasks and the NCAs' powers are limited to those expressly provided for in the third subparagraph of Article 9(1) and Article 18(5) of the SSMR.<sup>36</sup>

In such situations, it is possible to speak of composite procedures, based on the assumption that the NCAs have a duty to take action following the ECB's request, i.e. framing the ECB's request as a power of initiative with respect to initiating the procedure.

More to the point, pursuant to the third subparagraph of Article 9(1) of the SSMR, the ECB may require the NCAs to make use of their supervisory powers under the relevant national law, to the extent that these powers impinge on the ECB's supervisory tasks.<sup>37</sup>

Moreover, under Article 18(5) of the SSMR, the ECB may require the NCAs to open sanctioning proceedings in cases not covered by Article 18(1). Such proceedings may involve (in addition to the imposition of sanctions on members of the bodies of significant credit institutions) the imposition on significant credit institutions of non-pecuniary sanctions for violations of Union law and pecuniary or non-pecuniary sanctions for violations of national law.<sup>38</sup>

Pursuant to Article 134(2) of the FR, proceedings under Article 18(5) of the SSMR may also be triggered by an NCA asking the ECB to request it to open proceedings.

## 2.5 Delegation of powers to the NCAs

The scope of the composite procedures in the supervisory field has been extended by the ECB by delegating powers to the NCAs in relation to the fit and proper requirements for members of significant credit institutions' management bodies.

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<sup>34</sup> In relation to credit institutions established in a Member State whose NCA cooperates closely with the ECB, the ECB is responsible for the tasks provided for by Article 4 and Article 5(2) of the SSMR but may not act directly. Due to the mismatch between tasks and powers the ECB must ask the relevant NCA to use its own supervisory powers.

<sup>35</sup> See also Article 107(3) of the FR, which states: 'In accordance with Article 6 of the SSM Regulation, the ECB may issue to an NCA in close cooperation instructions in respect of significant supervised entities and groups and only general instructions in respect of less significant supervised entities and groups'.

<sup>36</sup> Unlike the close cooperation regime, the ECB's powers to request the NCAs of euro area participating Member States to adopt a supervisory decision or open a sanctioning proceeding are an exception to the normal performance of the ECB's tasks, since the ECB is generally vested with both the tasks and the relevant supervisory powers.

<sup>37</sup> In the ECB's view the third subparagraph of Article 9(1) of the SSMR refers to the NCAs' residual powers that go beyond the SSM's tasks; with regard to these powers, the ECB may give instructions to the NCAs.

<sup>38</sup> See also Article 134 of the FR.

In this context, the ECB has tasked the NCAs with assessing compliance with certain fit and proper requirements, while the final decision is still taken by the ECB (hereinafter the 'alternative F&P process').<sup>39</sup>

Under the alternative F&P process, NCAs are responsible for preparing draft ECB fit and proper decisions, which will be finally adopted by the ECB's heads of work units<sup>40</sup> or, for decisions not subject to delegation, by the GC under the non-objection procedure.

More generally, Article 6(3) of the SSMR provides for the NCAs' responsibility to assist the ECB with the preparation and implementation of ECB decisions.

Article 6(3) of the SSMR provides that '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 [of the SSMR]', not only 'with the preparation', but also with the 'implementation of any acts relating to the tasks referred to in Article 4 related to all credit institutions, including assistance in verification activities'.

Article 90(1)(b) of the FR simply mimics Article 6(3) of the SSMR with only the addition of the assistance in 'the day-to-day assessment of the situation of' significant credit institutions.

Here, however, a distinction has to be made.

While mere assistance in verification activities and in the day-to-day assessment of the situation of significant credit institutions cannot result in composite procedures (see Part 1), a different conclusion should be drawn when the assistance relates to preparing or implementing ECB supervisory decisions.<sup>41</sup>

## 2.6 Cooperation between the ECB and the NCAs in supervising high priority LSIs

The cooperation between the ECB and the NCAs when supervising LSIs may take the form of a composite procedure if the NCA's material decisions<sup>42</sup> concern high priority LSIs.<sup>43</sup>

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<sup>39</sup> See ECB Annual Report on supervisory activities 2017, p. 86. In legal literature, see Hernández Saseta, C., 'Assignments to the national competent authorities in the preparation of the ECB's decisions: legal challenges', in *ESCB Legal Conference 2018*, pp. 84-95, at p. 85.

<sup>40</sup> See Article 2(1) of Decision (EU) 2017/935 of the European Central Bank of 16 November 2016 on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (ECB/2016/42) (OJ L 141, 1.6.2017, p. 21).

<sup>41</sup> As mentioned in Part 1, Article 91 of the FR specifies the cases where the NCAs assist in preparing the ECB's supervisory decision, by stating that this assistance may occur at the ECB's request (Article 91(1)) or on the NCA's own initiative, by submitting a draft decision to the ECB via the JST.

<sup>42</sup> Under Article 98(2) of the FR, material decisions are those that: '(a) relate to the removal of members of the management boards of the less significant supervised entities and the appointment of special managers; or (b) have a significant impact on the less significant supervised entity'.

Indeed, should this situation arise, the NCAs are required to transmit draft decisions to the ECB, on which the ECB may express its views.<sup>44</sup>

## 2.7 Composite procedures in the field of macroprudential supervision

The allocation of competences for macroprudential tasks between the ECB and the NCAs or the national designated authorities (NDAs)<sup>45</sup> applies a different criterion to that of an entity's status as an SI or an LSI (see recital 24 and Article 5 of the SSMR).

Indeed, pursuant to Article 5 of the SSMR both the ECB and the NCAs or NDAs are entitled to apply macroprudential tools provided for under Union law. These tools apply to all credit institutions, irrespective of whether they are SIs or LSIs.

More to the point, the NCAs or NDAs act first (Article 5(1) of the SSMR), whilst the ECB may only apply higher buffers than those applied by the NCAs or NDAs (using what is known as its 'top-up power': Article 5(2) of the SSMR) if this is deemed necessary.<sup>46</sup>

It is worth clarifying that the NCAs or NDAs, on the one hand, and the ECB, on the other hand, exercise separate powers which each give rise to acts directly applicable to their addressees. The only peculiarity is that the ECB may exercise its own powers, autonomously and distinctly from those already exercised by the NCA or NDA, to impose stricter macroprudential requirements.

In the light of this, the procedure under Article 5(1) of the SSMR and the procedure under Article 5(2) to (4) of the SSMR are distinct and do not give rise to a unique composite procedure.

On the contrary, each of the two separate procedures for adopting NCA or NDA decisions, on the one hand, and ECB decisions, on the other hand, constitutes, in its own right, a composite procedure as it requires a decision-making process involving both the NCAs or NDAs and the ECB.

Indeed, with regard to the Article 5(1) procedure, which results in an NCA or NDA decision, it is worth noting that, 'ten working days prior to taking such a decision, the concerned authority [the NCA or the NDA] shall duly notify its intention to the ECB.

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<sup>43</sup> Article 98(1) of the FR states that: '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 send to the ECB draft supervisory decisions that fulfil the criteria laid down in paragraphs 2 and 3 where the draft decision concerns the less significant supervised entities for which the ECB considers that, based on the general criteria defined by the ECB regarding their risk situation and potential impact on the domestic financial system, the information shall be notified to it'. High priority less significant credit institutions have been identified in compliance with these criteria.

<sup>44</sup> See Article 6(7)(c)(iii) of the SSMR and Articles 97 and 98 of the FR.

<sup>45</sup> Pursuant to Article 136 of the CRD: 'each Member State shall designate a public authority or body (a "designated authority") that is responsible for setting the countercyclical buffer rate for that Member State'. The national designated authority (NDA) is also empowered with the activation of the other macroprudential instruments provided for in Union legislation.

<sup>46</sup> As clarified in the second sentence of Article 102 of the FR, the ECB's top-up power implies also that it may apply a macroprudential measure (i.e. a capital buffer) even when no macroprudential measures have been adopted at national level.

Where the ECB objects, it shall state its reasons in writing within five working days. The concerned authority shall duly consider the ECB's reasons prior to proceeding with the decision as appropriate'.

The procedure laid down in Article 5(2) to (4) of the SSMR is slightly more articulated, as it may involve an initiative by the NCA or NDA prior to resulting in an ECB decision.

More specifically, Article 5(3) of the SSMR states that, 'any national competent authority or a national designated authority may propose to the ECB to act under paragraph 2, in order to address the specific situation of the financial system and the economy in its Member State'.

In other respects, the Article 5(2) to (4) procedure mirrors the one laid down in Article 5(1) of the SSMR. Indeed, pursuant to Article 5(4) of the SSMR, 'where the ECB intends to act in accordance with paragraph 2, it shall cooperate closely with the national designated authorities in the Member States concerned. It shall in particular notify its intention to the concerned national competent authorities or national designated authorities ten working days prior to taking such a decision. Where any of the concerned authorities objects, it shall state its reasons in writing within five working days. The ECB shall duly consider those reasons prior to proceeding with the decision as appropriate'.

## 3 Composite procedures in the SRM

### 3.1 Allocation of tasks and powers in the SRM and NRA involvement in implementing most SRB decisions

At first glance, the allocation of tasks in the SRM mimics the allocation of tasks in the SSM.

Nevertheless, the two systems are not perfectly aligned.

First, the SRB is vested with resolution powers not only with regard to SIs and groups, but also with regard to other cross-border groups, irrespective of their status as significant or less significant (see Article 7(2)(b) of the SRMR).

Second, unlike the SSM, where the ECB's decisions are directly addressed to SIs, almost all SRB decisions need to be implemented by NRA measures.

Not surprisingly, composite procedures are the rule in the SRM, particularly with regard to the SRB's most important powers.

The SRB is vested, among other things, with the following powers: adopting the resolution plan, identifying any material impediments to resolvability and outlining relevant actions for how those impediments could be addressed (Articles 8 and 10 of the SRMR); determining minimum requirements for own funds and eligible liabilities (hereinafter 'MREL') (Article 12 of the SRMR); determining whether conditions for the



write-down and conversion of capital instruments are met (Article 21 of the SRMR); adopting the resolution scheme according to the resolution plan, including establishing the details of the applicable resolution tools (Articles 18 and 23 to 27 of the SRMR); calculating ex ante and ex post contributions to the Single Resolution Fund (SRF) (Articles 70 and 71 of the SRMR).

The implementation of these SRB decisions is left to the NRAs.

The NRAs must, pursuant to the SRB's instructions: take any measures to address or remove the substantive impediments to resolvability (Article 10(10) and (11) of the SRMR); implement the SRB's determinations on MREL (Article 12(14) of the SRMR); exercise write-down or conversion powers in accordance with the BRRD (Article 21(8) to (11) and Article 29 of the SRMR); adopt specific resolution tools and measures (Article 18(9), and Articles 23 and 29 of the SRMR); raise the ex ante and ex post contributions to the SRF (Article 67(4) of the SRMR).

Moreover, pursuant to Article 29(1) of the SRMR, the NRAs 'shall implement all decisions addressed to them by [the SRB]'.<sup>47</sup>

## 3.2 NRA involvement in preparing certain SRB decisions

In some of the cases already mentioned, and also in certain other cases, the NRAs may also be involved in preparing SRB decisions.

Without claiming to be exhaustive, this section provides a number of examples.

The SRB may require the NRAs to prepare and submit to it a draft resolution plan and may address specific instructions to the NRAs for this purpose.<sup>48</sup>

The SRB, on its own initiative, after consulting the relevant NRA or upon proposal by an NRA, may apply simplified obligations in relation to the drafting of resolution plans and may waive certain obligations regarding the drafting of these plans.<sup>49</sup>

Moreover, under Article 13(3) of the SRMR, the SRB may require the relevant NRA to draft a preliminary resolution scheme.

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<sup>47</sup> The general scope of this provision may justify the absence within the SRM of a mechanism similar to that of close cooperation provided for in Article 7 of the SSMR. Indeed, unlike what is established under Article 7 of the SSMR, Article 4 of the SRMR contains no express provision for the SRB to instruct the NRAs of Member States in close cooperation or for them to follow such instructions. As mentioned, a plausible explanation could lie in the fact that, in the SRM, the decisions of the SRB, unlike what is provided for with regard to the ECB's decisions within the SSM, are generally implemented by the NRAs. There was, therefore, no need to establish a specific mechanism for instructing the NRAs in order to ensure compliance with SRB decisions.

<sup>48</sup> See Article 8(2) and (3) of the SRMR and Article 6 of the SRB Decision on the framework for cooperation.

<sup>49</sup> See Article 11(1) of the SRMR and Article 9 of the SRB Decision on the framework for cooperation. Article 11(9) of the SRMR also provides for a composite procedure on the withdrawal of a waiver: 'Where the national resolution authority which has proposed the application of simplified obligations or the grant of a waiver in accordance with paragraph 2 considers that the decision to apply simplified obligations or to grant the waiver must be withdrawn, it shall submit a proposal to the Board to that end. In that case, the Board shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national resolution authority in the light of the factors or circumstances referred to in paragraph 3 or in paragraphs 7 and 8'.

Furthermore, pursuant to Article 71(2) of the SRMR, the SRB 'shall, on its own initiative after consulting the national resolution authority or upon proposal by a national resolution authority, defer, in whole or in part ... an institution's payment of extraordinary ex-post contributions ... if it is necessary to protect its financial position. ...'.

The SRB may decide either on its own initiative, after consulting the relevant NRA, or upon the NRA's request, to directly exercise its resolution powers over LSIs.<sup>50</sup>

### 3.3 The SRB's power to recommend that NRAs apply sanctions

According to Article 38(2) of the SRMR, the SRB's sanctioning powers are limited to cases where institutions do not:

1. supply the information requested by the SRB;
2. submit to a general investigation by the SRB;
3. comply with an SRB decision adopted pursuant to Article 29 of the SRMR.

Moreover, under Article 38(8) of the SRMR, the SRB may recommend that the NRAs take action in order to ensure that appropriate penalties are imposed in accordance with Articles 110 to 114 of the BRRD and any relevant national legislation.

Contrary to what is provided for under Article 18(5) of the SSMR, under Article 38(8) the SRB may only recommend, and not require, that NRAs open sanctioning proceedings. Moreover, NRAs are empowered to open sanctioning proceedings in accordance with the national law transposing Articles 110 to 114 of the BRRD irrespective of any recommendation from the SRB that they should do so.

However, this situation should not affect the qualification of the procedure as a composite procedure where the SRB does address a recommendation to the relevant NRA and the NRA decides to comply with the recommendation.

## 4 Composite procedures involving both SSM and SRM authorities

### 4.1 A composite supervisory procedure that may involve the NRAs: the withdrawal of the banking licence

Article 14(6) of the SSMR specifies that 'as long as national authorities remain competent to resolve credit institutions, in cases where they consider that the

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<sup>50</sup> See Article 7(4)(b) of the SRMR and Article 9(1)(a) of the SRB Decision on the framework for cooperation.

withdrawal of the authorisation would prejudice the adequate implementation of or actions necessary for resolution or to maintain financial stability, they shall duly notify their objection to the ECB explaining in detail the prejudice that a withdrawal would cause. In those cases, the ECB shall abstain from proceeding to the withdrawal for a period mutually agreed with the national authorities. The ECB may extend that period if it is of the opinion that sufficient progress has been made. If, however, the ECB determines in a reasoned decision that proper actions necessary to maintain financial stability have not been implemented by the national authorities, the withdrawal of the authorisations shall apply immediately.’

The ambiguous wording of the provision (‘national authorities’ instead of ‘national competent authorities’, i.e. the authorities mentioned in Article 2 of the SSMR as those vested with supervisory powers under Directive 2013/36/EU of the European Parliament and of the Council<sup>51</sup> (hereinafter the ‘CRD’) and Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>52</sup> (hereinafter the ‘CRR’)) may seem to refer only to national supervisory authorities that are also resolution authorities.

Nevertheless, reading Article 14(6) of the SSMR in conjunction with Articles 83 and 84 of the FR clarifies that the authority involved in this phase of the withdrawal procedure is the NRA, irrespective of whether it may also be an NCA.

Should the NRA be different from the NCA, the ECB must consult both.

Articles 83 and 84 of the FR do not consider the case where the resolution authority is the SRB, as the FR came into force before the adoption of the SRMR.

However, the reference to the NRAs should also include, by analogy, the SRB.

In any case, when the resolution authority is the SRB, Paragraph 9.5.3 of the MoU between the SRB and the ECB of 22 December 2015 applies.

This provision states that ‘the ECB will cooperate with the SRB whenever, either on its own initiative or on a proposal from an NCA, it intends to take a decision on the withdrawal of the authorisation of an institution subject to the direct responsibility of the SRB in case of failure or a likely failure situation. Following consultation with the SRB, the ECB will take its views into account when taking its decision’.

In conclusion, the resolution procedure may have an impact on the procedure for withdrawal of the authorisation.

Although the two procedures remain distinct, the resolution authority is entitled to take part in the procedure for withdrawal, which, besides involving the relevant NCA, may

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<sup>51</sup> 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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

<sup>52</sup> 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 and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

include NRA or SRB procedural or preparatory acts related to the procedure, depending on the allocation of resolution tasks under Article 7 of the SRMR.

## 4.2 Participation of supervisory authorities in composite resolution procedures

(a) Supervisory authorities participate in some minor composite resolution procedures as provided for under the SRMR.

In addition to the resolution decision-making process under Article 18 of the SRMR there are a number of other examples as indicated in this section.

The SRB's decision on resolution planning involves consulting the ECB or the NCAs, depending on whether the entity concerned is an SI or an LSI, and the relevant NRA.<sup>53</sup>

Moreover, the SRB's consultation of the ECB or the NCAs, depending on whether the entity concerned is an SI or an LSI, is also provided for under Article 12(1) of the SRMR in the procedure for determining the MREL.

Furthermore, ex ante contributions to the SRF are calculated by the SRB, after consulting the ECB or the NCA and in close cooperation with the NRAs (Article 70(2) of the SRMR).

(b) The resolution procedure under Article 18 of the SRMR has a much higher level of complexity than the procedures mentioned under point (a).

There are many reasons for this.

First, the assessment of the different conditions for resolution is entrusted to different supervisory and resolution authorities.

Second, the procedure involves not only the SRB, but also the Commission and the Council.

Third, in the event of a negative assessment from the SRB with regard to the resolution scheme being in the public interest, a national judicial or administrative procedure, such as compulsory administrative liquidation under Italian law, follows.

It is not clear in such procedures whether two separate but interconnected procedures or two stages of the same composite procedure are involved.

An argument in favour of separate but interconnected procedures is the fact that the procedure following the negative public interest assessment can be either a judicial or an administrative procedure, neither of which is regulated, or at least not harmonised by Union law.

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<sup>53</sup> See Article 8(2) of the SRMR.

Furthermore, in order to activate a national liquidation, national law may require the assessment of other conditions in addition to the existence of a distinct public interest. However, whether, and to what extent, any public interest differs from that assessed under a resolution procedure is difficult to establish and depends on the choices made by the national legislature.

An argument in favour of the uniqueness of the resolution procedure, at least in relation to the Italian framework for compulsory administrative liquidation, is the uniqueness of the failing or likely to fail (FOLTF) assessment, which is not called into question in the subsequent phase of the national procedure.

The steps in the resolution procedure are summarised below.

Under Article 18 of the SRMR, the resolution procedure applies only where the following conditions are met:

1. the entity is failing or is likely to fail;
2. having regard to the timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an institutional protection scheme, or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments, taken in respect of the entity, would prevent its failure within a reasonable timeframe;
3. a resolution action is necessary in the public interest.

The competence to declare whether a credit institution is FOLTF must follow, as a rule, the allocation of supervisory tasks within the SSM based on whether the entity concerned is an SI or an LSI.

As the scope of the SRB's resolution powers does not coincide with that of the ECB's supervisory powers, there are cases – for example, the resolution of cross-border groups – where the SRB's assessment of the other requirements of the resolution follows an NCA's rather than the ECB's assessment of FOLTF.

The ECB assesses that a significant credit institution is FOLTF, after consulting the SRB (see Article 18(1) of the SRMR). The SRB itself, in its executive session, may make such an assessment only after informing the ECB of its intention, and only if the ECB does not make its own assessment within three days of learning of the SRB's intention (Article 18(1) of the SRMR).

The SRB, after having assessed the (other) conditions in Article 18(1) of the SRMR,<sup>54</sup> adopts the resolution scheme (Article 18(1) of the SRMR), whose approval is subject to a non-objection procedure in which both the Commission and the Council are involved (Article 18(7) of the SRMR).

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<sup>54</sup> It is of note that the condition in Article 18(1)(b) of the SRMR, namely, the existence of no alternatives that could prevent the entity's failure, is assessed 'in close cooperation with the ECB'.

The resolution scheme (Article 18(6) of the SRMR) places the entity under resolution; determines the application of the resolution tools; and determines the use of the SRF to support the resolution action.

The involvement of the Commission and the Council in the resolution procedure, which represents an additional complicating element in the procedure, is due to the *Meroni* concerns, as clarified in recital 26 of the SRMR.<sup>55</sup> Accordingly, the Commission may object to the scheme with regard to its discretionary aspects and the Council (based on a Commission proposal) may object to the public interest criterion not being fulfilled by the scheme or to a material modification of the amount of the SRF provided for in the scheme.<sup>56</sup>

Finally, the resolution scheme is addressed to and is effectively carried out by the NRAs.

The NRAs must take all necessary measures to implement it by exercising the resolution powers provided for in the national law implementing the BRRD. The SRB closely monitors the execution of the scheme by the NRAs (Article 28(1) of the SRMR).

In relation to the execution of the resolution scheme, the NRAs must: cooperate with and assist the SRB in the performance of its monitoring duty (Article 28(1)(a) of the SRMR); regularly provide information on the execution of the resolution scheme (Article 28(1)(b) of the SRMR); submit to the SRB a final report on the execution of the resolution scheme (final sentence of Article 28(1) of the SRMR).

The SRB may give instructions to the NRAs regarding any aspect of the execution of the resolution scheme (Article 28(2) of the SRMR).

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<sup>55</sup> '... The procedure relating to the adoption of the resolution scheme, which involves the Commission and the Council, strengthens the necessary operational independence of the Board while respecting the principle of delegation of powers to agencies as interpreted by the Court of Justice of the European Union ...'.

<sup>56</sup> Pursuant to the third subparagraph of Article 18(7) of the SRMR, the Board must transmit the resolution scheme to the Commission. Within 24 hours, the Commission 'shall either endorse the scheme, or object to it with regard to the discretionary aspects'. Within 12 hours, the Commission 'may propose to the Council: (a) to object to the resolution scheme' for lack of public interest, or '(b) to approve or object to a material modification of the amount of the Fund' proposed by the Commission. The scheme will be adopted if the Commission and the Council do not object within 24 hours. In the event of objections, the SRB will modify the scheme in accordance with these objections within 8 hours. Where the Council objects on the ground of lack of public interest, the entity will be wound up in accordance with national law (insolvency procedure). Where amendments of the adopted scheme are necessary, they follow the same procedure.

## 5 Due process requirements in SSM and SRM composite procedures

### 5.1 General issues

In principle, in composite procedures the authority adopting the final decision, whether it is the ECB or the SRB or the relevant NCA or NRA, must comply with due process requirements, including the right to be heard.

Nevertheless, the author is of the opinion that, where the authority adopting the final decision is legally bound by a previous act of another authority, due process rights must be adequately protected before the authority responsible for the previous act.<sup>57</sup>

Unlike Article 22 of the SSMR and a number of provisions in Title 2 of Part III of the FR, there are no provisions in the SRMR dealing with due process, with the exception of Article 40 of the SRMR, which expressly provides for due process rules in relation to fines and the periodic penalty payments procedure.<sup>58</sup>

Nevertheless, in relation to SRB decisions, a right to be heard can be based on the general principles of the Union administration and on Article 41(2)(a) of the Charter of Fundamental Rights of the European Union (hereinafter the 'Charter'). This Article

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<sup>57</sup> As a comparison for the analysis conducted here, see Article III-24 of the ReNEUAL Model Rules on Union Administrative Procedure entitled 'Right to be heard in composite procedures', which reads as follows: '(1) The right to be heard must be respected at all stages of a composite procedure between the EU and the Member States leading to a decision in the manner set out in this article. The application of the right to be heard will depend on the division of responsibility in the decision-making process. (2) In a case of composite procedure, where an EU authority makes the decision it must comply with the procedural requirements in Article III-23. Where the decision is made by a Member State authority it must comply with the requirements of Article III-23 where sector-specific EU law renders the procedural rules in Book III applicable. In the absence of such sector-specific EU law, or any other EU law specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with general principles of EU law concerning fair hearings. (3) In a case of composite procedure, the form and content of the hearing provided pursuant to Article III-23(5) by the public authority that makes the decision will be affected by the extent to which the rights of the defence were adequately protected at a prior stage in the administrative proceedings by another public authority. (4) In a case of composite procedure, where the public authority making the decision is legally bound by a recommendation made by an EU authority, then the right to be heard must be adequately protected before the EU authority that makes the recommendation, including through application of the principles in Article III-23(3)-(5). Where sector-specific EU law renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the recommendation. In the absence of such an EU provision, or any other EU law specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with general principles of EU law concerning fair hearings. (5) In a case of composite procedure, where the EU authority's decision is predicated on a recommendation made by another public authority and where there was no opportunity for a hearing before such a public authority, the right to be heard before the decision is taken shall include knowledge of the recommendation and the ability to contest its findings. Where sector-specific EU law renders Book III applicable to Member States, the preceding obligation applies *mutatis mutandis* where a Member State authority makes the decision pursuant to a recommendation made by another public authority. In the absence of such an EU provision, or any other EU law specifying applicable procedural requirements, the Member State authority will apply national rules of administrative procedure, which must comply with general principles of EU law concerning fair hearings. (6) For the avoidance of doubt, this article is also applicable to cases of composite procedure where EU law imposes legal obligations on Member State authorities to coordinate or co-operate action that leads to individual decisions.'

<sup>58</sup> Article 40 of the SRMR provides the addressees of SRB decisions to impose fines and/or periodic penalty payments with the right to be heard and the right to have access to the SRB's files. Access to files is subject to 'the legitimate interest of other persons in the protection of their business secrets' and does not extend 'to confidential information or internal preparatory documents of the Board'.

applies to all Union institutions and bodies and provides for 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'.

## 5.2 The right to be heard in SSM common procedures

With regard to applications for and withdrawal of licences and the acquisition of qualifying holdings, the FR provides for the right to be heard by the ECB for the party concerned (see Article 77 and Articles 81(2), 82(3) and Article 87 of the FR) in accordance with the provisions of Article 31 of the FR. However, the FR is silent as regards the national phase, presumably under the assumption that the ECB is not bound by the NCAs' proposals.

However, there is a case where the protection of the right to be heard must be granted in the national phase as there are no other phases in the procedure.

Indeed, if the applicant does not comply with the conditions for authorising a licence set out in the relevant national law, the authority competent to reject the application is the NCA, which can directly adopt the final negative decision.

As regards the ECB phase, the right to be heard must be granted only if the ECB assesses that, despite the NCAs' proposal, the conditions for approving the authorisation are not met, in such cases the authorisation must be withdrawn or the acquisition of qualifying holdings must be opposed.

In the withdrawal procedure, comments provided by the credit institution are taken into account by the ECB together with the NCA's draft withdrawal decision or the NCA's view, where the ECB decides to withdraw the licence on its own initiative, and, possibly, the NRA's view.

It is not clear whether the credit institution's right to be heard also includes the NCA's and the NRA's views.

It is worth noting that the fact that the ECB should take full account of the NCA's proposed withdrawal of authorisation does not mean that the ECB does not have discretionary powers in this respect and that consequently the right to be heard must be granted within the national phase of the procedure. Rather, it means that the ECB, before whom a right to be heard must be granted, is under a stricter obligation to provide convincing reasoning if it intends to deviate from the NCA's proposal.

## 5.3 The right to be heard in procedures on the classification of a supervised entity

Pursuant to Article 44(1) of the FR, 'when taking decisions on the classification of a supervised entity or a supervised group as significant under this Title, and unless otherwise provided, the ECB shall apply the procedural rules of Title 2 of Part III' (general provisions relating to due process for adopting ECB's supervisory decisions).



It follows that in the procedures aimed at classifying supervised entities as significant or less significant, the due process rules apply within the ECB phase of the procedure.

The ECB's decision to assume direct supervision of an LSI or conversely to classify a credit institution as an LSI even though the criteria for classification as significant are fulfilled may be adopted following a composite procedure.

In both cases, Article 44 of the FR applies,<sup>59</sup> which in turn refers to Title 2 of Part III of the FR, on due process when adopting ECB supervisory decisions.

## 5.4 The right to be heard in SSM composite proceedings at the ECB's initiative

As regards SSM composite proceedings at the ECB's initiative (see Articles 7, 9 and 18(5) of the SSMR), it is uncertain whether, and if so to what extent, the ECB's instruction is binding on the NCAs and detrimental to the addressee of the final decision.

In situations where the ECB's request is considered to be binding on the NCA, it would be a common sense rule that the right to be heard should be granted before the requesting authority.

Should NCAs enjoy a margin of discretion in complying with the ECB's request, the right to be heard would have to be granted before the NCA.

The situation is addressed in Article 18(5) of the SSMR, and is supported by recital 36 of the SSMR, which states that the ECB should be able to refer the matter to the NCAs for those purposes.<sup>60</sup>

Notwithstanding the above, the scope of discretion enjoyed by an NCA in activating and carrying out a sanctioning procedure when required to do so by the ECB under Article 18(5) of the SSMR may vary from case to case.

This discretion is very wide and also extends to activating a procedure when sanctions are imposed on natural persons. In such a case, the NCA must assess whether the infringement is imputable to individual persons. The same should be true with regard to cases where the NCA is required to verify the violation of a national rule, especially for infringements of national rules that do not transpose directives.

However, if the ECB directly verifies in its findings both the violation committed and its imputability to the credit institution, the NCA would have no choice other than to activate the sanctioning procedure and take due account of the comments of the parties concerned. Based on these remarks it is the NCA that decides whether to apply the sanction.

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<sup>59</sup> See Article 68(5) of the FR, which refers to Title 2 of Part IV of the FR, which includes Article 44, and Article 71(3) of the FR, which refers directly to Article 44 of the FR.

<sup>60</sup> However, since the ECB's request is a necessary precondition for the sanctioning procedure, the right to be heard must include knowledge of the request and the ability to challenge its findings.

## 5.5 The right to be heard in the alternative F&P process

Under the alternative F&P process, the NCAs are responsible for preparing ECB draft fit and proper decisions, which will be finally adopted by the ECB's heads of work units or, if they cannot be adopted by a delegated decision, by the ECB's decision-making bodies (the SB and the GC) under the non-objection procedure.<sup>61</sup>

Decisions that may not be adopted by a delegated decision are essentially negative decisions, which are subject to the non-objection procedure.<sup>62</sup>

Given that the ECB is not bound by the NCA's assessment, the right to be heard must be granted in the ECB phase of the procedure in compliance with Article 22 of the SSMR and Article 31 of the FR.

## 5.6 The right to be heard in composite procedures concerning high priority LSIs

In composite procedures aimed at the NCAs adopting material decisions concerning high priority LSIs, NCAs are required to transmit draft decisions to the ECB on which the ECB may express its views.

Given the timeframe for the procedure, it is not clear how the right to be heard can be exercised effectively and extended to the acts in which the ECB expresses its views.

Indeed, pursuant to Article 98(4) of the FR 'NCAs shall send draft decisions ... that ... are deemed material draft supervisory decisions, to the ECB at least 10 days in advance of the planned date of adoption of the decision. The ECB shall express its views on the draft decision within a reasonable time before the planned adoption of the decision. In cases of urgency, a reasonable time period for sending a draft decision which meets the criteria laid down in paragraphs 1, 2 and 3 to the ECB shall be defined by the relevant NCA.'

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<sup>61</sup> See Article 3(5) of Decision (EU) 2017/935 (ECB/2016/42): 'Where, pursuant to paragraphs 1 to 4, a fit and proper decision cannot be adopted by means of a delegated decision, it shall be adopted in accordance with applicable law and the non-objection procedure'.

<sup>62</sup> *Ibid.*, recital 10: 'If a member is not deemed to fulfil the fit and proper requirements, the fit and proper decision should not be adopted by means of a delegated decision, but rather under the non-objection procedure. It is thus necessary to allow for sufficient time for a non-objection procedure in cases where it is not possible to determine in advance whether a delegated decision may be adopted. For this reason, if a national competent authority does not submit to the ECB a draft delegated decision 20 working days before the expiry of the deadline for the adoption of the fit and proper decision under applicable national law, the decision should be adopted under the non-objection procedure. Furthermore, if the heads of work units have concerns regarding the fit and proper requirements being fulfilled by the member due to insufficient information being provided by the national competent authority or the complexity of the assessment, the non-objection procedure should again be used.'

## 5.7 The macroprudential composite procedure and the limited scope of the right to be heard

Although macroprudential decisions are adopted by a composite procedure, this procedure does not normally apply the due process rules.

Article 22 of the SSMR only applies to microprudential decisions, since it refers to the decisions taken under Article 4 of the SSMR and not to those taken under Article 5 of the SSMR. Macroprudential decisions are, therefore, not subject to the rules of due process under Article 22.

A problem arises as to whether these decisions are subject to Article 41(2) of the Charter, which, as was already stated, applies to all Union institutions and bodies. Under the provisions of Article 41(2), every person has the right to be heard 'before any individual measure which would affect him or her adversely is taken' and the right to have access to files is an essential precondition of the right to be heard.

Thus, for these rights to be granted to the addressees of a decision adversely affecting them, the decision must be an individual decision. Since macroprudential decisions are essentially general, and not individual, decisions, their addressees do not have a right to be heard.

Nevertheless, the possibility cannot be excluded that a macroprudential decision could be addressed to a single credit institution, as is the case with the capital conservation measures and the systemic risk buffer for global systemically important financial institutions provided for under the CRD.

In these cases, the right to be heard and the right to have access to the file apply as fundamental rights provided for by the Charter.<sup>63</sup>

## 5.8 Due process requirements in SRM composite procedures: a postponement of the right to be heard?

In the SRM, the protection of due process rights may conflict, to a much greater extent than in the SSM, with the need to ensure the stability of the financial system as a whole.

This may lead to a balancing of interests and the sacrifice of due process rights in favour of the objective of preserving financial stability. This could be compatible with the general principles of Union law, provided that it is only a limitation and not an elimination of these rights and that the judicial protection of the persons concerned is ensured.

This statement needs to be better explained.

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<sup>63</sup> This is confirmed by Article 101(2) of the FR: 'the macro-prudential procedures referred to in Articles 5(1) and (2) of the SSM Regulation shall not constitute ECB or NCA supervisory procedures within the meaning of this Regulation, without prejudice to Article 22 of the SSM Regulation in relation to decisions addressed to individual supervised entities.'

First, it can be assumed that such a limitation is only acceptable in the resolution procedure under Article 18 of the SRMR, in order to ensure that it is carried out expeditiously.

It makes less sense with regard to procedures relating, for example, to preparing resolution plans, including the phase on the assessment of resolvability, or the determination of MREL. Some SRMR rules, even though they do not expressly provide for the protection of a genuine right to be heard, seem to confirm this assumption,<sup>64</sup> together with the practice followed so far by the SRB with regard to some of its decisions.<sup>65</sup>

With specific regard to the resolution procedure under Article 18 of the SRMR, it seems that only a postponement of the exercise of the right to be heard is possible, as its complete elimination would violate the Charter.

However, a mere postponement of the right would be compatible with Article 52 of the Charter, as it would preserve the essence of the due process rights, while fostering the general interest of financial stability.

This assumption is also grounded on the following additional arguments.

First, recital 121 of the SRMR states that the SRMR should be implemented in accordance with the general principles provided for in the Charter.<sup>66</sup>

Second, Article 29 of the SRMR specifies that the NRAs must implement the SRB's resolution decisions in compliance with the safeguards provided for in the BRRD and in accordance with the conditions laid down in the national law transposing it.

Third, Article 10 of the SRB Decision on the framework for cooperation refers to the safeguards provided for by the BRRD and to the conditions laid down in the national laws transposing the BRRD.<sup>67</sup>

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<sup>64</sup> Under Article 8(8) of the SRMR, the SRB 'may require institutions to assist it in the drawing up and updating' of the resolution plans. Moreover, Article 10(7) to (10) of the SRMR provides that: (i) where the SRB determines that there are substantive impediments to resolvability it will address a report to the credit institution concerned; (ii) within four months of receiving the report the credit institution must propose to the Board possible measures to address or remove the substantive impediments; (iii) should these measures not work, the SRB will adopt a decision instructing the NRA to require the credit institution to take any of the measures listed in Article 10(11). Under Article 12(13) of the SRMR, any determination by the SRB on MREL 'shall [be made] in parallel with the development and maintenance of the resolution plans' and presumably following the same procedure and dialogue with the institution concerned by the plan.

<sup>65</sup> See the Process and timeline section of the report of the 10 December 2018, 7th SRB Banking Industry Dialogue Meeting – SRB MREL policy, p. 13, and the Decision of the Single Resolution Board of 17 March 2020 determining whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular Español S.A. have been effected (SRB/EES/2020/52), both available on the [SRB's website](#).

<sup>66</sup> See recital 121 of the SRMR, which reads as follows: 'This Regulation respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, and, in particular, the right to property, the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial and the right of defence, and should be implemented in accordance with those rights and principles'.

It is not clear at what stage of the procedure the postponement of the right to be heard should take place.<sup>68</sup>

According to the general principles applicable to composite procedures, such a postponement should take place at the SRB stage, as the NRAs have no discretion in enforcing the SRB's resolution decisions.

However, the foregoing provisions and recitals would seem to suggest that the exercise of the right to be heard must be postponed until the national stage of the procedure.

## 6 Do the ECB and SRB have the power to remedy at an early stage prejudicial consequences that may arise from the national phases of SSM and SRM composite procedures?

Even if there are defects in the endo-procedural or preparatory acts related to a procedure, these should not affect the final decision since, as is the rule, the Union authority may decide to depart from these acts. A potential problem remains in all cases where the national authority has not adopted the required endo-procedural or preparatory act related to a procedure.

Further questions arise as to whether the Union authority may instruct the national authority to adopt the necessary act and on which rule such an instruction could be based.

With regard to the SSM, it is unclear whether Article 6(1) of the SSMR provides for the involvement of the ECB, as the authority responsible for the effective and consistent functioning of the SSM, in individual administrative procedures.<sup>69</sup>

An alternative could be to refer to Article 6(7) of the SSMR, which allows the ECB to establish a framework for all SSM procedures concerning SIs and LSIs. Nevertheless, an amendment to the FR would be necessary.<sup>70</sup>

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<sup>67</sup> Under the Italian legal framework, the case-law of the administrative courts has so far recognised the constitutionality of rules restricting the rights of defence in the context of the compulsory administrative liquidation of credit institutions, based on the assumption that these rules aimed to ensure the protection of savings under Article 47 of the Italian Constitution. The same problem arises with regard to the resolution procedures under Articles 3(5), 32(7) and 34(3) of Italian Legislative Decree No 180/2015 and should presumably be resolved in the same way. It is difficult to say whether such restrictions on the rights of defence are also compatible with the Charter.

<sup>68</sup> On this issue, generally speaking, the Union may rely on national administrations to comply with the right to be heard; see Christina Eckes' presentation on the 'Rights of the Defence in Composite Procedures' at the ECB's Legal Colloquium of 26 February 2020 on composite administrative procedures.

<sup>69</sup> Article 6(1) of the SSMR reads as follows: 'The ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities. The ECB shall be responsible for the effective and consistent functioning of the SSM.'

With regard to the SRM, although not specifically mentioned in Article 6(2) of the SRB Decision on the framework for cooperation, the SRB may give specific instructions to the NRAs related, in general, to NRA tasks in connection with entities and groups under the SRB's direct responsibility.

It is the author's view that this power may also include the instruction to adopt an endo-procedural or preparatory act related to a procedure, when the lack of such an act would hinder the adoption of the final decision.

Where national authorities (NCAs or NRAs) are called on to implement a Union authority's (ECB or SRB) instruction or decision and do not comply with this instruction or decision, a problem arises as to whether the Union authority may require the national authority to comply.

Article 6 of the SRB Decision on the framework for cooperation may once again prove useful in this context.

In addition, the SRB may exceptionally adopt specific resolution tools and measures directly addressed to credit institutions where the NRAs have not applied or have not complied with SRB decisions (Article 29(2) of the SRMR).

This contrasts with the FR, where specific provisions exist that require the NCAs to comply with the ECB's instructions;<sup>71</sup> however, contrary to the compliance provisions in the field of monetary policy, the ECB enjoys no coercive power to ensure compliance in the supervisory field.<sup>72</sup>

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<sup>70</sup> Article 6(7) of the SSMR reads as follows: 'The ECB shall, in consultation with national competent authorities, and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to organise the practical arrangements for the implementation of this Article. The framework shall include, at least, the following: ... (b) the definition of the procedures, including time-limits, and the possibility to prepare draft decisions to be sent to the ECB for consideration, for the relation between the ECB and the national competent authorities regarding the supervision of credit institutions not considered as less significant in accordance with paragraph 4; (c) the definition of the procedures, including time-limits, for the relation between the ECB and the national competent authorities regarding the supervision of credit institutions considered as less significant in accordance with paragraph 4 ...'.

<sup>71</sup> Pursuant to Article 90(2) of the FR: 'when assisting the ECB, an NCA shall follow the ECB's instructions in relation to significant supervised entities'. Moreover, Article 108(5) of the FR specifies that: 'an NCA in close cooperation shall take all necessary measures to comply with the ECB's instructions, requests or guidelines and it shall inform the ECB without undue delay of the measures it has taken'. However, Article 134(3) merely states that: 'an NCA of a participating Member State shall notify the ECB of the completion of a penalty procedure initiated at the request of the ECB pursuant to paragraph 1. In particular, the ECB shall be informed of the penalties imposed, if any'.

<sup>72</sup> Indeed, according to the provisions of Articles 9.2, 12.1 and 14.3 of the Statute of the ESCB, the ECB may require the NCBs to take an action, but may also replace the NCBs in the adoption of a given action by discarding the principle of decentralisation. Moreover, under Article 35.6 of the Statute of the ESCB: 'if the ECB considers that a national central bank has failed to fulfil an obligation under the Treaties and this Statute, it shall deliver a reasoned opinion on the matter after giving the national central bank concerned the opportunity to submit its observations. If the national central bank concerned does not comply with the opinion within the period laid down by the ECB, the latter may bring the matter before the Court of Justice of the European Union.'

## 7 The allocation of jurisdiction between the CJEU and national courts on acts emanating from SSM and SRM composite procedures

For composite administrative proceedings, establishing which court is empowered to review both the final decision and any other acts related to it is conditional on the discretion that the decision-making authority enjoys when adopting the final decision.

As regards the distribution of jurisdiction between the CJEU and the national courts in SSM composite proceedings, the leading precedent is the ECJ's judgment in Case C-219/17, *Fininvest and Berlusconi*.<sup>73</sup>

The Court drew a clear distinction between two situations:

1. the situation where the Union institution has only limited or no discretion, so that the NCA's act is binding on the Union institution, and
2. the situation where the Union institution exercises, alone, the final decision-making power without being bound by an NCA's act.<sup>74</sup>

In the first case, it falls to the national courts to rule on any irregularities that may vitiate such a national act, making a reference to the Court for a preliminary ruling where appropriate.

In the second case, it falls to the CJEU not only to rule on the legality of the final decision adopted by the Union institution, but also to examine any defects vitiating the preparatory acts or the proposals of the NCA that would affect the validity of that final decision.

The Court observed that the ECB has exclusive competence to decide whether or not to authorise the proposed acquisition of qualifying holdings in a credit institution, procedures for which are laid down in the context of the SSM, and for the effective and consistent functioning of which the ECB is responsible.<sup>75</sup>

Consequently, the Union Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision is affected by any defects in the preparatory acts adopted by the NCA. The legality of those acts cannot be reviewed by the national courts.

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<sup>73</sup> Judgment of the Court of Justice of 19 December 2018, *Silvio Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023.

<sup>74</sup> *Ibid.*, paragraphs 43 and 45.

<sup>75</sup> More precisely, the Court ruled in paragraph 59 that Article 263 of the TFEU precludes national courts from 'reviewing the legality of decisions to initiate procedures, preparatory acts or non-binding proposals adopted by the [NCAs] in the procedure provided for by Articles 22 and 23 of [the] CRD ..., in Article 4(1)(c) and 15 of the SSM Regulation and Articles 85 to 87 of the SSM Framework Regulation', as the acts adopted by national authorities have no binding effects and do not produce legal consequences on the applicant. According to the ECJ, this is made especially clear by Article 87 of the SSM Framework Regulation, which specifies that: 'the ECB shall decide whether or not to oppose the acquisition on the basis of its assessment of the proposed acquisition and the NCA's draft decision'. Therefore, the NCA's proposal is only an element of the ECB's assessment, leaving the ECB free to diverge from the opinion of the NCA.

With regard to SRM composite procedures, it is important to refer to the ECJ's judgment in Case C-414/18, *Iccrea*.<sup>76</sup>

The Court applied the principles enshrined in the *Berlusconi and Fininvest* judgment to the specific issue of the calculation of *ex ante* contributions to the SRF and considered both the leg of the procedure where the Banca d'Italia intervened prior to the adoption of the final SRB decision and the leg in which the Banca d'Italia must simply apply the final SRB decision.

The Court held, in relation to the first leg (see paragraphs 47-48):

'47. ... it is plain that, with respect to the calculation of the *ex ante* contributions to the SRF, the Board exclusively exercises the final decision-making power and that the role of the national resolution authorities is confined ... to providing operational support to the Board. While those authorities may, accordingly, be consulted by the Board in order to facilitate the determination of the amount of the *ex ante* contribution payable by an institution and while they must, in any event, cooperate with the Board to that end, the findings that they might, in particular cases, make at that time on the situation of an institution cannot in any way be binding on the Board.

48. Consequently, the EU Courts alone have jurisdiction to determine, when reviewing the legality of a decision of the Board setting the amount of the individual *ex ante* contribution to the SRF of an institution, whether an act adopted by a national resolution authority that is preparatory of such a decision is vitiated by defects capable of affecting that decision of the Board, and no national court can review that national act (see, by analogy, judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, EU:C:2018:1023, paragraph 57)'.  
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With regard to the second leg of the procedure, the Court held (see paragraphs 57-59):

'57. It follows from the foregoing that, after the adoption of a decision of the Board on the calculation of the *ex ante* contributions to the SRF, the task of the national resolution authorities is solely to notify and give effect to that decision.

58. In that context, having regard to the specific powers of the Board ... those authorities do not have the power to re-examine the calculations made by the Board in order to alter the amount of those contributions and they cannot therefore, after the adoption of a decision of the Board, review, to that end, the extent to which an institution is exposed to risk.

59. Likewise, if a national court were to be able, as envisaged by the referring court, to annul the notification, by a national resolution authority, of a decision of the Board on the calculation of the *ex ante* contribution of an institution to the SRF, on the ground of an error in the evaluation of that institution's exposure to risk on which that calculation

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<sup>76</sup> Judgment of the Court of Justice of 3 December 2019, *Iccrea*, C-414/18, EU:C:2019:1036.



was based, that would call into question a finding made by the Board and would ultimately impede the execution of that decision of the Board in Italy'.<sup>77</sup>

It is difficult to say to what extent this stance of the CJEU on the allocation of jurisdiction between the CJEU and national courts in relation to composite procedures is in line with other rulings of the CJEU, according to which, where concurrent liability of a Union and a national authority exists, the applicant must first exhaust its alleged right to damages under national law and then seek damages for non-contractual liability against the Union.<sup>78</sup>

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<sup>77</sup> The Court also observed, in paragraph 61, that a national court may refer a question to the ECJ for a preliminary ruling, where the outcome of proceedings pending before it depends on the validity of a decision of the SRB. Nevertheless, in order to avoid the circumvention of the time limits for appeals before the General Court, the possibility for a person to rely, in an action brought before a national court, on the invalidity of provisions contained in a measure of the European Union, which constitutes the basis of a national decision concerning that person, presupposes that either that person has also brought an action for the annulment of that Union measure within the prescribed time limits, or that the person in question has not done so, as a result of not having an undoubted right to bring such an action (paragraph 63).

<sup>78</sup> Judgments of the Court of Justice of 14 July 1967, *Kampffmeyer and Others v Commission*, 5, 7 and 13 to 24/66, EU:C:1967:31; and of 12 April 1984, *Unifrex v Commission and Council*, 281/82, EU:C:1984:165, paragraphs 11 and 12.

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## Raffaele D'Ambrosio

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Raffaele D'Ambrosio was born in Salerno on the 4th January 1964 and in December 1986 graduated with honour (110/110 cum laude) at the Law School of the LUISS University in Rome.

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During his professional career he also worked for the Legal Services Directorate of the European Central Bank (December 2012 to September 2013) where he was in charge of drafting the regulatory framework for the cooperation between the European Central Bank and the National Competent Authorities within the Single Supervisory Mechanism. He also worked for the Italian Markets Authority (Consob) from November 1986 to September 1992, where he was in charge, amongst others, of drafting Consob's regulations implementing the 1991 Italian Law on Investment Firms and Regulated Markets.

He has an extensive academic experience. He has been appointed Professor of Financial Institutions' Law at the University of Bologna (1999-2000) and Professor of Banking Law at the University of Viterbo (2000-2001). He has also worked, since 1997, on several research projects in the field of banking and financial regulation and supervision. Currently, he is a Member of EuBAR, a research group established by the University of Luxembourg to conduct a research on the administrative and criminal sanctions in the European Banking Union, and also a Member of the Advisory Board of the European Banking Institute. He is regularly invited as a speaker in LL.M. programs on Business and Company Law, Italian Law of Markets in Financial Instruments and Global Markets Regulation.

He is author of numerous essays on commercial law, banking law and financial law.

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