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## **Administrative Measures, Administrative Sanctions & the Allocation of Responsibilities between the ECB & the NCAs within the SSM**



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*'Reflections on Competent Authorities' "Measures" in EU Banking Law'*

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# NCA functions in the European prudential regime

Authorization (CRD IV, Art 18)

Control of qualifying holdings

Functions in relation of freedoms of establishment and to provide services

Monitoring of compliance with prudential requirements

Supervisory review and

supervisory measures to address problems (supervisory powers under Arts 64 & 18, 102, 104, 105)

Information gathering and investigations (Art 65(3))

Enforcement

(as distinct from exercise of supervisory powers for regulatory/corrective purposes)

- through the imposition of administrative sanctions (penalties and other measures) (Art 65(1)–(2))
- against institutions, etc (regulated legal persons) and members of their management body and other natural persons responsible for breaches of regulatory requirements
- for breaches of authorization requirements and requirements in relation to acquisition/disposal of qualifying holdings (Art 66) & prudential requirements (Art 67)

Tasks relating to recovery planning and early intervention in the pre-resolution phase (BRRD)

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## Tasks of the ECB within the SSM

*Tasks concerning policies relating to the prudential supervision of credit institutions, with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State – SSMR, Art 1, reflecting TFEU, Art 127(5) & (6)*

### Tasks in relation to credit institutions (SSMR, Art 4)

Authorization / withdrawal of authorization

Tasks of home NCA for institutions established in participating MSs

Assessment of notification of acquisitions / disposals of qualifying holdings

Monitoring of compliance with Union law (regulations, tertiary legislation and non-legislative acts) & national legislation transposing directives (CRD IV, BRRD) imposing financial, reporting and public disclosure requirements, as well as governance requirements

Carrying out of supervisory reviews

Carrying out consolidated basis over credit institution's parents in the euro area, participation in supplementary supervision of financial conglomerates

Tasks in relation to recover planning and early intervention

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**Participation / concurrent tasks in field of macroprudential regulation (Art 5)**

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## Limited scope of the SSM

### ***Ratione personae: credit institutions***

but neither other 'banks' under national definitions of banking, nor closely related services, like payment services

### ***Ratione materiae: prudential supervision***

including certain macroprudential tasks,

but excluding all supervisory functions outside the prudential framework specifically addressed to credit institutions,

e.g., supervisory tasks covering the activities of credit institutions in markets in financial instruments, or the application of AML and consumer protection rules to credit institutions (even though some of the relevant rules are occasionally characterized as 'prudential')

### ***Ratione loci: euro area***

(and, possibly, non-euro area MSs with a 'close cooperation' agreement)

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## Legal provisions on performance of the tasks

### Operationalization of the supervisory tasks

Attribution of specific supervisory powers, including the ‘supervisory and investigatory powers’ of SSRM, ch III (Arts 9–18)

Procedural arrangements & requirements, including with regard to role of NCAs (esp. SSMR Art 6 & Framework Reg)

Conditions and safeguards for the exercise of the supervisory powers

Organizational provisions

### Contribution of NCAs in the performance of the ECB’s tasks (Art 6)

Direct performance of several tasks in relation to ‘non-significant’ banks

Division of supervisory responsibilities as a form of ‘cooperation’ between the ECB and the NCAs within the SSM: no strict division of tasks (competences)

Provisions on enforcement and powers to apply sanctions: do not imply a functional division, with NCAs exercising autonomous powers in separation, but reflect modes of decentralized implementation of the single supervisory regime, subject to parameters set by the ECB

This applies even to national powers within the field of prudential regulation which do not reflect provisions in Union law / directives: see Art 18(5)

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## Nature of ECB-NCA roles within the SSM

### Distribution of responsibilities between the ECB & the NCAs

ECB: Power to classify supervised entities as significant (SSMR, Art 6; Framework Reg, Pt IV)

ECB: Exclusive competence for prudential supervision of 'significant' entities falls to the ECB

ECB: Exclusive competence for prudential supervision of 'less significant' entities in relation to Art 4(1)(a) and (c) tasks

NCAs: other Art 4(1) tasks regarding 'less significant' entities, but only subject to ECB's control

- Oversight of direct supervision, exchange of information
- Regulation, guidelines, general instructions
- No ECB power to give individual instructions; but the ECB has broad discretion to assume itself the direct supervision of any institution
- ECB Framework Regulation, setting out the practical arrangements for cooperation

More generally, the supervisory cooperation across levels is not confined to supervision of less significant entities: NCAs (and NCB) staff members participate in the supervision of significant entities (although not in a decision-making capacity) (Framework Reg, Pt II, Title 1, and Pt VI)

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## Case T-122/15, Landeskreditbank Baden-Württemberg – Förderbank v ECB, judgment of 16 May 2017

*'The logic of the relationship between them consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences . . . direct prudential supervision by the national authorities under the SSM was envisaged . . . as a mechanism of assistance to the ECB rather than the exercise of autonomous competence . . . the ECB retains important prerogatives even when the national authorities perform the supervisory tasks . . . the existence of such prerogatives is indicative of the subordinate nature of the intervention by the national authorities in the performance of those tasks.'*

Proportionality and subsidiarity: cannot determine the performance by the ECB of its supervisory tasks and the exercise of its powers

- Proportionality: addressed in the context of the SSMR's division of supervisory responsibilities, reflected in the overall institutional balance
- Subsidiarity: inapplicable within the SSM, since this involves exclusive competencies of the ECB, which are performed in a decentralized manner

# Structure & classification of ECB's supervisory 'powers'

## Powers of the ECB directly based on particular legislative provisions

### 'Supervisory and investigatory powers' in SSMR, ch II (Arts 9–18)

'Investigatory powers' (Arts 10 – 13): wide powers, covering both the specification by the ECB of legislative reporting and notification requirements, and further decisions to request further information, whether of general-periodic or of specific-individual nature, including by way intrusive investigatory techniques (subject to important procedural safeguards)

'Specific supervisory powers' (Arts 14 – 18): include both powers relating to the ongoing conduct of prudential supervision and the ECB's

- Fall-back general provision of Art 16 conferring ongoing powers to set requirements & specify remedies for 'problems': enables the individuation of the regulatory regime (*cf* CRD IV, Art 64 etc)
- Specific powers, with strict procedural conditions, for 'common procedures' (Arts 14–15)
- Authorization / approval procedures and related powers: formal procedures leading to clearly identifiable formal decisions
- Power to impose pecuniary sanctions on institutions (Art 18(1)–(2))
- Power to require NCAs to open national enforcement proceedings (Art 18(3))

# Why separate provisions on ‘administrative penalties’?

## Allocation of enforcement powers for reasons of institutional balance (intention to distribute competences) or a question of expediency?

Art 18(1)–(2): Need to make available CRD IV-style pecuniary sanctions to the ECB

Art 18(3): Multiple practical reasons for extensive involvement of NCAs in enforcement

- Treaty constraints: limitations of Art 127(6) and limits inherent in the provisions on the legal powers, organizational structure and legal acts of the ECB, as set out in the Maastricht Treaty (i.e. without taking into consideration the BU)
- Practical difficulties inherent in the direct enforcement tasks to a Union institution, including lack of direct criminal jurisdiction and of complete structures for the application of administrative sanctions at European level
- Special problems involved in the direct enforcement by a European institution based on national enforcement procedures and national obligations (varied, due to transposition of directives, ODs in the CRR, plus additional national requirements)
- Need to interact at the national level with other enforcement and prosecuting authorities, including the judiciary

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## Coordination problems in indirect enforcement

### Diverging national approaches to sanctioning

Variations as to the form of enforcement, type of sanction, intensity, characterization

No level playing field (despite coordination of sanctions in CRD IV)?

Special but acute problem:

situations where national law has failed to provide the necessary 'effective, proportionate and dissuasive' sanctioning tools

### Discretionary decision-making & coordinated enforcement

Margin of discretion of NCAs in initiating procedures and setting penalties

Cooperation problems when the sanctioning tools are not within the NCA's full control – esp. in the case of involvement of national judicial authorities (cf MiFID II, rec 150)

Liability issues (including the allocation of liability to the ECB or the NCA) when there is a national margin of appreciation or possibility for autonomous national action

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## Extent of due process safeguards

### Due process in ECB supervisory decision-making

SSMR, Art 22 & Framework Reg, Pt III, Title 2 (provisions reflecting wider primary European law): due process, including rights of defence (right to be heard, access to file) and duty of ECB to give reasons

Due process principles supported by elaborate organizational requirements, including review by the Administrative Board of Review

Due process provisions cover supervisory decisions generally, not only imposition of administrative penalties

Not available in the case of decisions to use information and investigation powers; but there are other procedural and substantive safeguards; role of judicial authorities in the case of intrusive investigative techniques

Circumstances will be relevant for the specification of the demands of due process!

### Due process at national level

How consistent are the national due process requirements horizontally and with EU law?

Special problems with regard to sanctions with strong punitive elements / of criminal nature

Different classification of measures in national laws

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## ‘Administrative penalties’

### **Categorically different set of powers, or separate treatment for reasons of organizational and procedural convenience?**

Controlling or differentiating factor: culpable breaches of regulatory and supervisory requirements and need to impose a sanction

Ambiguous relationship with investigatory powers: separate treatment in SSMR, Art 10–13 and 18, respectively; but systematic link in CRD IV, Art 65; and investigatory powers with quasi-criminal colour, directly link to suspected culpable breaches and sanctioning regime in MiFID II, Arts 69–74

Specifically treated in the SSMR order to: attribute to the ECB of special power to impose pecuniary sanctions against institutions; and provide power to control / instruct the NCAs with regard to the imposition of sanctions not available to the ECB, or the initiation of punitive procedures at national level, under national provisions

# • • • **‘Administrative penalties’ v ‘administrative measures’?**

## **Relationship in CRD IV, Arts 65–70**

No practical significance from a European perspective; mentioned as national alternatives

In SSMR, they constitute jointly a subcategory of the general category of ‘supervisory powers’

## **Distinction between ‘penalties’ and ‘measures’ in national public law**

National laws frequently distinguish between the two categories

- Administrative measures (including when in response to infringements): pertains to the protection of the public and the organization & normal operation of markets; based on objective criteria (risk-orientated?)
- Administrative penalties: always in response of infringements, impose harm on the party responsible; based on evaluation of subjective behaviour & culpability (although in certain national regimes, they may also apply on a strict-liability basis!)

More demanding set of rights of defence: self-incrimination, retroactivity, etc?

Distinction often ambiguous & uncertain

- It may require *ad hoc* evaluations or a standing/categorical classification of remedies
  - Withdrawal of authorization: typically treated as objectively justified administrative measure
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## *Ne bis in idem?*

### **Concurrent proceedings only where they serve different functions?**

Case C-489/10, *Bonda*, judgment of 5 June 2012: it must be ascertained whether the purpose of the administrative penalty imposed for the violation of the administrative norm (fraudulent application for a subsidy) is punitive

C-617/10, *Fransson*, judgment of 26 Feb 2013: possibility of applying both a tax penalty and a criminal penalty for violations of VAT rules, in so far as the first penalty is not criminal in nature

### **Explicit acceptance of parallel proceedings (administrative & criminal) as part of the overall enforcement regime**

MiFID II, rec (150): ‘nothing prevents MSs from laying down rules for administrative and criminal sanctions for the same infringements’

ECHR, *A & B v Norway*, 24130/11 & 29758/11, judgment of 26 Nov 2016:

*‘The object of Article 4 of Protocol No. 7 is to prevent the injustice of a person’s being prosecuted or punished twice for the same criminalised conduct. It does not, however, outlaw legal systems which take an “integrated” approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes.’*

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**Thank you for your attention**

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