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# Sanctioning Powers of the European Central Bank and the *Ne Bis In Idem* Principle within the Single Supervisory Mechanism

*Abstract*

The article focuses on the enforcing powers of the European Central Bank (ECB) after the entry into force of (EU) Regulation 1024/2013 establishing the Single Supervisory Mechanism (SSM). More precisely, the article discusses whether the attribution of direct sanctioning powers to the ECB in the field of banking supervision may result in a violation of the *ne bis in idem principle* as defined at the EU level. In fact, the coexistence of different authorities within the same sector – the ECB, on the one hand, the NCAs, on the other – provided with sanctioning powers gives rise to a potential risk of double jeopardy. Moreover, the relevant European sources in this field do not mention the *ne bis in idem* principle, but only other fundamental rights such as the right to the protection of personal data, the freedom to conduct a business and the right to an effective remedy and to a fair trial. The article therefore seeks to describe one of the potential problematic issues deriving from the attribution of direct sanctioning powers to the ECB and the NCAs. For that purpose, after a brief description of the institutional framework of the SSM, the article analyses the allocation of sanctioning competences between the ECB and the national competent authorities within this framework; then, specific attention is given to the ECB's sanctions that are labelled as administrative, but may be considered substantially criminal: indeed, the principle can be violated only in so far as the sanctions concerned are criminal in nature. The article finally describes the *ne bis in idem* principle with the aim of verifying whether the prohibition of double jeopardy is guaranteed in the field of banking supervision.

## *I. Introduction*

In order to provide effective protection of European legal interests, the European Union (EU) is endowed with both indirect and direct sanctioning powers. The former expression refers to the imposition on Member States of the duty to adopt national sanctions in the event of breaches of EU provisions; the latter expression, by contrast,

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refers to the EU's competence to adopt measures already laying down certain sanctions, which will be imposed either by supranational authorities (direct centralised sanctions) or by national authorities (direct decentralised sanctions).[1]

The areas where the EU is provided with direct and centralised sanctions have increased: indeed, alongside the traditional sectors concerning competition law[2] and the

1 For an overview of Community sanctions as means of harmonising national punitive systems, see *K. Ligeti*, European criminal law: administrative and criminal sanctions as means of enforcing Community Law, Acta Juridica Hungarica (AJH) 3-4/2000, p. 199 et seq.; *J. Stuyck, C. Denis*, Les sanctions communautaires, in: *F. Tulkens, H. D. Bosly (eds)*, La justice pénale et l'Europe, Bruxelles, 1996, p. 423 et seq.; *J.A.E. Vervaele*, Administrative sanctioning powers of and in the Community. Towards a system of European administrative sanctions?, in : *J.A.E. Vervaele*, Administrative law application and enforcement of Community law in the Netherlands, Deventer, 1994, p. 161 et seq.; *C. Haguenau*, Sanctions pénales destinées à assurer le respect du droit communautaire, Révue du Marché Commun et de l'Union Européen (RMC) 367/1993, p. 351 et seq.; *G. Grasso*, Nouvelles perspectives en matière des sanctions communautires, Revue de Science Criminelle et Droit Pénal Comparé (RSC) 2/1993, p. 265 et seq.; *A. M. Maugeri*, Il regolamento n. 2988/95: un modello di disciplina del potere punitivo comunitario, in: *G. Grasso (eds)*, La lotta contro la frode agli interessi finanziari della Comunità europea tra prevenzione e repressione, Milano, 2000, p. 149 et seq. More recently, *S. Vitale*, Evolution and current trends in Eu administrative sanction proceedings, Rivista Italiana di Diritto Pubblico Comunitario (Riv. it. dir. pub. com.) 1/2017, p. 151 et seq., particularly p. 159, where the author mentions the new sanctioning powers of the ECB, which will be discussed in this paper.
For an overview of the evolution of EU's competences in criminal matters, see *J.A.E. Vervaele*, The European Union and harmonization of the criminal law enforcement of Union policies: in search of a criminal law policy?, in: *J.A.E. Vervaele*, European criminal justice in the Post Lisbon Area of Freedom, Security and Justice, Trento, 2014, p. 11 et seq.; *H. Satzger*, International and European criminal law, München-Oxford-Baden-Baden, 2012, p. 43 et seq.; *A. Klip*, European criminal law. An integrative approach, Antwerp-Portland, 2012, p. 165 et seq.; *E. Herlin-Karnel*, The constitutional dimension of European criminal law, Oxford, 2012, p. 10 et seq.; *J. Pradel, G. Corstens, G. Vermeulen*, Droit penal européen, Paris, 2009, p. 457 et seq. Before the entry into force of the Treaty of Lisbon, see *V. Mitsilegas*, Constitutional principles of the European Community and European criminal law, European Journal of Law Reform (Eur. J. L. Reform) 2-3/2006, p. 301 et seq.; *M. Wasmeier, N. Thwaites*, The battle of the pillars: does the European Community have the power to approximate national criminal laws? European Law Review (E. L. Rev.) 5/2004, p. 613 et seq.; *A. Bernardi*, I tre volti del «diritto penale comunitario», Rivista Italiana di Diritto Pubblico Comunitario (Riv. it. dir. pub. com.) 2/1999, p. 33 et seq.; *M. Delmas-Marty*, The European Union and penal law, European Law Journal (Eur. L. J.) 1/1998, p. 87 et seq.; *U. Sieber*, Union européenne et droit penal européen. Proposition pour l'avenir du droit pénal europèen, Revue de Science Criminelle et Droit Pénal Comparé (RSC) 2/1993, p. 249 et seq.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2003 L 1/1.

protection of the EU's financial interests[3] other sectors, such as maritime[4] and air[5] transport security, as well as banking supervision[6] have become a focus of attention of European legislator.

The subject matter of this study concerns the *centralised sanctions* of the European Central Bank (ECB) in the last of the aforementioned sectors, as well as the interactions between the ECB's sanctioning competences and national punitive powers in the same field.[7]

It should be noted that the banking supervision system has radically changed since the entry into force of (EU) Regulation 1024/2013 introducing the Single Supervisory Mechanism (SSM).[8] In this regard, it is worth pointing out first of all that the SSM not only attributes *sanctioning powers* to the ECB, but also gives several *supervisory tasks and powers* to this European authority. Our attention, however, will be mainly focused on the *sanctioning powers* of the ECB (and related issues), whereas *supervisory tasks and powers*, strictly speaking, will be taken into consideration only insofar as they are pertinent to the main subject of this study.

More precisely, Part 2 describes the institutional framework of the Single Supervisory Mechanism; Section 3 deals with the allocation of sanctioning competences between the ECB and the national competent authorities (NCAs) within this framework; Part 4 focuses attention on ECB's sanctions that are labelled as administrative, but are substantially criminal in nature, according to the Engel criteria, whereas Section 5 focuses on the *ne bis in idem* principle within the Single Supervisory Mechanism. Finally, Part 6 provides some provisional conclusions on the sanctioning powers of the ECB the aforementioned principle.

3 Council Regulation (EURATOM, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ 1996 L 292/2.

4 Council Regulation (EC) No 1891/2006 of 18 December 2006 amending Regulations (EC) No 6/2002 and (EC) No 40/94 to give effect to the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs, OJ 2006 L 386/14.

5 Regulation (EC) No 216/2008 of the European parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ 2008 L 79/1.

6 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 2013 L 287/63.

7 The horizontal allocation of powers between the ECB and other EU agencies will not be analysed. On this topic, see for instance *F. Guarracino*, Role and powers of the ECB and of the EBA in the perspective of the forthcoming Single Supervisory Mechanism, Law and Economics Yearly Review 2013 (vol. 2, part 1), p. 184 et seq.

8 See *supra*, fn. 6.

## II. Overview of the banking supervision system within the framework of the European Banking Union

The Single Supervisory Mechanism falls within the context of the European Banking Union (EBU). Briefly,[9] the EBU is based on three pillars:[10] the first, indeed, is the Single Supervisory Mechanism, which was established, as already mentioned, by (EU) Regulation 1024/2013 (SSM Regulation) and came fully into force on the 4th November 2014; the second is the Single Resolution Mechanism (SRM), regulated by (EU) Regulation 806/2014[11] and Directive 2014/59/EU[12]; the third is the Deposit Guarantee Scheme, harmonised by Directive 2014/49/EU.[13]

This study focuses on the first pillar, which has changed the banking supervision system within the EU framework by endowing the ECB with functions that were previously exercised at the domestic level.[14] The reasons behind such a choice are linked

9 For a detailed overview of the significant steps leading up to the construction of the European Banking Union, see *N. Moloney*, European Banking Union: assessing its risks and resilience, Common Market Law Review (CML Rev.) 6/2014, p. 1616 et seq.; *N. Véron, G.B. Guntram*, From supervision to resolution: next steps on the road to the European Banking Union, Bruegel Policy Contribution 4/2013 (February).

10 Alongside these three pillars there are two different goals pursued by the European Banking Union: internal market regulation and European monetary policy. For an analysis of the interrelation between the above-mentioned pillars and goals, with particular attention to the problem concerning legal basis, see *T. Tuominen*, The European Banking Union: a shift in the internal market paradigm?, Common Market Law Review (CML Rev.) 5/2017, p. 1359 et seq.

11 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 2014 L 225/1.

12 See D. Busch, Governance of the Single Resolution Mechanism, in: D. Busch, G. Ferrini, European Banking Union, Oxford, 2015, p. 281 et seq.*; D. Howarth, L. Quaglia*, The steep road to the European Banking Union: Constructing the Single Resolution Mechanism, Journal of Common Market Studies (JCMS) 2014, p. 125 et seq.; *S. Antoniazzi*, L'Unione bancaria europea: i nuovi compiti della BCE di vigilanza prudenziale degli enti creditizi e il meccanismo unico di risoluzione delle crisi bancarie. Parte seconda, Rivista Italiana di Diritto Pubblico Comunitario (Riv. it. dir. pub. com.) 3-4/2014, p. 717 et seq.

13 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173.

14 Briefly: before the entry into force of the SSM Regulation, a clear distinction existed between governance concerning monetary policy, entrusted to the ECB, and governance concerning supervisory policies, entrusted to national authorities.
On the debate concerning the separation or concentration of monetary and supervisory policies in the hands of ECB, see *R. Smits*, The European Central Bank, The Hague-London-Boston, 1997, p. 323 et seq.
For further details on the relation between monetary and supervisory policies in the current system, see *M. Lamandini, D. Ramos, J. Solana*, The European Central Bank (ECB) as a catalyst for change in EU law, Part 1: The ECB's mandate, Columbia Journal of European Law (Colum. J. Eur. L.) 1/2016, p. 46 et seq. For a critical approach to the concentration of the abovementioned policies in the hands of a single authority, see *K. Alexander*, The European Central Bank and banking supervision: The regulatory limits of the Single Supervisory

to the financial crisis that broke out in 2008 and, more precisely, to the idea that the centralisation of supervisory powers could represent a fundamental step for restructuring the European banking system.[15]

Bearing in mind this goal, the SSM aims to guarantee compliance with the capital and prudential requirements imposed on credit institutions by (EU) Regulation 575/2013 (*Capital Requirement Regulation* – CRR)[16] and Directive 2013/36/EU (*Capital requirement Directive* – CRD IV)[17]. Compliance with the requirements laid down therein is ensured by the SSM Regulation, which – as already mentioned – establishes supervisory tasks and sanctioning powers.[18]

Mechanism, European Company & Financial Law Review (ECFR) 3/2016, p. 467 et seq., particularly p. 488 et seq. See also *S. Antoniazzi*, La Banca Centrale Europea tra politica monetaria e vigilanza bancaria, Torino, 2013, p. 145 et seq., where the author makes a comparison between the previous supervisory system and current one, as well as the debate leading up the current regime.

15 The legal basis of SSM Regulation is Art. 127, par. 6 TFEU. In relation to the choice of this legal basis, see *K. Alexander*, European Banking Union: a legal and institutional analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism, European Law Review (E. L. Rev.) no 2/2015, p. 154 et seq.; *K. Lackhoff*, How will the Single Supervisory Mechanism (SSM) function? A brief overview, Journal of International Banking Law & Regulation (J.I.B.L.R.) 1/2014, p. 13 et seq.; *G. Lo Schiavo*, From national banking supervision to a centralized model of prudential supervision in Europe? The stability function of the Single Supervisory Mechanism, Maastricht Journal of European & Comparative Law (MJ) 1/2014, p. 120 et seq.; *B. Wolfers, T. Voland*, Level the playing field: the new supervision of credit institutions by the European Central Bank, Common Market Law Review (CML Rev.) 5/2014, p. 1468 et seq.

16 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 2013 L 176/1.

17 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 2013 L 176/338.

18 A terminological specification is now warranted. For the purpose of carrying out the *tasks* described in Chapter II of the SSM Regulation, the ECB is provided with the enforcement powers described in the following Chapter III. The latter are distinguished into two categories: investigatory powers on the one hand (Articles 10 to 13) and specific supervisory powers on the other (Articles 14 to 18). The specific supervisory powers include the authority to impose administrative sanctions. For an overview of these tasks and powers allocated between the ECB and the NCAs, see *B. Wolfers, T. Voland*, Common Market Law Review 2014, p. 1468 et seq. For an analysis focused on the investigatory and sanctioning powers, see. *S. Allegrezza, I. Radopolos*, Enforcing prudential banking regulations in the Eurozone: A reading from the viewpoint of criminal law, in: *K. Ligeti, V. Franssen*, Challenges in the field of economic and financial crime in Europe and the US, London, 2017, p. 233 et seq.; *S. Allegrezza, O. Voordeckers*, Investigative and sanctioning powers of the ECB in the framework of the Single Supervisory Mechanism. Mapping the complexity of a new enforcement model, Eucrim 4/2015, p. 151 et seq.; *M. Clarich*, Le sanzioni amministrative bancarie nel meccanismo di vigilanza unico, Banca Impresa Società (BIS) 2/2014, p. 333 et seq.; *S. Loosveld*, The ECB's investigatory and sanctioning powers under the future Single Supervisory Mechanism, Journal of International Banking Law & Regulation (J.I.B.L.R.) 10/2013, p. 422 et seq. We shall also point out the analytical study coordinated by *M. Luchtman* and

This overview of the sources relating to the supervision of credit institutions is not exhaustive. Firstly, it is worth pointing out that the provisions of the SSM Regulation were further defined in ECB Regulation 468/2014 of 16 April 2014, establishing *the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities* (SSM Framework Regulation, or SSMFR). Moreover, substantive banking law includes other ECB regulations, soft law acts of the European Bank Authority (EBA) and national law implementing EU directives, as well as "autonomous" national law, not linked to EU law.[19]

In conclusion, it is not incorrect to describe the SSM Regulation as a single tile within a complex and variegated mosaic of sources.

### *III. The vertical allocation of sanctioning powers between the ECB and NCAs*

In order to understand the problematic aspects connected to the allocation of *sanctioning powers* between the ECB and NCAs, it is necessary to outline the allocation of *supervisory powers* between such authorities.[20]

As far as the supervisory tasks are concerned, according to the combined provisions of Arts. 4 and 6 of the SSM Regulation, the ECB is competent to supervise *significant*[21] credit institutions, whereas NCAs are competent to supervise *less significant* entities.[22]

*J.A.E Vervaele*, Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN, ESBA/ECB), Utrecht, 2017. This study focuses on OLAF's enforcement powers – with particular attention to the investigatory powers – and, more precisely, on a comparison between OLAF and the other European agencies having analogous enforcement tasks, such as the ECB.

19 *A. Magliari*, Il Single Supervisory Mechanism e l'applicazione dei diritti nazionali da parte della Banca Centrale Europea, Rivista Italiana di Diritto Pubblico Comunitario (Riv. it. dir. pub. com.) 5/2015, p. 1353 et seq.

20 The reference goes to micro-prudential supervisory tasks – concerning the risks related to any single credit institution – and not to macro-prudential tasks – concerning the banking and financial system in its entirety. For an analysis of the supervisory tasks and powers in the SSM Regulation, see *K. Lackhoff*, Single Supervisory Mechanism. A practitioner's guide, München-Oxford-Baden Baden, 2017, p. 195 et seq.

21 The significance of the credit institutions is based on some criteria listed in Art. 6, par. 4 of the SSM Regulation. For an analysis of these criteria, see *K. Lackhoff*, Which credit institutions will be supervised by the Single Supervisory Mechanism?, Journal of International Banking Law & Regulation (J.I.B.L.R.) 11/2013, p. 454 et seq.
More precisely, the ECB – following the procedure established in articles 43 et seq. of the SSM Framework Regulation – classifies a certain credit institution as *significant* based on an individual decision. Under Art. 49 of the SSMFR, the ECB publishes and updates the list of *significant* entities, subject to its own supervision, and *less significant* entities, subject to the NCAs' supervision.
Under Art. 24 of the SSM Regulation, the Administrative Board Review can review the decision classifying the credit institution as *significant*, without prejudice, under paragraph 11 therein, to the right to bring proceedings before the EU Court of Justice. In this regard, it is worth noting that on the 16 May 2017 the General Court of the European Union delivered a

More precisely, although Art. 4 of the SSM Regulation gives supervisory tasks to the ECB for all credit institutions, Art. 6, par. 6 delegates such tasks to NCAs in relation to *less significant* credit institutions. As a consequence, in the case of *less significant* entities, NCAs will exercise the tasks laid down in Art. 4 of the SSM Regulation (except for those specified under letters *a* and *c*, which thus remain in the hands of the ECB), whereas the role of the ECB is confined to coordination, according to Art. 6, pars. 5 and 6.[23]

As far as sanctioning powers are concerned, Art. 18 of the SSM Regulation does not make any reference to the "significance" of credit institutions. Instead, it refers to two different classes of powers of the ECB: direct sanctioning powers, on the one hand *(a)*; indirect sanctioning powers on the other *(b)*.

*(a)* The direct sanctioning powers of the ECB are laid down in paragraphs 1 and 7 of Art. 18 of the SSM Regulation. The first paragraph establishes that the ECB is competent to impose administrative pecuniary penalties on *credit institutions* (but not on natural persons)[24] in the event of an *intentional or negligent breach of directly applicable acts of Union law*, *in relation to which administrative pecuniary penalties shall be made available to competent authorities*.[25] The seventh paragraph empowers the ECB to impose the sanctions laid down in Regulation (EC) 2532/1998[26] (fines and periodic penalty payments) *in case of a breach of ECB regulations or decisions*. Finally, we should not forget to mention the withdrawal of

judgment in a case (T-122/15) brought by a German bank (Landeskreditbank Baden-Württemberg – Förderbank) qualified as *significant* by the ECB (decision adopted on 1 September 2014). More precisely, the aforementioned German bank had first brought an action before the Administrative Board to get the ECB's decision reviewed. However, the Administrative Board gave an opinion finding the decision to be lawful. The ECB subsequently adopted another decision (ECB/SMM/15/1) maintaining the applicant's qualification as *significant*. We shall not analyse the merits of the judgment here, as the technical aspects concerning the criteria listed in Art. 6, par. 4 are not discussed in this study. We shall only note that the General Court dismissed the action and that the German bank appealed against this judgment on 26 July 2017.

22 Although this division of competences, there are *ex ante* and *ex post* controls over NCAs in order to guarantee a common standard in supervisory practice. For further details, see *J. Gren, D. Howarth, L. Quaglia*, Supranational bank supervision in Europe: the construction of a credible watchdog, Journal of Common Market Studies (JCMS) 2015, p. 184 et seq.

23 We must mention the power under letter *b* of Art. 6, par. 5: the ECB may decide to exercise all the relevant powers against *less significant* credit institutions "when necessary to ensure consistent application of high supervisory standards".

24 See also recital no 53 of SSM Regulation: "Nothing in this Regulation should be understood as conferring on the ECB the power to impose penalties *on natural or legal persons other than credit institutions*, *financial holding companies or mixed financial holding companies*, without prejudice to the ECB's power to require national competent authorities to act in order to ensure that appropriate penalties are imposed» (italics added).

25 For the interpretative issues concerning this expression, see *infra*, § 5.3.

26 This Regulation was modified by Council Regulation (EU) 2015/159 of 27 January 2015 amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, OJ 2015 L 141/1.

the authorisation to take up the business of a credit institution under Art. 14 of the SSM Regulation.

*(b)* The indirect sanctioning power of the ECB is established in paragraph 5 of Art. 18. This paragraph provides the ECB with the power to ask NCAs to start proceedings aimed at imposing certain sanctions "in the cases not covered by paragraph 1 of this Article", namely, where no direct sanctioning powers are available to the ECB.[27]

More precisely, the competence as per paragraph 5 will be exercised in the following cases: when *non-pecuniary sanctions* or *measures other than sanctions* are involved[28] (also in relation to violations of directly applicable EU law, committed by either natural persons or legal persons); in case of sanctions, including pecuniary ones, *addressed to natural persons*; and in case of breaches of *national law transposing the relevant directives.*[29]

Paragraph 5 establishes, moreover, that the power laid down therein is applicable in order to ensure that appropriate penalties are imposed in relation to "*any relevant national legislation which confers specific powers which are currently not required – rectius*, not imposed – *by Union law*" (italics added).[30] The material scope of this provision is represented, for instance, by Art. 66 CRD IV.[31] Indeed, the first paragraph compels Member States to impose certain sanctions (listed in the following paragraph) for breaches of national rules *at least* in the cases covered by letters *a*, *b* and *c* of the same article: the expression "at least" means that Member States are free to sanction further violations, without those States being compelled by the European Union.[32]

Both classes of sanctioning powers, *(a)* and *(b)*, raise some interpretative issues worth addressing.

27 It is important to specify that the concept of *indirect sanctioning competences* referred to in the first paragraph of this paper and the concept of the *ECB's indirect sanctioning powers* are not equivalent. More precisely, the former expression refers to the EU's power to compel Member States to provide and impose (national) sanctions in case of a breach of EU law; the latter expression, by contrast, refers to the ECB's power to ask NCAs to start proceedings for certain violations.

28 For the distinction between supervisory tasks, administrative measures and administrative sanctions within the framework of the SSM Regulation, see *R. D'Ambrosio*, Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings, Banca d'Italia – Quaderni di Ricerca Giuridica della Consulenza Legale (Quad. Ric. Giur.) 74/2013, p. 11 et seq.

29 Although the opening words of Art. 18, par. 5 – in the cases not covered by paragraph 1 – could probably have been sufficient, the second part of Art. 18, par. 5, as well as Art. 134 letters *a* and *b* of the Framework Regulation, further specify the cases where the ECB may exercise its power pursuant to Art. 18, par. 5.

30 See also the Italian version of Art. 134, letter *c* of the Framework Regulation, which refers to sanctions *not imposed* by EU law.

31 See *supra*, fn. 17.

32 In this case, the ECB is only empowered with indirect sanctioning powers. This specification will be relevant in relation to the *ne bis in idem* principle. See *infra*, § 5.

As for the direct sanctioning powers *(a)*, the main question that has been raised since the entry into force of the SSM Regulation concerns the addressees of sanctions imposed by the ECB. Indeed, as already pointed out, Art. 18 makes no reference to the *significance* of credit institutions. Therefore, in the absence of any reference, the question is whether the criterion laid down for the allocation of supervisory powers (based on a distinction between *significant* and *less significant* entities) should also apply to the allocation of sanctioning powers, or whether such a "silence" must be interpreted as the expression of a different *voluntas legis*.[33]

In the case referred to in Art. 18, par. 7 of the SSM Regulation, the interpretative doubts just mentioned may be easily dispelled by reading Art. 18, par. 7 in conjunction with the SSM Framework Regulation: indeed, Art. 122 of the latter states that "the ECB shall impose administrative penalties […] if there is a failure to comply with obligations under ECB regulations or decisions on: (a) significant supervised entities, or (b) less significant supervised entities where the relevant ECB regulations or decisions impose obligations on less significant supervised entities vis-à-vis the ECB".[34]

In the case referred to in Art. 18, par. 1 of the SSM Regulation, the opening words of the provision, which establish that the competences of the EBC are linked to the "purpose of carrying out the tasks conferred on it by this Regulation", seem to suggest that the sanctioning powers are only applicable against *significant* credit institutions.[35] In other words, according to this interpretation, only *significant* credit institutions can be subject to the sanctioning powers set forth in Art. 18, par. 1, because the ECB has the power to exercise its supervision only on such institutions.

This reasoning is without a doubt to be welcomed, since the power to impose sanctions should not be exercised without previous "supervision" of the addressees of such sanctions and verification of the violations allegedly committed. Moreover, Art. 124, par. 1(a) of the SSM Framework Regulation, makes reference only to *significant* supervised entities; thus, it confirms the aforementioned interpretation.[36] Before the entry into force of the SSM Framework Regulation, some scholars were not persuaded that the parallelism between supervisory and sanctioning powers could be based on the sole opening phrase of Art. 18, par. 1.[37] However, as just noted, the problem has lost most

33 This issue does not concern the withdrawal of the license, because only the ECB may withdraw the authorisation to take up the business of a credit institution: either on its own initiative, after a consultation with the NCAs, or on the input of the latter.

34 Even before the entry into force of the SSM Framework Regulation, the same conclusion could be reached by affirming that the ECB can efficiently exercise its sanctioning powers only in so far as it is equipped with supervisory powers. See *R. D'Ambrosio*, Quad. Ric. Giur. 74/2013, p. 42.

35 For this interpretation, *R.* D'Ambrosio, Quad. Ric. Giur. 74/2013, p. 42; *K. Lackhoff*, J.I.B.L.R. 1/2014, p. 25.

36 See *S. Allegrezza, O. Voordeckers*, Eucrim 4/2015, p. 156; *M. Clarich*, BIS 2/2014, p. 239.

37 The question as to whether this parallelism exists is answered in the affirmative by *R. D'Ambrosio* Quad. Ric. Giur. 74/2013, p. 42; *K. Lackhoff*, J.I.B.L.R. 1/2014, p. 25; in the negative by *S. Loosveld*, J.I.B.L.R. 10/2013 p. 423, who affirms that Art. 18 makes a distinction based on the type of violation committed, rather than on the addressees of the sanctions; and *M.*

of its relevance since the adoption of the SSM Framework Regulation, which clarifies the scope of application of both pars. 1 and 7 of Art. 18.

The indirect power of the ECB *(b)* raises some issues as well: *(i)* firstly, and as in the case of the direct powers, we must clarify the targets of the sanctions; *(ii)* secondly, it is not clear from the text of the provision whether NCAs are prevented from starting a proceeding without the input of the ECB; and *(iii)*, thirdly and finally, we question the effects of requests made by the ECB.

*(i)* As far as the first point is concerned, the ECB makes use of the indirect power at issue for the purpose "of carrying out the tasks conferred on it by this Regulation". This expression seems to suggest that such a power can be exercised only in relation to *significant* credit institutions.[38] Moreover, this suggestion is further borne out by Art. 134 of the SSM Framework Regulation, which elucidates the scope of application of Art. 18, par. 5 of the SSM Regulation and only mentions *significant* credit institutions.

*(ii)* As far as the second point is concerned, Art. 134, par. 1 of the SSM Framework Regulation clarifies – in relation to *significant* credit institutions – that NCAs can open proceedings only at the request of the ECB; thus, any autonomous intervention of the NCAs is precluded. However, paragraph 2 of Art. 134 limits the scope of application of this provision, because it states that "an NCA may ask the ECB to request it to open proceedings in the cases referred to in paragraph 1". Accordingly, NCAs are given a substantial power of initiative, which, however, is not binding for the ECB: the latter, in fact, may refuse to make the formal and necessary request to open a proceeding.

In relation to *less significant* credit institutions, by contrast, NCAs will impose sanctions regardless of any previous input of the ECB and they are only required to inform the ECB of the sanctions imposed.[39]

*(iii)* As far as the third and last issue is concerned, if the ECB requests that a proceeding be opened, this does not mean that the NCAs are obliged to impose a sanction at the end of the proceeding itself. In other words, NCAs maintain certain discretion in deciding whether to impose a sanction, as well as in determining the type and entity thereof.[40] Art. 134, par. 3 of the SSM Framework Regulation further

*Mancini*, Dalla vigilanza nazionale armonizzata alla Banking Union, Banca d'Italia – Quaderni di Ricerca Giuridica della Consulenza Legale (Quad. Ric. Giur.) 74/2013, p. 29 et seq. More precisely, *Mancini* is of the opinion that the opposite conclusion is not possible without a legal reform, because all the issues concerning the application of sanctions must be strictly interpreted.

38 *R. D'Ambrosio*, Quad. Ric. Giur. 74/2013, p. 42; *K. Lackhoff*, J.I.B.L.R. 1/2014, p. 25.

39 See Art. 135 of the Framework Regulation.

40 *S. Allegrezza, O. Voordeckers*, Eucrim 4/2015, p. 157. See also *R. D'Ambrosio* (fn. 28), p. 49, who is of the opinion that there is not even an obligation to start a proceeding.

confirms such an interpretation, stating that the NCAs must inform the ECB of the penalty imposed, "if any".

At the end of this brief overview concerning the allocation of sanctioning powers between the ECB and NCAs, it is worth pointing out that the power to impose sanctions is strictly linked with the power to open investigations laid down in Arts. 11-13 of the SSM Regulation.[41] Such an interrelation is confirmed by Art. 123 et seq. of the SSM Framework Regulation: in particular, Art. 124 states that whenever there is a reason to suspect a relevant breach under Art. 18, par. 1 and par. 7, the ECB must refer the matter to the investigating unit,[42] which is endowed with all the powers specified in the SSM Regulation and, accordingly, the powers set forth in Articles 11-13.[43]

However, though it is true that the imposition of a certain sanction must be based on a prior investigation, it should be pointed out that there is at least one case where the investigatory power is not linked with any subsequent sanctioning power. More precisely, the ECB can start investigations not only against *significant* credit institutions – which are subject to daily supervision – but also against *less significant* credit institutions, even if no sanction may be imposed on the latter: according to Art. 6, par. 5, letter *d*, in fact, the ECB may decide, at any moment, to make use its powers under Arts. 11-13 against *less significant* credit institutions, with the risk – as we will further explain – of an overlap between supranational investigations and national proceedings.

### *IV. The nature of the sanctions imposed by the ECB*

The aforementioned description of the legal framework concerning the allocation of competences between the ECB and NCAs is not sufficient for the purpose of analysing the *ne bis in idem* principle within the SSM. Indeed, such an analysis requires further preliminary examination.

As is well known, the scope of application of the *ne bis in idem* principle is limited to *matière pénale*, which encompasses both *crimes stricto sensu* and infringements formally labelled as administrative but which are substantively criminal in nature according to the well-known Engel criteria.[44] The scheme set out by the Strasbourg Court in

41 Briefly, the investigative powers encompasses the request for information, documents and (written and oral) explanation, as well as on-site inspections. For further details, see *S. Allegrezza, O. Voordeckers*, Eucrim 4/2015.

42 As pointed out by *S. Allegrezza, O. Voordeckers*, Eucrim 4/2015, p. 157 "the establishment of the IIU […] reflects the distinction between the investigating and decision taking phase for imposing administrative sanctions".

43 As far as periodic penalty payments are concerned, it must be specified that procedural rules laid down in Regulation 2532/1998 will also apply.

44 *Engel v. The Netherlands*, Applications nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgement 8 June 1976.

the Engel decision – followed by the EU Court of Justice, directly[45] and indirectly[46] – imposes an assessment, firstly, of the legal classification of the infringement under national law *(first criterion)*. However, the legal qualification of an infringement as "administrative" is not sufficient to exclude it from *matière pénale*, since the nature of the infringement *(second criterion)*, as well as the scope, the nature and the severity of the sanction *(third criterion)*,[47] might lead to the opposite conclusion that the infringement was indeed criminal in nature.

The necessity of an autonomous definition of *matière pénale* – which was conceived with the aim of preventing national systems from excluding the application of guarantees afforded under criminal law (such as the *ne bis in idem*) by giving an administrative label to a certain infraction – also occurs within the framework of the European Union,[48] thus in relation to the sanctions laid down or referenced in the SSM Regulation. Indeed, since these sanctions are not classified as criminal,[49] an assessment needs to be made as to whether they fall within the concept of *matière pénale* based on the above-mentioned criteria *(b)* and *(c)*.

45 See *European Court of Justice* (ECJ) 5.6.2012, case C-489/10 (*Bonda*), [2012], in particular paras. 37-46.

46 See *European Court of Justice* (ECJ) 26.2.2013, case C-617/10 (*Aklagaren v. Hans Akerberg Fransson*), [2013], where the CJEU specified that the criminal nature of the infringement is to be assessed by national judge. For a note on the ruling, see *J.A.E. Vervaele*, The application of the EU Charter of fundamental rights (CFR) and its *ne bis in idem* principle in the Member States of the EU, in: *J.A.E. Vervaele*, European criminal justice in the Post Lisbon Area of Freedom, Security and Justice (fn. 1), p. 207 et seq. It must be pointed out that the CJEU has formally adhered to the notion of *matière pénale* in the context of domestic *ne bis in idem*. However, in the judgement 27.5.2014, case C-129/14 (*Spasic*), [2014], concerning transnational *ne bis in idem* situation, the Luxembourg Court preliminarily stated that there was a need to assess the criminal nature of the judgment, which had become final, and explicitly referenced the *Fransson* case.

47 A clarification is needed: criteria *b* and *c* are not cumulative, but alternative. Moreover, we shall highlight that the notion of *matière pénale* has been further clarified and expanded on by the ECtHR. See, among many others, *D.J. Harris, M. O'Boyle, C. Warbrick*, Law of the European Convention on Human Rights, Oxford, 2009, 204 et seq.; *P. van Dijk, M. Viering*, Right to a fair and public hearing, in: *P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (eds)*, Theory and practice of the European Convention on Human Rights, 2006, p. 543 et seq. Less recent, *M. Delmas-Marty,* La «matière pénale» au sens de la Convention Européenne des Droits de l'Homme, flou du droit pénal, Revue de Science Criminelle & Droit Pénal Comparé (RSC) 1987, p. 819 et seq.; *C. E. Paliero*, "Materia penale" e illecito amministrativo secondo la Corte Europea dei Diritti dell'Uomo: una questione "classica" a una svolta radicale, Rivista Italiana di Diritto e Procedura Penale (RIDPP) 3/1985, p. 894 et seq.

48 *ECJ*, *Bonda* (fn. 45), where the Court was called on to assess the nature of the sanctions laid down in Art. 138, par. 1 of Regulation 1973/2004; in paragraph 38 the CJEU affirmed: "it must be observed that the measures provided for in Article 138(1) of Regulation No 1973/2004 are not regarded as criminal in nature by European Union law, *which must in the present case be equated to 'national law' within the meaning of the case-law of the European Court of Human Rights*" (italics added).

49 Nor it could have been otherwise on the basis of the criminal competences given to the European Union by the Treaties.

As for *the administrative pecuniary penalties and fines*[50] provided for, respectively, under paragraph 1 of Art. 18 and paragraph 7 of Art. 18 of the SSM Regulation (*rectius*, under Regulation 2532/1998 mentioned by Art. 18, par. 7), their criminal nature does not seem to be called into question.

This conclusion is firstly supported by the circumstance that these sanctions have a repressive and deterrent nature:[51] paragraph 1 deals with intentional or negligent violations of directly applicable EU law,[52] in relation to which administrative pecuniary penalties are made available to NCAs;[53] in the case of paragraph 7, on the other hand, the imposition of a sanction is linked with a previous violation of ECB regulations or decisions.[54]

Moreover, the severity of the penalty goes in the same direction, since the entity of the sanctions, under both Art. 18, par. 1 and Art. 18, par. 7, may reach up to twice the amount of the profits gained or the loss avoided because of the breach (when these amounts can be determined) or up to 10% of the total annual turnover.[55]

As for the *periodic penalty payments* under Art. 18, par. 7 (*rectius*, under Regulation 2532/1998 mentioned by Art. 18, par. 7), the ambiguous aim that they pursue raises some doubts.[56] In fact, on the one hand Art. 1, par. 1, letter *a* of Regulation (EU) 2015/159[57] establishes that periodic penalty payments are "amounts of money which, in the case of a continued infringement, an undertaking is obliged to pay either as a punishment, or with a view *to forcing the persons concerned to comply with the ECB supervisory regulations and decisions*." (italics added). On the other hand, however, we should not forget that *the failure to comply with a regulation or a decision of the ECB* is already an infraction that the periodic penalty payment aims to bring a halt to, the

50 The problem also concerns fines, since here we are discussing European fines and not (formally) national criminal fines.

51 This is a sub-criterion already mentioned in the *Engel* decision and further specified in the ECtHR judgment *Öztürk v. Germania*, Application no. 8544/79, 21 February 2009, para. 53. Regarding this aspect, see *F. Mazzacuva*, La materia penale e il "doppio binario" della Corte europea: le garanzie al di là delle apparenze, Rivista Italiana di Diritto e Procedura Penale (RIDPP) 3-4/2013, p. 1907 et seq. The author places emphasis on the polysemous meaning of *prevention*. In fact, the *preventive aim* of a sanction may reveal its criminal nature, whenever it is aimed at preventing a criminal from committing another crime – on account of the threat of the penalty – and it does not have merely the aim of neutralising the criminal's dangerousness.

52 First and foremost breaches of the CRR (*Capital Requirements Regulation*) committed by a *significant* credit institution (see *supra*, fn. 16).

53 As it will be observed more in detail in the next paragraph, the material scope of this provision is represented by Art. 67 of the CRD IV (see *supra*, fn. 17).

54 *S. Allegrezza, I. Radopolos* (fn. 18), p. 251.

55 As already pointed out, Art. 18, par. 7 refers to Regulation (EC) 2532/98. Art. 4 *a* of the latter, introduced by the amending Regulation (EU) 2015/159, increased the maximum fine for breaches of ECB decisions and regulations, making the limit equal to that established for relevant breaches under Art. 18, par. 1 of the SSM Regulation.

56 *R. D'Ambrosio*, Quad. Ric. Giur. 74/2013, p. 18, who is of the opinion that when a periodic penalty payment is imposed in order to ensure compliance with a certain decision, it cannot be considered a sanction.

57 Amending Regulation (EC) 2532/98.

consequence being that such an instrument also has a dissuasive and deterrent nature.[58] Moreover, the third Engel *criterion* concerning the severity of the penalty further supports the *coloration pénale* of the periodic penalty payment.

As for the *withdrawal of the licence* under Art. 14 of the SSM Regulation, the case law of the ECtHR, concerning – for instance – the withdrawal of a driving licence or a professional licence, may provide some useful insights.[59]

In the *Haarvig v. Norway judgment*,[60] the Strasbourg Court ruled out the criminal nature of the temporary suspension of a medical licence on the ground that such a measure was not provided with a deterrent and punitive nature, but rather had the exclusive aim of protecting patients.

In the *Nilsson v. Sweden judgment*,[61] the Court held that the deterrent-punitive nature of the measure stemmed from the long interval time (almost one year) between the withdrawal of the licence and the commission of the fact (driving under the influence of alcohol), which had been already punished under criminal law by means of a judgment which became final before the issuing of the revocation. Moreover, in that case the Court found that the fact that the withdrawal was an automatic, direct and foreseeable consequence of the previous conviction for the same offence had to be considered as the main indicator of the criminal nature of the measure.[62]

In conclusion, if we apply the same reasoning to the subject matter currently being analysed, we will conclude that the withdrawal of the licence for the exercise of a bank activity does not necessarily have a *coloration pénale*. Rather, this *coloration* should be assessed on a case-by-case basis, also in the light of intersections with other proceedings regarding the same fact.

58 *S. Allegrezza, I. Radopolos* (fn. 18), p. 252. For an opposing view, see *R. D'Ambrosio*, Quad. Ric. Giur. 74/2013, p. 16 et seq. In fact, according to this author, the link to a previous breach characterises not only sanctions, but also so-called *administrative measures*. The distinctive element concerns the aim pursued: the sanctions, in fact, have a punishing aim, whereas the measures aim at repairing the damage caused by the author's conduct.

59 *B. van Bockel*, *Ne bis in idem* issues under the Single Supervisory Mechanism, in: *B. van Bockel*, *Ne bis in idem* in EU law, Cambridge, 2016, p. 218 et seq.; *Id*, The Single Supervisory Mechanism Regulation: questions of *ne bis in idem* and implications for the further integration of the system of fundamental rights protection in the EU, Maastricht Journal of European & Comparative Law (MJ) 2/2017, p. 194 et seq.

60 ECtHR, *Haarving c. Norvegia,* Application no 11187/05, Judgment 11 December 2007.

61 *Nilsson v. Sweden*, Application no. 73661/01, Judgement 13 December 2005. The applicant complained of a violation of Art. 4, Prot. 7 ECHR because the national authorities withdrew his driving license for driving under the influence of alcohol, following a final criminal conviction for the same fact.

62 For instance, under Italian law, driving under the influence of alcohol is a crime if the blood alcohol level exceeds a certain threshold. After the crime has been proved, the suspension of the driving license – an administrative sanction – is an automatic consequence, which cannot thus be considered as criminal in the light of ECtHR case law.

## *V. The ne bis in idem principle*

After this overview concerning the nature of the relevant sanctions under the Single Supervisory Mechanism, it must be verified whether the structure of this system has been built in such a way to prevent violations of the *ne bis in idem* principle from occurring or whether such a violation may take place.

In this regard, we must note that *ne bis in idem* takes on several meanings within the framework of the European Union and the European Convention on Human Rights. For this reason, the different connotations of the principle at issue need to be analysed before an assessment can be made as to whether the single supervisory regime is consistent with the prohibition of double jeopardy.

### *V.1 Supranational sources and elements of ne bis in idem*

Within the framework of the European Union, the prohibition of double jeopardy is laid down in Art. 50 of the *Charter of Fundamental Rights of the European Union* (the Charter), which enshrines both the national and transnational dimension of the principle concerned.

Entering into the details of this distinction, *national ne bis in idem* aims at ensuring that a person who has already been convicted or acquitted by a final judgment in a certain State will not be prosecuted or convicted a second time, for the same fact, by other national authorities of the *same State*.

*Transnational ne bis in idem* – an issue that arises whenever multiple jurisdictions are interested in the prosecution of the same fact – may take a horizontal or vertical form: in the former case, the aim is to protect a person, whose trial has been finally disposed of in a certain State, from the threat of further prosecution (or conviction), for the same fact, by national authorities of *another State*; in the latter case, by contrast, the aim is to avoid the risk of double proceedings before the national authorities of a certain State, on the one hand, and supranational authorities, on the other.[63] As pointed out at the beginning of this paper, there are several sectors where the EU has direct sanctioning powers; thus, there are just as many sectors where the risk of "vertical" concurrent jurisdiction on the same fact might arise.[64]

63 On these classifications and for further details on transnational-horizontal *ne bis in idem*, see *N. Recchia*, Il *ne bis in idem* transnazionale nelle fonti eurocomunitarie. Questioni risolte e nodi problematici alla luce delle recenti sentenze della Corte di Giustizia UE, Rivista Italiana di Diritto e Procedura Penale (RIDPP) 3/2015, p. 1373 et seq. and several references therein; *J.A.E. Vervaele*, The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights, Utrecht Law Review (ULR) 2/2005, p. 100 et seq.

64 This aspect has been broadly discussed in the competition law sector, where *ne bis in idem* is the only remedy against the admissibility – under Regulation 1/2003 – of parallel proceedings by the Commission under EU law and NCAs under national law. See *R. Nazzini*, Parallel proceedings in EU competition law. *Ne bis in idem* as a limiting principle, in: *B. van Bockel*, *Ne bis in idem* in EU law (fn. 59), p. 131 et seq.; *J. Tomkin*, , in: *S. Peers, T. Harvey, J.*

Within the EU there is other legislation governing the principle at issue. First, there are several European sectorial acts explicitly enhancing the *ne bis in idem* principle.[65] Moreover, the protection of the accused from the risk of being prosecuted or punished twice is further guaranteed in Articles 54 to 58 of the Convention Implementing the Schengen Agreement (CISA); the CISA is a secondary EU law source,[66] which regulates the sole transnational-horizontal dimension of the principle at issue.[67]

*Kenner, A. Ward*, The EU Charter of Fundamental Rights: a Commentary, München, Oxford, Baden-Baden, 1st ed., 2014, Art. 50, p. 1399 et seq.; *A.J.C. de Moor-van Vugt*, Administrative sanctions in EU law, Review of European Administrative Law (REALaw) 1/2012, p. 37 et seq. This author, more precisely, focuses on the case law of the EU Court of Justice related to substantive *ne bis in idem* (see *infra*). *F. Rizzuto*, Parallel competence and the power of the EC Commission under Regulation 1/2003 according to the Court of First Instance, European Competition Law Review (ECLR) 5/2008, p. 286 et seq.

65 See, for instance, the Council Framework Decision of 13 June 2002 on the *European arrest warrant and the surrender procedures between Member States* (2002/584/JHA). Art. 3 of the mentioned Framework Decision laid down *ne bis in idem* as a ground for refusing the execution of a request submitted by the issuing Member State. Therefore, *ne bis in idem* is considered as an exceptional ground for refusing to cooperate with another Member State. At the basis of this architecture lies the *mutual recognition principle*, which requires a high level of trust between Member States and thus admits derogations from the duty to cooperate only in so far as these derogations are exceptional. The measures inspired by the mutual recognition principle have replaced the *mutual assistance* instruments, adopted within the framework of the Council of Europe (see, in the same fields, Articles 8-9 of the European Convention on Extradition, 13 December 1957). For an overview on the switch from mutual legal assistance to mutual recognition measures, see *V. Mitsilegas (ed. by C. Grandi)*, Justice and trust in the European legal order, Napoli, 2016, p. 39 et seq.; *P. Rackow, C. Birr*, Recent development in legal assistance in criminal matters, Goettingen Journal of International Law (GoJIL) 3/2010, p. 1087 et seq.; *J.A.E. Vervaele*, Mutual legal assistance in criminal matters to control (transnational) criminality, in: *N. Boister, R. Currie (eds),* Handbook of transnational criminal law, London, 2015, p. 121 et seq. For an analysis on *ne bis in idem* from this perspective, see, among others, *J.A.E. Vervaele*, *Ne bis in idem,* towards a transnational constitutional principle in the EU?*,* in: *J.A.E. Vervaele*, European criminal justice in the Post Lisbon Area of Freedom, Security and Justice (fn. 1), p. 167 et seq.

66 At the beginning, the field of application of the principle was limited to the Schengen Area. After the entry into force of the Amsterdam Treaty, this limitation was removed because the CISA became part of EU law as secondary legislation. More precisely, Art. 2 of the *Protocol integrating the Schengen acquis into the framework of the European Union* required the Council to adopt a decision in order to determine "the legal basis for each of the provisions or decisions which constitute the Schengen acquis". The Council thus adopted *Decision 1999/436/EC* of 20 May 1999, which took Articles 31 to 34 as the legal basis for the CISA's provisions concerning the *ne bis in idem* principle. As a consequence, the CISA became part of the EU as a third pillar act.

67 The case law of the Court of Justice is very broad: *European Court of Justice* (ECJ) 11.2.2003, joined cases C-187/01 and C-358/01 (*Gözütok and Brügge*), [2001] ECR 2003 I-01345; *European Court of Justice* (ECJ) 10.3.2005, case C-469/03 (*Miraglia*), [2003] ECR 2005 I-02009; European Court of Justice (ECJ) 9.3.2006, case C-436/04 (*Van Esbroek*), [2006] ECR 2006 I-02333; *European Court of Justice* (ECJ) 28.9.2006, case C-467/04 (*Gasparini*), [2006] ECR 2006 I-09199; *European Court of Justice* (ECJ) 28.9.2006, case C-150/05 (*Van Straaten*), [2005] ECR 2006 I-09327; *European Court of Justice* (ECJ) 18.7.2007, case C-288/05 (*Kretzinger*), [2005] ECR 2007 I-06441; *European Court of Justice* (ECJ) 18.7.2007, case C-367/05 (*Kraaijenbrink*), [2007] ECR 2007 I-06619; *European Court of Jus-*

Finally, as for the European Convention on Human Rights (ECHR), the *ne bis in idem* principle is enshrined in Art. 4 of Protocol 7, and it protects the sole national dimension of *ne bis in idem*.

The existence of several sources governing this principle is symptomatic, on the one hand, of the relevance that it has acquired within the framework of the multilevel protection of the rights of the accused. On the other hand, however, the participation of several Courts – the Court of Justice and the European Court on Human Rights – in the interpretation of the principle may lead, as we will underline, to the creation of inhomogeneous protection standards.

Moreover, the above-mentioned sources – Art. 50 of the Charter, Art. 4, Prot. 7 ECHR and Articles 54 to 58 CISA – only protect procedural *ne bis in idem.*[68]

This last consideration requires that a further distinction be drawn. *Procedural ne bis in idem* prevents the initiation (or the continuation) of a second proceeding as soon as the first proceeding (or the parallel one) has been finally disposed of; the consequence being that the initiation (or the continuation) of a second proceeding would represent a violation of *procedural ne bis in idem*, even if the overall penalty is proportionate. *Substantive ne bis in idem* concerns the application of multiple criminal provisions to the same conduct.

*tice* (ECJ) 11.12.2008, case C-297/07 (*Bourquain*), [2008] ECR 2008 I-09425; *European Court of Justice* (ECJ) 22.12.2008, case C-491/07 (*Turansky*), [2008] ECR 2008 I-11039. These judgments contributed to defining the constitutive elements of the principle (*idem*, *bis*, final sentence) in relation, however, to cases concerning *formal* criminal proceedings. For an analysis of these judgments, see *J. Tomkin* (fn. 64), p. 1392 et seq; *A. Weyemberg*, La jurisprudence de la CJ relative au principe *ne bis in idem*: une contribution essentielle à la reconnaissance mutuelle en matière pénale, in: *VvAa*, The Court of Justice and the construction of Europe: analysis and perspectives on sixty years of case-law, The Hague, 2013, p. 539 et seq.; *W. Schomburg*, Criminal matters: transnational *ne bis in idem* in Europe – conflict of jurisdictions – transfer of proceedings, ERA Forum, 29 August 2012, p. 316 et seq.
As for the relation between Art. 50 of the Charter (primary EU law) and Art. 54 CISA (secondary EU law), see CJEU, *Spasic* judgment (fn. 46). For an analysis of the judgment, see among many others, *M. Wasmeier*, *Ne bis in idem* and the enforcement condition: balancing Freedom, Security and Justice, New Journal of European Criminal Law (NJECL) 4/2014, p. 534 et seq.
Finally, more recent, *European Court of Justice* (ECJ) 29.6.2016, case C-486/14 (*Kossowski*), [2016], where the Court wasted an opportunity to rule on the question related to the relationship between Art. 50 of the Charter and Art. 55 CISA. See *M. Simonato*, *Ne bis in idem* in the EU: two important questions for the CJEU (Opinion of the AG in C-486/14 Kossowski), www.europeanlawblog.eu, 12 January 2016.

68 Therefore, the European Courts would not find a violation of the *ne bis in idem* principle if multiple criminal provisions were adopted against (and corresponding sanctions imposed on) the accused within the context of a single proceeding. See, for instance, the recent judgment of the ECtHR, *Dungveckis c. Lituania*, Application no. 32106/2008, Judgement 14 April 2016, where the Strasbourg Court points out "that there was only one set of proceedings concerning both charges against the applicant, and those proceedings were concluded by a single final judgment. Thus, there was no duplication of proceedings and the applicant was not prosecuted more than once" (§ 43), and the guarantee did not apply.

The procedural/substantial dichotomy does not merely reflect two faces of the same principle, but it reveals two different guarantees, based on different *rationes*. Therefore, the European Courts are called upon to engage in a constant dialogue in order to ensure a level of protection that is as homogeneous as possible; at the same time, they are also expected to interpret the principle without confusing the interests underlying *procedural ne bis in idem* with the proportionality exigencies underlying *substantive ne bis in idem.*[69]

As for the constituent elements of the principle, it is not disputed that the concept of *idem* is interpreted as the *same material fact* in the case law of both the Luxembourg[70] and Strasbourg[71] Courts – although there are still some doubts regarding the meaning of "same material fact".[72] Similarly, it is undisputed that, according to the above-mentioned Courts, a two-track system, administrative and criminal, might give rise to a violation of the *ne bis in idem* principle.[73]

However, as far as the *idem* element is concerned, the notion of *idem factum* is radically restricted in the field of competition law; in that field, in fact, fulfilment of the

69 On the relationship between substantive and procedural *ne bis in idem*, see *F. Mazzacuva*, Le pene nascoste. Topografia delle sanzioni punitive e modulazione dello statuto garantistico, Torino, 2017, p. 293 et seq., where the author analyses the problematic interferences between the two principles.

70 The CJEU has always adopted this notion of *idem*, although the case-law refers to preliminary rulings on the interpretation of Art. 54 CISA – thus, the sole transnational dimension of the *ne bis in idem* principle –and not Art. 50 of the Charter. On the concept of *idem*, see. *H. Mock*, "*Ne bis in idem*", une locution dont le sens ne semble pas être le même à Luxembourgqu'à Strasbourg (Arrêt C-436/04 de la CJ des Communautés européennes, du mars 2005, Leopold Henri Van Esbroeck), Revue Trimestrielle des Droits de l'Homme (Rev. trim. dr. h.) 67/2006, p. 635 et seq.; *A. Weyembergh, I. Armada*, The principle of *ne bis in idem* in Europe's Area of Freedom, Security and Justice, in: *V. Mitsilegas, M. Bergstrom, T. Konstadinides* (eds), Research Handbook on European criminal law, Cheltenham-Northampton, 2016, p. 194 et seq.; *C. Wong*, Criminal sanctions and administrative penalties: the quid of the *ne bis in idem* principle and some original sins, in: *F. Galli, A. Weyembergh (eds),* Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of EU, Bruxelles, 2014, p. 219 et seq., where the author underlines the influence of the Court of Justice on the case-law of the Strasbourg Court on the interpretation of Art. 4, Prot. 7 ECHR.

71 As well known, the ECtHR finally adopted this criterion in the *Zolotukhin v. Russia* case, 10 February 2009 (application no 14939/03), under the influence of the case law of the Court of Justice.

72 For an overview of the interpretations of *idem factum* within the Italian context, see, among others, *N. Galantini*, Il fatto nella prospettiva del divieto del secondo giudizio, Rivista Italiana di Diritto e Procedura Penale (RIDPP) 3/2015, p. 1205 et seq., although the author only focuses on formal criminal proceedings.

73 See *supra*, § 4. As for the case law of the Court of Justice, see *Bonda* (fn. 45); *Fransson* (fn. 46). As for the case law of the ECtHR see, for instance, *Grande Stevens v. Italia*, Application no. 18640/10, Judgement 4 March 2014, in the context of which the Strasbourg Court found the two-track system in the field of market abuse at odds with Art. 4 Prot. 7.

*idem* requirement is subject to a double condition: the identity of the facts and the identity of the legal interests protected.[74]

As far as the *bis* element is concerned, in the *A and B v. Norway* judgment,[75] the ECtHR emphasised the "*sufficiently close connection in substance and time*" *criterion*, thus restricting the scope of application of the guarantee concerned. More precisely, according to this criterion, (procedural) *ne bis in idem* will not apply when the proceedings concerned are sufficiently connected from both a substantial and a temporal perspective. In other words, the principle will not apply when the proceedings, on the basis of some indicators listed in the judgment,[76] are combined in such a way as to form a coherent whole, in the context of which the overall legal treatment is proportionate and foreseeable. If the sufficiently close connection is fulfilled, the *ne bis in idem* principle will not be applicable because the *bis* element is lacking.[77]

Coming to the case law of Luxembourg, in the recent *Menci* and *Garlsson Real Estate* judgments[78] the Court of Justice did not passively accept the criterion proposed by the Strasbourg Court,[79] but rather followed, at least from a methodological perspective, the path suggested by the Advocate General.[80] Briefly, the Advocate General pointed out that the duty to interpret the Charter in conformity with provisions of the ECHR having a similar content – a duty that is laid down in Art. 52, par. 3 of the Charter – cannot in itself justify a radical restriction of the scope of application of the *ne bis in idem* principle: the duty of "uniform interpretation", in fact, does not affect the possibility of giving a broader definition of the principle at issue within the framework of the EU. According to the Advocate General, an autonomous definition of *ne bis in idem* within the context of the European Union would be highly desirable and limitations to the application of the principle should be admitted only in so far as they comply with the requirements laid down in Art. 52, par. 1 of the Charter; namely, in so

74 For further details see *R. Nazzini* (fn. 64), p. 141 et seq. In this field, moreover, the *ne bis in idem* principle seems to guarantee only the right not to punished twice. See again *R. Nazzini* (fn. 64), p. 155 et seq.

75 *A and B v. Norway*, Applications nos. 24130/11 e 29758/11, Judgement 15 November 2016.

76 *Ivi*, § 132.

77 Referring to this criterion, the Court of Strasbourg took a step backwards in the interpretation of the *ne bis in idem* principle, mixing the interests underlying *procedural ne bis in idem* with the proportionality exigencies underlying *substantive ne bis in idem*. The new criterion was used again in the case *Jòhannesson and others v. Finland*, Application no. 22007/11, Judgement 18 May 2017, although the Court concluded that the sufficiently close connection was lacking in that particular case.

78 *European Court of Justice* (ECJ) 20.3.2018, case C-524/15 (*Menci*), [2018]; *European Court of Justice* (ECJ) 20.3.2018, case C-53716 (*Garlsson Real Estate*), [2018].

79 This criterion was not completely new, since the Court had already used it in some cases: *ECtHR*, *Nilsson v. Svezia* (fn. 61); *Nykänen v. Finlandia*, Application no 11828/11, Judgement 20 May 2014; *Glantz v. Finland*, Application no 37394/11, Judgement 20 May 2014; *Lucky DEV v. Svezia*, Application. no 7356/10, Judgment 27 November 2014.

80 Conclusions of the Advocate General M. Campos Sànchez-Bordona, 12.9.2017.

far as these limitations respect the essence of the principle and they are proportionate.[81]

In its judgments, the Court of Justice followed this suggested route, analysing the two-track system in the light of Art. 52, par. 1. The Court reached the conclusion that the *ne bis in idem* principle can be legitimately derogated from where national law fulfils some conditions that in actual fact echo those established by the ECtHR in the *A and B* judgement. More precisely, the national legislation must contain "rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings", and provide for "rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned".[82]

### *V.2. Ne bis in idem and sanctioning powers in the banking supervision system*

Turning to the banking supervision system, the relevant European sources do not even mention the *ne bis in idem* principle.[83] This omission might feed concern that the enforcement architecture of the SSM has been built in defiance of the principle in question. However, the complex allocation of competences between the ECB and NCAs seems to moderate, at least partially, such concern.

More precisely, with regard to the transnational-vertical intersections between the ECB's and NCAs' sanctioning powers, the fact that the addressees of the sanctions are different (*significant* entities, on the one hand, and *less significant* entities, on the other) should prevent the risk of double proceedings.[84]

Indeed, with regard to the breaches as per Art. 18, par. 1 of the SSM Regulation,[85] the ECB may exercise its sanctioning power only against *significant* entities, precluding NCAs from starting any punitive proceeding against them; on the other hand, NCAs are given sanctioning powers in respect of *less significant* entities, depriving the ECB of any analogous enforcing power. The mechanism envisaged in Art. 18, par. 7 is

81 The steps are analytically described in the Opinion of the Advocate General related to the *Menci* case (paras. 43-94).

82 As for the *Menci* judgment, although the Court had followed the methodological approach suggested by the Advocate General, they came to different conclusions. In fact, the Advocate General found the proportionality requirement not fulfilled, whereas the Court stated that "subject to verification by the referring court, that national legislation, such as that at issue in the main proceedings, makes it possible to ensure that the duplication of proceedings and penalties which it authorises does not exceed what is strictly necessary" (§ 57).

83 In fact, recital 86 of the SSM Regulation states that "this Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular *the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial*, and has to be implemented in accordance with those rights and principles" (italics added).

84 *B. van Bockel*, *Ne bis in idem* issues under the Single Supervisory Mechanism (fn. 59), p. 226.

85 Art. 18, par. 1 refers to cases where the ECB may impose sanctions on *significant* institutions for intentional or negligent breaches of directly applicable EU law.

entirely similar:[86] the ECB may use the punitive powers provided for therein against *less significant* credit institutions – when they are subject to obligations established in ECB regulations and decisions addressed to them – and against the *significant* ones, thus precluding any intervention of the NCAs.

Analogous reasoning applies for Art. 18, par. 5,[87] in the context of which the ECB may only ask NCAs to start a proceeding against *significant* credit institutions "in the cases not covered by paragraph 1", namely, when the ECB does not have any direct sanctioning power. More precisely, a request addressed to an NCA implies that the ECB has no direct sanctioning powers and that, as a consequence, the *significant* credit institution (or natural person) will be subject solely to a sanctioning proceeding of the NCA, thus preventing a situation of *bis in idem* from occurring.

However, after a more careful analysis, a procedural overlap cannot be completely ruled out.

Firstly, there are two specific cases where interpretation is particularly difficult. One is the case in which the ECB decides to start an investigation against a *less significant* credit institution under Art. 6, par. 5, letter *d*,[88] because such an investigation might overlap with a different national proceeding brought before an NCA.[89] However, a decision on the part of the ECB to make use of its investigative powers does not mean that it also has the power to impose sanctions:[90] this circumstance is probably sufficient to rule out the criminal nature of the investigative proceedings and, therefore, the violation of the *transnational-vertical ne bis in idem* principle.

The situation would change in the event that the ECB decided to make use of its power under Art. 6, par. 5, letter *b*:[91] in this case, in fact, the ECB could decide to exercise directly itself "all the relevant powers" – an expression that seems to encompass the sanctioning powers – against *less significant* institutions. In this circumstance, if the ECB decision does not have the further effect of overriding the supervisory (and sanc-

86 Breaches of regulations and decisions of the ECB.

87 We shall remind the situations falling under this provision: when *non-pecuniary sanctions* or *measures other than sanctions* are involved (also in relation to violations of directly applicable EU law, committed by either natural persons or legal persons); in case of sanctions, including pecuniary ones, *addressed to natural persons*; and in case of breaches of *national law transposing the relevant directives.*

88 We shall remind that the ECB can make use, at any moment, of the powers under Arts. 10-13 of the SSM Regulation with regard to *less significant* credit institutions.

89 In fact, Art 138 of the SSM Framework Regulation states that this power "shall however be without prejudice to the NCAs' competence to supervise less significant supervised entities directly pursuant to Article 6(6) of the SSM Regulation".

90 See *supra*, § 3.

91 "When necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4".

tioning) powers of the NCAs,[92] a procedural overlap might occur and, as a consequence, a violation of the *ne bis in idem* principle might arise.[93]

In addition to these controversial cases, there are three other situations in which infringements of *ne bis in idem* may potentially be lurking. Indeed, in the architecture of the banking supervision system it cannot be ruled out that: *(i)* a certain fact may be punished by multiple ECB sanctions; *(ii)* a certain fact may be assessed within the context of a proceeding of an NCA and also be relevant under national criminal law; and *(iii)* a certain fact may be punished by the ECB, on the one hand, and by national criminal law, on the other.

(i) *As for the risk of multiple sanctions imposed by the ECB*, this situation can be found in the case of a sanction accompanied by the withdrawal of an entity's banking license under Art. 14 of the SSM Regulation.[94]

It goes without saying that a potential breach of the *ne bis in idem* principle would arise only in the case of double proceedings. However, the provisions of the SSM Regulation preclude a full appreciation of the current relationship between procedures for the withdrawal of a licence and procedures for imposing a sanction under Art. 18. Moreover, we should ask whether the scope of application of the principle also covers cases in which only measures of a criminal nature (but without a criminal label) are involved. Finally, we should also point out that even the Court of Justice has recently stated that when the proceedings are somehow connected and the overall punishment is proportionate and dissuasive, the *ne bis in idem* principle would not be an issue.

(ii) *As for the potential overlap between national administrative and criminal proceedings* (where the *national ne bis in idem* principle is at stake), the relevant provision is Art. 18, par. 5 of the SSM Regulation. In fact, while it is true – as previously observed – that Art. 18, par. 5 precludes the risk of a breach of the transnational-vertical *ne bis in idem* principle, it is likewise true that there is room for potential double jeopardy within the framework of the same national system.

The risk of infringement of the national *ne bis in idem* principle may occur because though NCAs are precluded from initiating an autonomous proceeding (i.e. without the input of the ECB), there is no such preclusion against criminal authorities wishing to start a criminal prosecution.[95] Therefore, it may very well happen that an NCA starts a proceeding upon receiving input from the ECB while a criminal prosecution is

92 This element is not clear from the text of the SSM Regulation.
93 *B. van Bockel*, The Single Supervisory Mechanism Regulation, MJ 2/2017, p. 213.
94 *B. van Bockel*, *Ne bis in idem* issues under the Single Supervisory Mechanism (fn. 59), p. 229 et seq.
95 With reference in particular to Italian criminal law, Legislative Decree n. 223 of 14 November 2016 introduced Art. 144 *septies* into the Banking Act in order to bring the Italian legal system into line with the SSM Regulation. Art. 144 *septies*, consistently with Art. 18, par. 5 of

ongoing in relation to the same fact. This circumstance might arise, for instance, where the breach committed by a natural person is such as to justify the initiation of a proceeding by an NCA (on the initiative of the ECB) and is also relevant under national criminal law.[96]

However, it is worth highlighting that the protection offered by Art. 50 of the Charter is guaranteed only in so far as the Charter applies pursuant to the following Art. 51. The latter provision, as is well known, states that the provisions of the Charter "are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and *to the Member States only when they are implementing Union law*" (italics added). The scope of application of the last part of the Article was further clarified in the *Fransson judgment*,[97] where the Court of Justice specified that such a requirement must be deemed to be satisfied whenever Member States act within the scope of Union law, even if national legislation has not been adopted to transpose a directive.[98]

In relation to *national criminal law*, the link with the EU is to be assessed on a case-by-case basis.[99] In relation to *national proceedings under Art. 18, par. 5* of the SSM Regulation, there are two reasons for considering a request of the ECB as constituting a sufficient link with EU law: firstly, without such a request NCAs could not make use

the SSM Regulation, states that the Banca d'Italia (an NCA) imposes administrative sanctions at the request of the ECB in the following cases: when the breach concerns provisions other than directly applicable EU law *(a)*; when the sanction is applied against natural persons pursuant to Art. 139, 140, 144 *ter*, 144 *quinquies* and 144 *sexies (b)*; when the sanction is not pecuniary *(c)*. In both the above-mentioned Articles 139 and 140, the breaches defined in the first paragraph are punished by means of administrative sanctions, whereas the breaches defined in the second paragraph are punished by means of criminal sanctions. Art. 144 *septies* which, as already stated, prevents sanctions from being imposed without the input of the ECB, only refers to the *administrative sanctions that the Banca d'Italia may impose*, whereas the national criminal authorities and the criminal sanctions are not mentioned.

96 A similar situation might occur when a breach committed by a credit institution – which triggers a national administrative proceeding on the request of the ECB – is relevant under national criminal law and, as a consequence, a criminal proceeding is initiated either against the credit institution or, most likely, against its legal representative. In a recent judgment (5.4.2017, joined cases C-217/15 and C-350/15, *Orsi and Baldetti*), the CJEU – in line with ECtHR case law (*Pirttimaki v. Finland*, Application no 35232/15, 20 May 2014) – stated that where an administrative proceeding is brought against the legal entity and a criminal charge is brought, for the same facts, against its legal representative, the *ne bis in idem* principle is not to be considered as violated because the subjects involved in the two proceedings are different (the entity, on the one hand; a natural person, on the other). However, the European Courts' judgments do not state anything about the case where the criminal liability of the legal representative might be grounds for a subsequent (formally administrative but) substantially criminal proceeding against the legal entity, which would thus deal with a second proceeding.

97 See *ECJ, Fransson* (fn. 46).

98 *Ivi*, paras. 19-22. For an analysis of this sentence also under this perspective, see *J.A.E. Vervaele* (fn. 46), p. 213 et seq.

99 We talk about "weak link" because national law is not required to be adopted in order to transpose a EU directive.

of their powers; secondly, Art. 18, par. 5 requires the sanctions to have some typically European features: that is, they must be effective, dissuasive and proportionate.[100]

After the applicability of the Charter has been demonstrated, the notion of *idem* must be verified as well. In other words, which notion should have prevalence? The broader notion of *idem factum* or the more restrictive notion, adopted in the field of competition law, requiring the identity of the *legal interests protected* as well as an *idem factum*? Moreover, which meaning should be given to the *bis* element?

As we wait for these questions to be answered in practice, we shall point out that the ECB may prevent the risk of multiple proceedings *ab initio*: pursuant to Art. 136 of the SSM Framework Regulation, in fact, if "the ECB has reason to suspect that a criminal offence may have been committed, it shall request the relevant NCA to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law". The use of the power described in Art. 136 should facilitate a preventive coordination between national authorities, giving precedence to criminal prosecution.

*(iii) As for the possible scenario in which the same act may be subject to ECB sanctions and also be prosecutable under national criminal law,* the *transnational-vertical ne bis in idem* principle would risk being violated.

In this regard, we should again note that Art. 18, par. 7 of the SSM Regulation empowers the ECB to impose the sanctions laid down in Art. 2 of Regulation (EC) 2532/1998, in case of a breach of EBC regulations and decisions. As observed previously,[101] the ECB is always endowed with this power vis-à-vis *significant* supervised entities, whereas it exercises its power under Art. 18, par. 7 vis-à-vis *less significant* institutions only in so far as these institutions are subject to ECB regulations or decisions.

Therefore, on the one hand, the ECB can make use of its power in the case of breaches committed by any credit institutions, including *less significant* ones, within the limits just mentioned; on the other hand, national criminal law might define the same infringements as prosecutable offences and a parallel proceeding could be initiated on these grounds. This possibility seems to be confirmed by Art. 3, par. 10 of Regulation (EC) 2532/1998, which states that "this provision shall be without prejudice to the application of criminal law and to prudential supervisory competencies in participating Member States".

Art. 18. par. 1 of the SSM Regulation empowers the ECB to impose sanctions in the event of an intentional or negligent breach of "a requirement under relevant *directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent authorities* under the relevant Union law" (italics added).

100 *B. van Bockel*, The Single Supervisory Mechanism Regulation, MJ 2/2017, p. 212.
101 See *supra*, § 3.

The text of the provision raises some concerns to the extent that it makes the ECB's sanctioning power dependent on the existence of an analogous power of the NCAs. More precisely: the text of Art. 18, par. 1 empowers the ECB to impose sanctions when the relevant EU legislation makes administrative penalties available to NCAs; therefore, the concern stems from the fact that Art. 18, par. 1 seems to expressly authorise a *bis in idem*, since NCAs might concretely impose the administrative penalties made available to them.

In order to prevent such a paradoxical situation from arising, Art. 18, par. 1 should be interpreted as meaning that, when the conditions laid down therein are satisfied, NCAs, which would have sanctioning powers under relevant EU law – a requirement also under Art. 18, par. 1, whereby the ECB is empowered to impose direct sanctions – cannot impose administrative pecuniary penalties. Only such an interpretation enables us to avoid reading Art. 18, par. 1 as authorising a situation of *bis in idem*.

The material scope of this provision is represented by breaches of the requirements of the CRR (a directly applicable EU act), as identified in Art. 67, par. 1 of CRD IV; in relation to these breaches, par. 2 of Art. 67 states that the administrative penalties and other administrative measures that can be applied include *at least* the measures listed therein.[102] The use of the term "at least" means that Member States may issue further administrative sanctions – which may also have a criminal nature – for violations of the above-mentioned CRR requirements, as well as of formal criminal provisions. If Member States made use of this option, violations of the *ne bis in idem* principle could potentially occur.

It must be pointed out that a potential violation, under Art. 18, pars. 1 and 7, of *ne bis in idem* principle may occur only within those national frameworks that envisage (substantial) criminal liability for legal entities. Indeed, ECB proceedings may be brought (and sanctions imposed) exclusively against legal entities, whereas, as previously noted,[103] national criminal sanctions are usually issued against natural persons. Therefore – as stated by the Court of Justice in the recent *Orsi-Baldetti* judgment,[104] in line with the Strasbourg case law[105] – there would not be any possibility of a violation of *ne bis in idem* (in its transnational-vertical dimension) because *the addressees* of the sanctions concerned would be different. However, as mentioned earlier,[106] this judgment says nothing about the possibility that the liability of a natural person may be interpreted as grounds for further (substantially) criminal liability of the legal entity. If this were the case, in fact, there could be an evident risk of a breach of the *ne bis in idem* principle, in so far as a legal entity might be the target of both an ECB sanction and a national sanction.[107]

102 See *S. Allegrezza, O. Voordeckers*, Eucrim 4/2015, p. 159.
103 See *supra*, fn. 96.
104 *ECJ*, *Orsi and Baldetti* (fn. 96).
105 *ECtHR*, *Pirttimaki v. Finland* (fn. 96).
106 See *supra*, fn. 96.
107 Moreover, as already observed (see *supra*, § 5.1), national criminal law must fall within the scope of application of EU law.

## *VI. Conclusive remarks*

This study had the aim of outlining the problematic aspects deriving from the attribution of direct sanctioning powers to the ECB in the banking supervision sector, with a particular focus on the *ne bis in idem* principle. The coexistence of different authorities within the same sector – the ECB and NCAs – endowed with sanctioning powers gives rise, in fact, to a potential risk of double jeopardy.

However, we have observed that the vertical allocation of competences between the ECB and NCAs partially prevents this risk from arising, since the competences are distributed in such a way to rule out procedural overlap.[108]

At the same time, we have also identified three situations where a violation of the *ne bis in idem* principle could potentially occur: *(a)* on the one hand, these situations seem relevant mainly from a theoretical point of view; *(b)* on the other however, in the event of an actual overlap between different proceedings, several obstacles could prevent the guarantee from applying.

As for the first aspect *(a)*, we are referring above all to the situations falling under *sub ii* and *sub iii* of the previous paragraph, which require the violation in question to be relevant under national criminal law.[109] In this regard, in fact, it should be noted that some eminent scholars have correctly highlighted the inadequacy of criminal tools in the area of banking supervision and the advisability of not using criminal sanctions to punish breaches of prudential regulations.[110] Moreover, with particular regard to the hypothesis *sub iii*, the *ne bis in idem* principle would be at risk of being violated only to the extent in which national legislation provided for forms of liability for legal entities.

As for the second aspect *(b)*, the application of the rule against double jeopardy could be hindered under three different perspectives. Firstly, the *bis* element risks not being satisfied where the proceedings appear to be well integrated and the overall sanction is proportionate, in line with the case-law of the ECtHR and the Court of Justice. Secondly, a further restriction to the scope of application of the *ne bis in idem* principle could result from the adoption of a restrictive definition of *idem*, similar to the one adopted in the field of competition law. Thirdly and finally, the *ne bis in idem* principle enshrined in Art. 50 of the Charter applies only to the extent in which the condition laid down in Art. 51 is satisfied.

108 Except for the event in which the ECB can exercise investigatory powers in relation to *less significant* entities.

109 See *E. F. Bollo*, Coexistence of national and European regulations with regard to the *ne bis in idem* principle, in: ECB Legal Conference 2015. From Monetary Union to Banking Union, p. 143 et seq., where the author affirms that this requirement might unlikely occur.

110 *S. Allegrezza, I. Radopolos* (fn. 18), p. 256 et seq.