

# Enforcement of Sanctions within the SSM by European and National Authorities:

Unravelling Jurisdiction and Accountability under Art. 18 (1), (7) SSMR and Art. 299 TFEU

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Under the Single Supervisory Mechanism (SSM), the enforcement of pecuniary obligations vis-à-vis the ECB, such as fees and sanctions, is unclear at two levels: first, the division of sanctioning powers between European (ECB) and national competent authorities (NCAs) under primary and secondary law is rather unclear due to the underlying jumble of referrals. Second, the Article pivotal to enforcement, namely Art. 299 TFEU, constitutes only a ‘vague hybrid legal regime’ between European and national law, leaving credit institutions as well as the ECB exposed to considerable legal uncertainties and, as a result, additional costs. This paper examines both levels - which have received almost no attention in the literature so far - and offers concrete solutions to close the existing protection gaps.

Keywords:

Enforcement, fees, sanctions, penalty payments

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## I. Introduction – The Multi-Level Problem<sup>2</sup>

Fees, as well as sanctions, namely fines, periodic penalty payments<sup>3</sup>, administrative penalties and penalty interest, are, within the European System of Central Banks (ESCB) and/or the Single Supervisory Mechanism (SSM), significant pecuniary obligations the ECB might levy or impose. On 31 January 2022, for example, the ECB imposed an administrative penalty on a bank for an amount of EUR 3,755,000 for having provided inaccurate information on risk weighted assets and capital ratios<sup>4,5</sup> highlighting the severity of those sanctions specifically under the SSM. However, enforcement of those sanctions is unclear at two levels, exposing authorities to considerable legal uncertainties (and possible official liability), on the one hand, and leaving gaps in legal protection for the penalised entities, on the other. On a **first level**, the division of sanctioning powers between European (ECB) and national competent authorities (NCAs) under primary and secondary law, in particular Art. 18 (1) and (7) SSMR<sup>6</sup>, leaves room for interpretation. This paper therefore untangles the jumble of referrals within Union law and shows which authority is competent to impose sanctions for which violation/according to which procedure. Furthermore, differences in contrast to the enforcement of penalties within the ESCB (Art. 132 TFEU, Art. 19 (1) and (2) E(S)CB-Statute<sup>7</sup>) are shown. While jurisdiction for contesting the penalty issued (Art. 19 (1) TEU; Arts. 261, 263 TFEU) as well as for taking enforcement actions (Art. 299 (1)-(3) TFEU) is outlined rather clearly by Union law, Art. 299 (4) TFEU constitutes a ‘vague hybrid legal regime’ regarding the suspension and review of enforcement measures (**second level**). This paper contributes to effectively interlink European and national legal protection (Art. 19 (1) TEU, Art. 47 CFR) in this context. It highlights that, through further development of the law, the CJEU is responsible if (indirectly) the grounds for actions/preliminary procedures before the CJEU are invoked, whereas national authorities are responsible if enforcement measures are carried out in an irregular manner or if the claim enshrined in the title ceased to exist or was deferred.

On both levels, this paper demonstrates to what extent coordination and responsibility need to be modified when non-euro Member States (with and without close cooperation) are involved and what duties they are nevertheless subject to, e.g. due to the principle of loyal cooperation (Art. 4 (3) TEU). Although the paper focuses on the European legal order, the results will also be underpinned by data collected in 21 Member States on the concrete implementation of enforcement of ECB sanctions to ensure a cross check of the findings with practical reality.<sup>8</sup>

## II. Imposition of Sanctions

### II.1. The Three Pillars of Art. 18 SSMR

Before examining enforcement, the first question to be addressed is who may impose which sanction under which regulatory regime. On the one hand, Union law supports the legal practitioner here with numerous explicit regulations; on the other hand, these are only helpful to a limited extent, namely only once one has untangled the jungle of back and further references therein.

Within the SSM, the ECB is, to begin, responsible for the supervision of significant entities, whilst the National Competent Authorities (NCAs) of the participating member states supervise less significant

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<sup>2</sup> This paper is based on the findings of a study conducted within the ECB’s legal research programme 2020, addressing beyond the SSM primarily the ESCB, see Helene Hayden, ‘Enforcement of Fines and Other Pecuniary Obligations Imposed by the ECB (Part I): European Level’ [2021] ECFR 1011-1049; Helene Hayden, ‘Enforcement of Fines and Other Pecuniary Obligations Imposed by the ECB (Part II): National Level’ [2022] ECFR 76-99.

<sup>3</sup> See, however, European Central Bank, ‘SSM Supervisory Manual, European banking supervision: functioning of the SSM and supervisory approach’ [2018] 100 et seq. (hereinafter ‘SSM Manual’) <<https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf?42da4200dd38971a82c2d15b9ebc0e65>> accessed 2 June 2022, according to which, periodic penalty payments are not considered to be qualified as sanctions.

<sup>4</sup> Regulation (EU) 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 [2013] OJ L 176/1 amended by Regulation (EU) 2021/558 of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards adjustments to the securitisation framework to support the economic recovery in response to the COVID-19 crisis [2021] OJ L 116/25, art. 430 (1) a.

<sup>5</sup> *Banque et Caisse d’Epargne de l’Etat, Luxembourg*, ECB Decision [2022] <[https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.20220311\\_publication\\_template.en.pdf](https://www.bankingsupervision.europa.eu/banking/sanctions/shared/pdf/ssm.20220311_publication_template.en.pdf)> accessed 1 June 2022.

<sup>6</sup> Council Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.

<sup>7</sup> Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank 2016] OJ C 202/230.

<sup>8</sup> In detail Hayden (n 2) 79 et seqq.

entities (cf. Art. 6 (4) Council Regulation 1024/2013 (SSMR)<sup>9</sup>).<sup>10</sup> The sanctioning power is, in general, divided along this distinction and accompanied by numerous reporting and cooperation duties between NCAs and ECB: Art. 18 (1) and Recital 36 SSMR provide that the ECB may (if it deems it proportionate)<sup>11</sup> impose administrative pecuniary penalties on credit institutions, financial holding companies and mixed financial holding companies (not: other persons; see Recital 53 SSMR) if they are significant entities and breach a requirement enshrined in directly applicable acts of Union law (**Art. 18 (1) Sanctions**). An example for such a sanction-protected obligation would be the large exposure requirements enshrined in Art. 395 (1) Regulation 575/2013.<sup>12</sup> The criterion ‘Union law’, however, is limited twofold: first, it does not cover regulations and decisions adopted by the ECB in the framework of the SSMR<sup>13</sup> (here the so-called Art. 18 (7) Sanctions come into play, see below). Second, Art. 18 (1) SSMR addresses only Union law ‘in relation to which administrative pecuniary penalties shall be made available to competent authorities under the relevant Union law’, which allows for several possible interpretations. Interpreting this extract as a division of the obligations set out in the secondary legislation into explicitly sanction-protected and non-sanction-protected obligations cannot be substantiated. Moreover, the principle of effectiveness precludes such an interpretation otherwise the sanction competence would become basically meaningless. Beyond this, mainly two interpretations are possible: *on the one hand*, the ECB’s competence to impose sanctions could only arise under the condition that the member states had previously authorised their national authorities to impose sanctions by implementing relevant Union law,<sup>14</sup> e.g. according to the Capital Requirements Directive (CRD)<sup>15</sup>. *On the other hand*, the following – more convincing arguments – support the fact that Art. 18 (1) SSMR is to be interpreted such that the ECB is already empowered to impose sanctions on the *leg cit*: in particular, if the mentioned dependence had been deliberate and intentional, the mere repetition of the same regulatory content (see Art. 66 (2) (c), (e) and Subpara. 2 CRD) could easily have been omitted. Neither do Recitals 36 and 53 SSMR mention a corresponding dependency; rather, the former appears to be based on the assumption of a correspondingly unconditional competence of the ECB under Art. 18 (1) SSMR. Furthermore, the necessity of a rule codifying accessoriness of the sanctioning competence to national law would be questionable against the background of the (indirect) reference in Art. 18 (4) to Art. 4 (3) SSMR and, the duty of the ECB enshrined in those provisions to apply not only certain Directives, but also national legislation transposing the Directives.<sup>16</sup>

The SSM Framework (Art. 1 (1) (h), Art. 123 et seqq. SSM Framework) provides for the necessary procedural rules for the sanctioning under the SSM, as well as the Sanction-Regulation (Sanction-Reg)<sup>17</sup> of the Council if ‘appropriate’ (Art. 18 (4) SSMR). As if it were not demanding enough for the legal practitioner to subsidiarily take into account the Sanction-Reg, which is primarily tailored to sanctions within the ESCB, the ECB’s implementing regulation (ECB Sanction-Reg)<sup>18</sup> is not applicable.<sup>19</sup> In practical terms, it follows from those procedural rules that the ECB in general refers alleged breaches to the independent Investigating

<sup>9</sup> Council Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63, art. 25 (2) (hereinafter ‘SSMR’).

<sup>10</sup> See, however, Case C-450/17 P *Landeskreditbank Baden-Württemberg/ECB* [2019] ECLI:EU:C:2019:372, para 37, according to which, the responsibility may be shared but the ECB remains “exclusively competent” to carry out, for prudential supervisory purposes, the tasks listed in Article 4(1) in relation to “all” credit institutions established in the participating MSs, without drawing a distinction between significant institutions and less significant institutions”; Paul Weismann, ‘Der Einheitliche Bankenaufsichtsmechanismus (SSM): ein rechtlich problematisches Konstrukt’ [2014] ÖBA 265, 267.

<sup>11</sup> See Case T-203/18 *VQ/ECB* [2020] ECLI:EU:T:2020:313 para 62: the principle of proportionality affects not only the level of the penalty but also whether a penalty should be imposed at all.

<sup>12</sup> Regulation (EU) 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 [2013] OJ L176/1 amended by Regulation (EU) 2021/558 of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards adjustments to the securitisation framework to support the economic recovery in response to the COVID-19 crisis [2021] OJ L 116/25.

<sup>13</sup> See SSMR, art 18 (7); Council Regulation (EC) 2532/98 concerning the powers of the European Central Bank to impose sanctions [1998] OJ L318/4 (amended by Regulation (EU) 2015/159 [2015] OJ L27/1), (hereinafter ‘Sanction-Reg’) art 4a (1) and Council Regulation 2015/159, Recitals 1 and 3; Recommendation (ECB/2014/19) for a Council Regulation amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions [2014] OJ L144/2).

<sup>14</sup> Arguing in this sense, Weismann (n 10) 265.

<sup>15</sup> Directive 2013/36/EU 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 [2013] OJ L176/338; last amended by Directive (EU) 2021/338 [2021] OJ L68/14.

<sup>16</sup> Hayden (n 2) 1018, fn 37.

<sup>17</sup> See fn 13.

<sup>18</sup> European Central Bank Regulation (EC) 2157/1999 on the powers of the European Central Bank to impose sanctions [1999] OJ L264/21, last amended by Regulation (EU) 2021/1814 of the European Central Bank amending Regulation (EC) No 2157/1999 on the powers of the European Central Bank to impose sanctions [2021] OJ L 367/2.

<sup>19</sup> ECB-Sanction-Reg, art 1a.

Unit leading the investigation, granting the supervised entity the right to be heard<sup>20</sup> and drafting a decision. The Supervisory Board of the ECB (if it agrees) consequently proposes the draft decision to the Governing Council<sup>21</sup> which ultimately may impose pecuniary penalties of up to twice the amount of the profits gained or losses avoided because of the breach or up to 10 % of the total annual turnover (Art. 18 (1) SSMR). Other penalties are possible, however, they require a specific legal basis in relevant Union law.<sup>22</sup>

In situations not covered by the material or personal scope of Art. 18 (1) SSMR, the ECB requests NCAs to open proceedings with regard to breaches of significant supervised entities if it is necessary to perform the duties entrusted to the ECB by the SSM Regulation (**Art. 18 (5) SSMR**; Art. 134 SSM-Framework). Those situations include, for example,

- breaches of national law implementing Directives;
- non-pecuniary penalties; or
- breaches by persons other than those named in Art. 18 (1) SSMR.

Despite this residual jurisdiction, NCAs may, in these cases, request that the ECB open proceedings (Art. 134 (2) SSM-Framework). Procedure and penalties generally might differ from member state to member state. However, since the sanctions are – if the NCA decides to impose one – nevertheless imposed within a situation ‘governed by European Union Law’ (in the broad sense of the *Åkerberg Fransson* case law<sup>23</sup>), they have to be effective, proportionate and dissuasive.<sup>24</sup> Regarding *less significant entities*, NCAs remain competent to impose sanctions according to national law, though they have to report to the ECB on a regular basis (Art. 135 SSM-Framework).<sup>25</sup>

In case of non-compliance with obligations enshrined in *ECB regulations/decisions*, the ECB is competent to impose – for the purpose of carrying out the tasks conferred upon it by the SSMR – fines and periodic penalty payments on significant or less significant supervised entities (**Art. 18 (7) SSMR**, Art. 4a Sanction-Reg). The upper limits of both penalties differ from those under the ESCB, the upper limit of these ‘fines’ corresponds to Art. 18 (1) SSMR. Concerning less significant entities, the ECB regulations/decisions must specifically impose obligations on them vis-à-vis the ECB.<sup>26</sup> The procedural rules are provided for in the Sanction-Reg (see Art. 4a-4c Sanction-Reg), which is to be ‘complemented’ by the SSM-Framework.<sup>27</sup> Here too it is the ECB’s Supervisory Board which proposes a draft decision to the Governing Council,<sup>28</sup> whereas, under the ESCB, the Executive Board adopts a decision that consequently may be reviewed by the Governing Council<sup>29, 30</sup>

Though natural or legal persons and entities addressed by the ECB’s decisions may bring proceedings before the CJEU<sup>31</sup>, there is the additional possibility to request an **administrative review** of the ECB’s supervisory decisions by the Administrative Board of Review (Art. 24 SSMR, ABoR-Decision<sup>32</sup>). In this procedure, the ABoR adopts a non-binding opinion directed primarily at the Supervisory Board, which shall propose a new draft decision to the Governing Council.<sup>33</sup>

The three main pillars of the SSM sanctions system analysed above can be summarised as follows:<sup>34</sup>

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<sup>20</sup> SSM-Framework, art 124 et seqq; for details concerning the procedure, cf Georgios Zagouras, ‘Verwaltungssanktionen der Europäischen Zentralbank: Bußgelder, Kompetenzen, Bemessungsmaßstäbe [2017] WM 558, 560 et seq, 564.

<sup>21</sup> SSM-Framework, art 127 (9).

<sup>22</sup> Hayden (n 2) 1017 et seqq.

<sup>23</sup> Case C-617/10 (Grand Chamber) *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 19; cf also Fritz Zeder, ‘Sanktionen des EU-Beihilferechts, Steuerzuschläge: ne bis in idem zu Betrug?’ [2014] ÖJZ 494, 498.

<sup>24</sup> Explicitly also art 18 (5) second sentence SSMR.

<sup>25</sup> Hayden (n 2) 1018 et seq.

<sup>26</sup> SSM-Regulation, art 18 (7); SSM-Framework, arts 120 (b), 122.

<sup>27</sup> SSM-Framework, art 121 (2); despite the alignment of supervisory and non-supervisory sanctioning procedures with Council Regulation 2015/159, the procedural provisions of the SSM Framework will continue to be of importance (cf Recital 6 of Regulation 2015/159 explicitly dealing with their relationship).

<sup>28</sup> Sanction-Reg, art 4b (4).

<sup>29</sup> Sanction Reg, art 3 (1)-(8).

<sup>30</sup> Hayden (n 2) 1019 et seq.

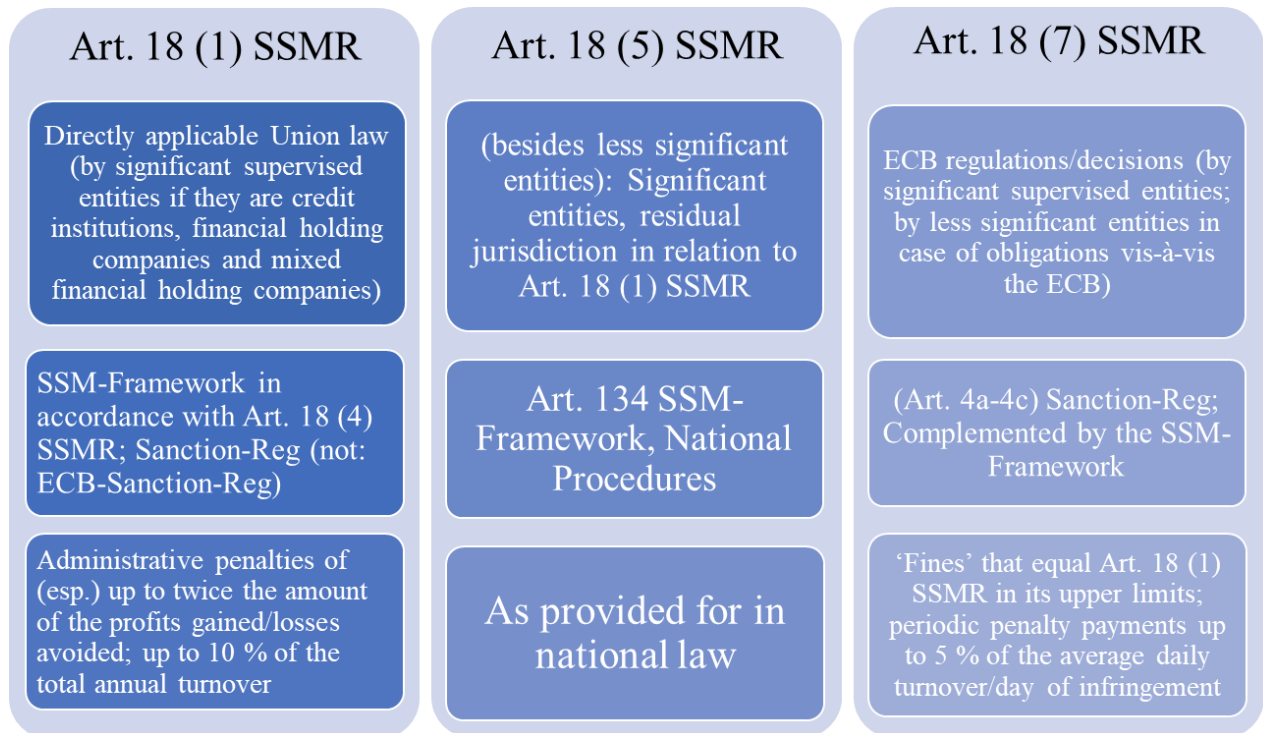
<sup>31</sup> As decisions of the ECB constitute acts of an organ of the EU (art 13 (2) TEU, Recital 54 SSMR).

<sup>32</sup> Decision 2014/360/EU of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules [2014] OJ L175/ 47, last amended by Decision (EU) 2019/1378 of the European Central Bank of 9 August 2019 [2019] OJ L224/9.

<sup>33</sup> Art 16 (5) and Art 17 (1).

<sup>34</sup> For a tabular summary covering also the ESCB, see Hayden (n 2) 1020 et seqq.

## Three Pillars of Art. 18 SSMR



### II.2. Supervisory Fees

Furthermore, the ECB may unilaterally levy supervisory fees determined on the basis of the bank’s importance and risk profile (Art. 30 and Recitals 77 et seq. SSMR; Supervisory-Fee-Reg<sup>35</sup>). If the notified fee is not paid, the ECB may levy additional default penalty interest, namely at an interest rate of the ECB’s main refinancing rate plus 8 percentage points (Art. 14 ECB-Supervisory-Fee-Reg) and impose sanctions according to the Sanction-Reg and complemented by the SSM-Framework.<sup>36</sup> NCAs are, however, entitled to levy separate fees pursuant to national law, concerning e.g. tasks not assigned to the ECB or costs of cooperating with/assisting the ECB and acting on its instructions (Art. 30 (5) SSMR).<sup>37</sup>

Whereas regarding enforcement of the sanctions imposed due to non-compliance with the fee notice reference can be made to the above statements, it has to be mentioned that the fee notice is – in my opinion – not enforceable itself: although the wording of the here relevant Art. 299 TFEU (in detail see III.2) could also cover their enforcement, it might be precluded by the reference made in Art. 15 Supervisory-Fee-Reg indirectly to periodic penalty payments. In case the fee notice were enforceable itself, the necessity of repressive sanctions to effect payment, such as *periodic* penalty payments, would be questionable; rather a single penalty might be deemed sufficient.<sup>38</sup>

### III. Enforcement of Sanctions

#### III.1. General

In addition to the general written (e.g. CFR) and unwritten (e.g. general legal principles of Union law) Union law determinants, as well as specific secondary-law provisions (e.g. Art. 4c (4) Sanction-Reg, establishing a time limit of five years to enforce a decision imposing a sanction), Art. 299 TFEU represents the main cornerstone for the execution of ECB sanctions, above all Art. 18 (1)- and Art. 18 (7)-Sanctions. It has to be mentioned, however, that the material scope of Art. 299 TFEU also covers legal acts of the Council

<sup>35</sup> Regulation (EU) 1163/b last amended by Regulation (EU) 2019/2155 of the ECB [2019] OJ L 327/70:

<sup>36</sup> Supervisory-Fee-Reg, arts 14 and 15.

<sup>37</sup> Hayden (n 2) 1022 et seq.

<sup>38</sup> Hayden (n 2) 1023.

and the EC as well as judgments of the CJEU (Art. 280 TFEU); Art. 82 of the Agreement on a Unified Patent Court (UPCA)<sup>39</sup> was based on Art. 299 TFEU.

### III.2. Art. 299 TFEU

According to Art. 299 (1) TFEU, acts of the ECB imposing ‘a pecuniary obligation on persons other than States’ are enforceable elements of fact that will generally be unproblematic as regards ECB sanction decisions. Secondly, the issuance of the order of enforcement and the enforcement itself is assigned to the member states (Art. 299 (2), (3) TFEU). Thirdly, the CJEU shall have sole jurisdiction for a ‘suspension’ of the enforcement, while national courts shall have jurisdiction for ‘complaints that enforcement is being carried out in an irregular manner’ (Art. 299 (4) TFEU).

The study conducted in 2020/2021 within 21 EU member states (euro and non-euro member states, namely Austria [AT], Belgium [BE], Bulgaria [BG], Czech Republic [CZ], Germany [DE], Denmark [DK], Estonia [EE], Greece [EL], Finland [FI], France [FR], Croatia [HR], Hungary [HU], Italy [IT], Lithuania [LT], Latvia [LV], Malta [MT], Netherlands [NL], Poland [PL], Portugal [PT], Slovenia [SI] and Slovakia [SK]) revealed that the member states basically lack a secure practice concerning the enforcement of ECB sanctions. This is due to the fact that there have been (if any) only a few cases, and in most domestic legal orders there are no specific rules on the enforcement by the ECB or other European institutions.<sup>40</sup> Yet the general enforceability of the monetary obligations imposed by the ECB on undertakings and especially credit institutions may be related not only to the fear of a loss of reputation but rather the fear of (indirect) negative effects on their license.<sup>41</sup>

However, there are dogmatic reasons according to which the competences and responsibilities between European and national authorities that are outlined in Art. 299 TFEU may be specified:

#### III.2.1. Procedural Law

‘Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out’ as explicitly stated by Art. 299 (2) TFEU. Following the principle of procedural autonomy of the member states, this is to be interpreted rather broadly, meaning that ‘civil procedure’ may also cover administrative procedures,<sup>42</sup> and the regulatory purpose being that the member states will have to safeguard certain minimum procedural guarantees. However, it does not require member states to apply ‘core’ civil procedure law or to qualify the underlying matter as civil in nature. It may be pointed out that the aforementioned reference to civil procedure law was dropped in Art. 82 (3) UPCA altogether. Furthermore, surveys carried out in the member states showed that enforcement in general is already governed by civil procedural law, whereas none of the participating member states applied criminal procedural law and only a few member states applied administrative procedural law, yet solely to the order for the enforcement or in addition to civil procedure law.<sup>43</sup>

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<sup>39</sup> Council Agreement on a Unified Patent Court [2013] OJ C175/1, not yet in force; see also Treaty Establishing the European Atomic Energy Community [2012] OJ C327/1, art 164 which is almost identical to TFEU, art 299.

<sup>40</sup> There are no *leges speciales* concerning (*ratione materiae*) ECB sanctions or (*ratione personae*) the ECB, EC or Council as creditors in BE, BG, DE, EL, FR, IT, LT, LV, MT, PL, PT and SI (as well as DK, HR, CZ and HU); whereas there are *leges speciales* (provisions specific to foreign legal acts/creditors were understood as *leges speciales*) in AT, EE and FI (Hayden (n 2) 84 et seq).

<sup>41</sup> See Directive 2013/36/EU 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 [2013] OJ L176/338; last amended by Directive (EU) 2021/338 [2021] OJ L68/14 (hereafter ‘CRD’), art 18, according to which the licence may be withdrawn in case of breaches referred to in art 67 (1) CRD (art 18 (f) CRD) or other cases stated by national law (art 18 (e)CRD); Hayden (n 2) 84 et seq.

<sup>42</sup> See esp Case C-217/16 *Zagoriou* [2017] ECLI:EU:C:2017:841, paras 15 et seq; differing: *Zagouras* (n 20) 564; Peter Vcelouch in Thomas Jaeger/Karl Stöger (eds), *Kommentar EUV/AEUV* (Manz 2019) art 299 TFEU paras 11 and 27 et seq; Maria Geismann in Hans von der Groeben/Jürgen Schwarze/Armin Hatje (eds), *Europäisches Unionsrecht* (7th edn, Nomos 2015) art 299 para 2 para 8; Martin Gellermann in Rudolf Streinz (ed), *EUV/AEUV, Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (3rd edn, C.H. Beck 2018) art 299 para 7; Markus Krajweski/Ulrich Rösslein, in Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV* (C.H. Beck, 2020) art 299 para 11.

<sup>43</sup> Hayden (n 2) 1027 et seq; Hayden (n 2) 85: general civil procedure law (including enforcement law) would be applicable in AT, FR, NL, PL, BE, EE, EL (concerning the procedure under art 299 (2) and (3) TFEU), MT and SI (concerning the procedure under art 299 (3) TFEU), FI (art 299 (3) which moreover applies general administrative enforcement law) and IT (art 299 (2) and (3) TFEU, which moreover applies administrative procedural (and enforcement) law, administrative criminal law and administrative penal execution law); only civil procedure law would be applicable in LV (art 299 (2) and (3) TFEU) and PT (art 299 (3) TFEU); only (civil) enforcement law would be applicable in DE and LT (art 299 (2) and (3) TFEU) and DK (art 299 (3) TFEU); only general administrative enforcement law would be applicable in BG (art 299 (2) and (3) and SI (art 299 (2) TFEU).

### III.2.2. Order for the Enforcement

The order for the enforcement ('Vollstreckungsklausel', 'formule exécutoire') should be issued by the competent national authority, notified to the EC/CJEU (Art. 299 (2) TFEU). Practically speaking, enforcement orders are distributed via the Permanent Representations of the member states, which explains why no (updated) record of competent authorities is maintained by the Union institutions. The survey conducted in the member states revealed that often the examination of the authenticity of the legal act to be enforced on the one hand, and the issuance of the order for the enforcement on the other, are divided among different authorities, namely e.g. a ministry (for foreign affairs and/or justice) and a court.<sup>44</sup> Only a few member states also provide for an authority responsible for both the order for the enforcement and the enforcement<sup>45</sup> or the possibility to combine these proceedings<sup>46</sup> ('one stop shop').<sup>47</sup> In the light of effective and fast proceedings and a reduction on vestiges of sovereignty considerations manifested in the order, special emphasis might be given to Bulgaria, where the order for the enforcement is waived.<sup>48</sup>

Regardless of the nature of the authorities involved, their competence is limited to the 'formality' of verifying the authenticity of the decision (Art. 299 (2) TFEU). This examination is not defined in more detail in Union law or most of the member states' national legal orders, yet recourse might be taken to Art. 3 (1) eIDAS-Reg<sup>49</sup>, where 'authentication' is understood as confirmation of 'the origin and integrity of data'. To safeguard a speedy procedure and the principle of mutual trust (and sincere cooperation), a more comprehensive or substantial examination is prohibited, namely not only a *révision au fond*<sup>50</sup>, but also e.g. compliance with an *ordre public*<sup>51</sup> or proper notice, irreconcilability of decisions and human rights infringements.<sup>52</sup> Those grounds have to be invoked before the CJEU (Arts. 261, 263 and – if the respective question was raised before a national court or tribunal and not a ministry – Art. 267 TFEU).<sup>53</sup>

### III.2.3. Enforcement

After receiving the order for the enforcement, the ECB will bring the matter before the competent national authority to enforce the decision pursuant to national law (Art. 299 (3) TFEU). Within the following enforcement procedure, the CJEU shall have sole jurisdiction to suspend enforcement and the national court shall have jurisdiction 'over complaints that enforcement is being carried out in an irregular manner' (Art. 299 (4) TFEU). On closer inspection, the latter in particular presents itself as a hybrid mismatch of national and European law, running the risk of impairing legal certainty – both for the ECB as the enforcing creditor and for the respective debtor. For example, the competence to decide on a suspension of proceedings if the legal remedy is directed not against the title or the enforcement as a whole, but only the concrete manner of enforcement, is left open by Art. 299 TFEU.

However, further indications of the delineation of responsibilities can be found elsewhere, namely the general accessoriness of interim measures (Art. 278 et seq. TFEU) to (main) proceedings before the CJEU, above all under Art. 263 and Art. 267 TFEU.<sup>54</sup> The relevance of the criteria of general interim measures to

<sup>44</sup> Hayden (n 2) 1027 et seq; Hayden (n 2) 87 et seq; eg in BE, EL, HU, LU, MT, PT.

<sup>45</sup> Eg EE and EL.

<sup>46</sup> Eg AT and EE.

<sup>47</sup> Hayden (n 2) 87.

<sup>48</sup> Hayden (n 2) 87, yet this might be limited at the moment to decisions by the EC and the Council.

<sup>49</sup> Regulation (EU) 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L257/73 ff.

<sup>50</sup> See eg Brussels Ibis, art 52.

<sup>51</sup> Cf concerning the *ordre public* exception *Marco De Cristofaro*, 'The Abolition of Exequatur Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of Defense' [2012] 1 IJPL 432, 440 et seqq; eg *Xandra Kramer*, 'Cross-Border Enforcement in the EU: Mutual Trust Versus Fair Trial? Towards Principles of European Civil Procedure' [2011] 1 IJPL 202, 211 et seqq.

<sup>52</sup> Cf also Brussels I-Regulation, art 45 et seq and Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L76/16, art 7.

<sup>53</sup> Art. 267 TFEU also provides an instrument to the national court (tribunal) which has to enforce a decision allegedly contrary to human rights from violating human rights itself (Hayden (n 2) 1030 fn 96; see eg ECtHR *Pellegrini v Italy* App no 30882/96 (ECHR 20 July 2001); see also *Kramer* (n 51) 220; see however ECJ 22 December 2010, C-491/10 PPU *Aguirre Zarraga* ECR I-14247, referring the competence to the court of origin); differing (ante Lisbon) Ingolf Pernice, 'Vollstreckung gemeinschaftsrechtlicher Zahlungstitel und Grundrechtsschutz' [1986] RiW 353,357.

<sup>54</sup> Hayden (n 2) 1044 et seqq; EGC 12 December 2000, T-11/00 R *Hautem/BEI* ECLI:EU:T:2000:103, para 12 stating as follows: 'Dès lors, il y a lieu de constater qu'il n'y a pas de lien direct entre ces deux procédures, le référé ne visant pas, en l'espèce, à sauvegarder les droits du requérant par rapport au recours au principal sur lequel il se greffe. La demande en référé doit, pour cette raison aussi, être rejetée.'; Krajweski and Rösslein (n 42) para 16 assuming accessoriness, however on the grounds of the sole competence for suspension; *Vcelouch* (n 42) paras 29-36 assuming accessoriness without further justification; see also Alexander Thiele, *Europäisches Prozessrecht, Verfahrensrecht vor dem EuGH* (C.H. Beck 2007) § 11 paras 3 et seqq assuming a *lex*

the suspension under Art. 299 (4) TFEU as *lex specialis* is demonstrated in the Rules of Procedure of the courts<sup>55</sup> through an explicit reference. This reference principally also covers accessoriness; in addition, there are no teleological considerations that would justify an exception. Why should the CJEU's competence to suspend enforcement under Art. 299 (4) TFEU go beyond that to suspend other obligations or Union acts according to Art. 278 et seq. TFEU? Moreover, the Practice Rules for the Implementation of the Rules of Procedure of the EGC<sup>56</sup> equally assume accessoriness under Art. 299 (4) TFEU by referring to a corresponding 'main action' that has to be indicated by the applicant. However, against this background, one might ask what the added value of Art. 299 (4) TFEU is or whether its regulatory content thus would be obsolete. Suspending not the obligation or the Union act but rather only enforcement have to be delineated because accrual of interest will only be stopped in the former.<sup>57</sup> As a consequence of the assumption of accessoriness, the applicant for a suspension is indirectly bound by the substantial grounds and procedural requirements of the main action, leaving the applicant with only fragmentary legal protection.<sup>58</sup> Actions against the ECB for failure to act (Art. 265 TFEU), namely to exercise its own power of suspension (e.g. Art. 4c (5) (b) Sanction-Reg and Art. 1 (24), Art. 34 and 131 (4) (b) SSM-Framework), would not completely close gaps in protection, as the power is firstly only discretionary in nature and, secondly, provided merely for some sanctions. Rather, the wording of Art. 299 (4) TFEU could also allow the national authorities to suspend (not the application or enforcement of the whole Union act but) single enforcement measures.<sup>59</sup> Such an understanding would correspond to suspension under Art. 267 TFEU because, here too, national authorities remain competent to suspend national acts based on the Union act.<sup>60</sup>

As a result, under Art. 299 (4) TFEU, the *CJEU* is responsible if (indirectly)<sup>61</sup> the applicant relies on grounds for actions/preliminary procedures before the CJEU (e.g. the ECB's decision violates positive Union law or rights of the credit institution). *National authorities* remain competent (1) if enforcement/enforcement measures are carried out in an irregular manner (e.g. if they violate fundamental rights of the credit institution or third parties) and (2) if the obligation imposed by the ECB's decision ceased to exist or was deferred (e.g. the ECB has waived payment).<sup>62</sup>

#### IV. Non-Euro Member States

It has been shown that in some non-euro member states the opinion is held that monetary obligations of the ECB are generally not enforceable due to non-participation in the euro area.<sup>63</sup> However, it is questionable whether this can be said in general terms. Though primary and secondary law lacks a general provision on the enforcement of ECB decisions in non-euro member states, three main case groups of sanction-related provisions can be formed:<sup>64</sup>

- a) provisions that shall not impose any duties on or shall not be applied to non-euro member states /states without a close cooperation (c.f. Art. 132 TFEU<sup>65</sup>);<sup>66</sup>;

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*specialis* relationship; leaving this question open: Geismann (n 42) paras 15 et seqq; Gellermann (n 42) paras 11 et seq; Ruffert (n 42) para 4 et seq; Heinz Hetmeier in Carl Otto Lenz/Klaus-Dieter Borchardt (eds), *EU-Verträge Kommentar* (6th edn, Reguvis 2012) art 299 para 5; differing and not requiring accessoriness under art 299 TFEU: Michael Jakobs, 'Durchführung der Zwangsvollstreckung', in Hans-Werner Rengeling/Andreas Middeke/Martin Gellermann (eds), *Handbuch des Rechtsschutzes in der Europäischen Union* (3rd edn, C.H. Beck 2014) § 33 para 27.

<sup>55</sup> Rules of Procedure of the Court of Justice [2012] OJ L265/1, art 165; Rules of Procedure of the General Court [2015] OJ L105/1 last amended [2018] OJ L240/68, art 161.

<sup>56</sup> [2015] OJ L152/1 ff, para 266.

<sup>57</sup> Cf also Case 107/82 *AEG/Commission* [1983] ECR 03151 para 7.

<sup>58</sup> See also Council of Europe, Recommendation Rec(2003)17 of the Committee of Ministers to Member States on enforcement (2003), (hereinafter 'CoE Rec(2003)17,') III (2) (f) whereas enforcement procedures should 'prescribe a right for parties to request the suspension of the enforcement in order to ensure the protection of their rights and interests'.

<sup>59</sup> See also the presumably broader German version '*Für die Prüfung der Ordnungsmäßigkeit der Vollstreckungsmaßnahmen sind jedoch die einzelstaatlichen Rechtsprechungsgremien zuständig.*'; Andrej Ekart/Sylvia Zangl, 'The Admissibility of Defences against the Substantive Claim in Cross-Border Enforcement of Judgments in Europe' [2001] *Lex localis*, Journal of Local Self-Government 311, 312, stating, regarding Brussels I, as follows (emphasis added): '*Undoubtedly*, according to national laws the debtor can apply for a stay of enforcement measures based on these objections.'

<sup>60</sup> See eg landmark cases: Joined Cases 143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen a.o.* [1991] ECLI:EU:C:1991:65, paras 14 et seqq; Case C-465/93 *Atlanta Fruchthandelsgesellschaft* [1995] ECLI:EU:C:1995:369; see also Thiele (n 54) § 11 para 6.

<sup>61</sup> Due to the requirement of *fumus boni iuris*.

<sup>62</sup> Hayden (n 2) 1047 et seq.

<sup>63</sup> CZ, DK, HU and HR (the latter before entry into force of the cooperation agreement), Hayden (n 2) 95.

<sup>64</sup> In detail Hayden (n 2) 95 et seq.

<sup>65</sup> TFEU, art 139 (2) (e), (4); non-euro MSs are suspended from the voting right within the Council when it comes to acts of the ECB in the context of art 132 TFEU and do not have a voting power within the General Council of the ECB at all. In turn, acts of the ECB under art 132 TFEU do not apply to them; Hayden (n 2) 95 fn 68.

<sup>66</sup> Concerning penalties under art 18 (1) and (7) SSMR, cf also recital 50 SSMR; see also with regard to penalties under art 18 (7) SSMR, also art 4b (2) Sanction-Reg which focuses on undertakings having their head office in a euro MS.



- b) provisions that shall not be applied to persons ‘residing’ in a non-euro member state (e.g. certain sanctions within the ESCB)<sup>67</sup>; and
- c) provisions that exempt both, i.e. the application to persons established in a non-participating member state and the imposition of duties on non-participating member states (e.g. supervisory fees under Art. 30 SSMR<sup>68</sup>).

Concerning *supra* a), however, the authority of a euro member state might have to exercise its enforcement powers on assets on its territory of persons residing in non-euro member states, depending on the concrete regulation governing the sanction. For example, the operator of systemically important payment systems (‘SIPS’) under Regulation 795/2014<sup>69</sup> may be established in a non-euro member state;<sup>70</sup> exempting assets located there would mean that the operator could – against the principle of effectiveness – easily avoid enforcement. Concerning *supra* b), non-euro member states might – also in the light of the concrete obligation enforced – have to enforce Union acts against persons residing in a euro member state. While obligations under the Reporting-Reg, for example, also apply to non-euro member states, enforcement of Union acts based on them would also be in line with the principle of loyal cooperation (Art. 4 (3) TEU). As a result, the link to a non-euro member state under *supra* a)-c) may not act in any case as a shield against the enforcement of ECB decisions.

Furthermore, concerning member states where a ‘close cooperation’ between the ECB and the National Central Bank has been established, the ECB is not competent to address a decision directly to supervised entities pursuant to Art. 18 (1) and (7) SSMR, yet it may instruct the NCA to take corresponding actions (Art. 113 (2) SSM-Framework). The material scope of Art. 299 TFEU, however, does not cover such actions, since it is not an act of Union law as such which is being enforced.<sup>71</sup>

## V. Conclusions

Sanctioning powers within the SSM are characterised by jumbled references both within the SSM regulatory framework and to ESCB regulations and national law. Clarification is provided by differentiating the competences into ‘Three Pillars of the SSM Sanctions Regime’, namely Art. 18 (1) and Art. 18 (7)-Sanctions, both of which can be imposed by the ECB but follow different procedures and result in different sanctions; and Art. 18 (5)-Sanctions, which primarily follow national law and are imposed by NCA (in detail II.1). Enforcement for Art. 18 (1)- and Art. 18 (7) sanctions is also determined by explicit Union law, namely Art. 299 TFEU (III.1). However, EU member states basically lack a secure practice concerning the enforcement of ECB sanctions due to the fact that there have been up to date only a few cases, and in most domestic legal orders there are no specific rules on the enforcement by the ECB or other European institutions. Whereas jurisdiction for the issuance of the *order* for enforcement is determined rather clearly by Union law (Art. 299 (2) TFEU; III.2.2), *enforcement* under Art. 299 (4) TFEU represents a hybrid mismatch of European and national law. To resolve this mismatch, it is suggested that the CJEU should have jurisdiction if (indirectly)<sup>72</sup> the ECB relies on grounds for actions/preliminary procedures before the CJEU, and national authorities remain competent (1) if enforcement/enforcement measures are carried out in an irregular manner and (2) if the obligation imposed by the ECB’s decision ceased to exist or was deferred (III.2.3). A link to non-euro member states does not lead to a blanket exemption from the SSM sanctioning regime. Rather, in certain cases, also non-euro member states are obliged to enforce ECB sanctions under the underlying secondary legislation and Art. 4 (3) TEU, requiring examination in the specific individual case though (in detail IV.).

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<sup>67</sup> Council Regulation (EC) No 2533/98 concerning the collection of statistical information by the European Central Bank [1998] OJ L318/8, art 7 (hereinafter ‘Reporting-Reg’), art 7 (1) in conjunction with art 1 (3); Art. 5.4 E(S)CB.

<sup>68</sup> Recital 50 SSMR; fees may only be levied on credit institutions established in a participating MS and branches established in a participating MS by a credit institution established in a non-participating MS.

<sup>69</sup> Regulation of the European Central Bank (EU) No 795/2014 of 3 July 2014 on oversight requirements for systemically important payment systems [2014] OJ L217/16.

<sup>70</sup> See the definition of SIPS in Regulation 795/2014, art 1 (3) (‘eligible to be notified as a system pursuant to Directive 98/26/EC by a Member State whose currency is the euro or its operator is established in the euro area’; Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems [1998] OJ L166/45, arts 1, 2 (a)).

<sup>71</sup> In detail concerning esp HR and BG: Hayden (n 2) 96 et seq.

<sup>72</sup> Due to the requirement of *fumus boni iuris*.

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