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Ensuring effective judicial protection in case of ECB decisions based on national law

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Abstract

The centralization of the prudential banking supervision within the EU has been organized via the Single Supervisory Mechanism, through a mechanism existing of the European Central Bank (ECB) and the national supervisors, and embedded in the composite legal order within the EU. The said mechanism required some innovative solutions to ensure effective supervision, including the obligation for the ECB, laid down in Article 4(3) of the SSM Regulation, to apply national law transposing the relevant directives. As a result of this novelty under Union law, the CJEU is facing actions brought before it against ECB decisions based on national law. Therefore, in its review national law is to be assessed as a question of law. The central question in this research is how effective judicial protection can be ensured by the CJEU in such case, considering the limitations to the CJEU's jurisdiction with respect to national law. The article starts with discussing the recent cases in which the CJEU was asked to review ECB decisions based on national law (Joined Cases C-152/18 P and C-153/18 P Crédit mutuel Arkéa v ECB & Joined Cases T-133/16 to T-136/16 Caisse régionale de crédit agricole mutuel Alpes Provence v ECB), and the legal questions that remain unanswered in this respect. It then explores the CJEU's approach vis-à-vis national law in other types of legal proceedings. The lessons learned from the latter analysis is subsequently discussed, as well as new ideas to ensure a more effective judicial protection of national law, on which ECB decisions are based, before the CJEU.

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1. Introduction

The centralisation of prudential banking supervision via the establishment of the Single Supervisory Mechanism (SSM) made it necessary for this mechanism to be embedded into the composite legal order in place within the European Union. A number of interesting solutions were introduced as a result. One solution in particular was the power of the European Central Bank (ECB), as laid down in Article 4(3) of the Council Regulation (EU) No 1024/2013 (SSM Regulation)[1], to apply, under certain circumstances, all relevant Union law and where this Union law is composed of Directives, the national legislation transposing those Directives.[2] This responsibility was introduced in order to enable the ECB to carry out its tasks, ensure high standards of supervision, and guarantee compliance with all relevant prudential banking rules.[3] As a consequence, the ECB would not only apply rules laid down in directly applicable Union law (such as Regulations) but also provisions of national law implementing relevant banking Union legislative acts; in this respect, it is worth mentioning that a substantive portion of prudential banking rules is still laid down in the form of a Directive. These include, for instance, rules regarding market access, governance (i.e. fit and proper, remuneration) and supervisory measures and powers.[4] The application of national law by an EU Institution in the field of banking supervision nonetheless constitutes a novelty in EU law and, as such, raises new challenges for the existing composite legal order.[5] To

1 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 [2013] OJ L287/63 (SSM Regulation).

2 Article 4(3) of the SSM Regulation reads: 'For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.'

3 Basically, Regulation (EU) No 575/2013 of the European Parliament and the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 [2013] OJ L 176/1, 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 [2013] OJ L176/338 (CRDIV), Directive 2011/89/EU of the European Parliament and of the Council of 16 November 2011 amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC as regards the supplementary supervision of financial entities in a financial conglomerate [2011] OJ L 326/113 and the accompanying lower legislation.

4 cf CRDIV (n 3).

5 See also M Lehmann, 'Single Supervisory Mechanism Without Regulatory Harmonisation? Introducing a European Banking Act and a "CRR Light" for Smaller Institutions' (2017) EBI Working Paper Series 3/2017, 7-8 <https://papers.ssrn.com/sol3/papers.cfm?abstract-id=2912166> accessed 1 November 2019; L Boucon and D Jaros, 'The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism: A New Mode of European Integration?' [2018] 10 European Journal of Legal Studies 155, 179-180; D Sarmiento, 'National Law as a Point of Law in Appeals at the Court of Justice.

this end, the central question posed by this paper is how effective judicial protection can be ensured in case of ECB decisions based on national law, considering the limitations of the CJEU's jurisdiction with respect to national law. Recently, the Court of Justice of the European Union (CJEU)[6] was asked to review ECB decisions that were based on national law.[7] The General Court referred to settled case law on the basis of which the scope of national laws, regulations or administrative provisions would need to be assessed in the light of the interpretation given to them by national courts.[8] In some of these cases, the General Court concluded that, in the absence of national judgments, it was up to the General Court to rule on the scope of national law provisions.[9] The Court of Justice only referred to this statement of the General Court.[10] In the opinion of the authors, the legal reasoning underlying the position taken by the CJEU might increase the risk of overlooking legal questions arising from this novel structure in EU law, and the challenges it entails when attempting to ensure effective judicial protection with respect to the national law at hand.

Against this background, this paper will analyse the judicial protection currently afforded in ECB decisions based on national law, and ways to strengthen this. It will firstly outline the current approach of the CJEU in the recent cases where it had to review ECB decisions based on national law. It will subsequently discuss the challenges for ensuring judicial protection, with regards to the national law at issue. The paper will then study various cases in which the CJEU already addresses national laws and discusses subsequently the relevance of these cases for the situation at hand. The final part of the paper will be devoted to an analysis of the various possibilities the authors think will ensure effective judicial protection in an Article 4(3) situation. This part will take elements from other fields into account, as well as new ideas to ensure a better judicial protection of national law before the CJEU. The paper will conclude with a reflection

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The case of Crédit Mutuel Arkéa/ECB' (*The EU Law live blog*, 8 October 2019) <https://eulawlive.com/2019/10/08/national-law-as-a-point-of-law-in-appeals-at-the-court-of-justice-the-case-of-credit-mutuel-arkea-ecb/> accessed 30 October 2019.

6 In line with article 19 of the Consolidation Version of the Treaty on European Union [2016] OJ C 202/15 (TEU), 'CJEU' refers to the Court of Justice of the European Union, which include both the General Court and the Court of Justice. When relevant, the General Court and the Court of Justice are separately referred to.

7 See Joined Cases C-152/18 P and C-153/18 P *Crédit mutuel Arkéa v ECB* [2019] EU:C:2019:810 (*Crédit mutuel Arkéa v ECB*) and Joined Cases T-133/16 to T-136/16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* [2018] EU:T:2018:219 (*Caisse régionale de crédit agricole mutuel Alpes Provence v ECB)*.

8 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* (n 7), paras 84 and 90.

9 Case T-712/15 *Crédit mutuel Arkéa v ECB* (I) [2017] EU:T:2017:900 (*Crédit mutuel Arkéa v ECB* (I)), para 132; Case T-52/16 *Crédit mutuel Arkéa v ECB* (II) [2017] EU:T:2017:902 (*Crédit mutuel Arkéa v ECB* (II)), para 131.

10 *Crédit mutuel Arkéa v ECB* (n 7) para 99.

on the outcome of the above analysis in relation to the principle of effective judicial protection.

2. A reflection on the current approach of the CJEU towards ECB decisions based on national law and the legal challenges involved

Few cases in which the ECB had to directly apply national substantive law have so far led to proceedings before the CJEU. They are discussed below, after which the judicial review of the national substantive law in these cases is reflected upon.

The first closely related cases laid before the CJEU by Crédit Mutuel Arkéa concerned an objection against a decision of the ECB addressed to the Crédit Mutuel group.[11] The subject of discussion was the ECB's approach to organising the consolidated prudential supervision of the Crédit Mutuel group, as well as the imposition of additional capital requirements by the ECB.[12] In order to determine if one of the requirements is met so as to be able to speak about a supervised group, for the purpose of the provisions at issue, the wording of the relevant national law provisions is referred to. The General Court refers to settled case-law in this respect, stating that 'the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts'.[13] The General Court adds that 'in the absence of decisions by the competent national courts, it is for the Court to rule on the scope of those provisions'.[14] The Court of Justice only refers to the latter statement, and further confirms that national judgments issued after adoption of the relevant act must also be taken into account, as long as parties have had the possibility to express their views in this respect.[15]

In the more recent Joined Cases T-133/16 to T-136/16, the General Court took the same approach. The cases concerned a claim by the applicants, i.e. regional agricultural credit union branches of Crédit Agricole (with the latter being su-

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11 *Crédit mutuel Arkéa v ECB* (n 7). See for a short summary of both cases before the General Court: R Smits, 'Short note on the Arkéa judgments' (*EBI*, 19 January 2018) <https://ebi-europa.eu/wp-content/uploads/2019/01/Note-on-the-Arke%CC%81a-judgments-for-publication-final.pdf> accessed 30 October 2019.

12 *Crédit mutuel Arkéa v ECB* (I) (n 9) paras 47-48; *Crédit mutuel Arkéa v ECB* (II) (n 9) paras 45-46.

13 *Crédit mutuel Arkéa v ECB* (I) (n 9) para 132 ; *Crédit mutuel Arkéa v ECB* (II) (n 9) para 131.

14 *Crédit mutuel Arkéa v ECB* (I) (n 9) para 132; *Crédit mutuel Arkéa v ECB* (II) (n 9) para 131.

15 *Crédit mutuel Arkéa v ECB* (n 7) paras 99, 101-102 ; cf Joined Cases C-152/18 P and C-153/18 P *Crédit mutuel Arkéa v ECB* [2019] EU:C:2019:810, Opinion of AG Pitruzzella, paras 120-121.

pervised by the ECB directly), to annul the ECB decisions opposing the proposed candidates to simultaneously carry out the functions of chairmen of the board of directors of each of the applicants, and of 'effective director' of each of the applicants.[16] The main issue in question concerned the ECB's interpretation (challenged by the applicants) of the concept of 'effective director' in light of Article 13 of Directive 2013/36/EU, a term which was already transposed into national law.[17] The General Court explicitly stated that, in accordance with the scheme of Article 4(3) of the SSM Regulation, the ECB has to apply both relevant Union provisions and national laws that transpose these provisions. Hence, it concluded that, pursuant to Article 4(3) of the SSM Regulation, an assessment of the legality of the contested decisions would be required in the light of both Union and relevant national provisions. It is necessary to establish the meaning of both Union and national provisions at hand in order to determine if the ECB committed the errors of law alleged by the applicants.[18] Different interpretations of the relevant Union and relevant national law are subsequently discussed. When discussing the latter, the General Court repeated its starting point that the scope of national laws must be assessed in the light of the interpretation given to them by national courts.[19]

The CJEU's competences with respect to the decisions discussed is not at issue in this paper. Given the CJEU's exclusive jurisdiction to review the legality of Union decisions,[20] such as decisions adopted by the ECB, it is logically also competent to review ECB decisions when they are based on national law.[21] However, in the opinion of the authors, the current approach of the CJEU seems

16 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* (n 7) paras 1-19.
17 ibid paras 31-32.
18 ibid para 48-50.
19 ibid para 84.
20 Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1 (TFEU), art 263. This is confirmed by the Court in a case concerning an ECB decision based on a national preparatory measure. See Case C-219/17 *Berlusconi and Fininvest* [2018] EU:C:2018:1023 (*Berlusconi and Fininvest*), para 58.
21 See G Gaja, 'Case C-6/99, Association Greenpeace France and Others v. Ministere de l'Agriculture et de la Peche and Others' (2000) 37 Common Market Law Review 1427 (Gaja), 1431 and the case law mentioned. It has been suggested more often by scholars that, in certain cases, the CJEU should also review national law in order to ensure effective judicial protection. For instance, Gaja discussed in his comment on the Greenpeace case that he did not agree with the idea that questions of validity of national measures have to be resolved by national courts. This reasoning is logical, in his view, when a direct action against a national measure is available before the national court, but cannot be upheld if this is not the case. Gaja states that 'the Court should be in principle entitled to examine all the questions that are relevant for ascertaining the validity of the Community act – whether these questions relate to facts, EC law or national law'. He argues that, whereas the CJEU's exclusive competence with respect to Union law is understandable in light of the aim to ensure a uniform applicable throughout the EU, an exclusive competence for national courts with respect to national law would not serve a similar purpose.

to overlook the nature of the law at hand and the possible limitations to the CJEU's competences in this respect. As a result, possible challenges with respect to ensuring effective judicial protection regarding the national law on which the ECB decision is based, may not be adequately addressed. It seems particularly debatable whether the CJEU has full and extensive jurisdiction with respect to the judicial review of the national law involved, even though this would be required in light of the fundamental right to effective judicial protection. It is required, after all, that there must be a court having jurisdiction to examine all questions of fact and law relevant to the dispute before it.[22] In other words, in order for the system of judicial remedies to be complete and fully operational, there should always be the possibility to resort to a court having the power and the competence to review in full a decision adversely affecting its addressee.

Although this paper discusses the legal challenges related to the novelty of an EU institution applying national law, similar issues arise in other fields of law due to complex composite procedures in place nowadays. Far-reaching forms of cooperation between the EU and national administrative authorities are increasingly used to ensure an effective implementation of EU law.[23] The close collaboration between administrations is, however, not properly reflected in the system of judicial review within the EU. The latter is in principle still build on two separate layers, whereas the administrations are increasingly intertwined. This mismatch between the organization of the administrative powers and the organization of the judicial powers within the EU raises comparable legal challenges about how to ensure effective judicial protection in such cases. A more often discussed problem is how it can be ensured that the entire decision-making procedure is subject to judicial review: in particular, preparatory measures carried out at a different level than the level at which the final decision

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22 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6(1); European Court of Human Rights (ECtHR), 'the Guide on Article 6 of the European Convention of Human Rights, Right to a fair trial (civil limb)' (*Council of Europe*, 31 August 2019), 35-39 <https://echr.coe.int/Documents/GuideArt6ENG.pdf> accessed 30 October 2019. Article 6 ECHR corresponds to Article 47 of the Charter of Fundamental Rights of the European Union (Charter), the latter being applicable to *inter alia* the ECB, pursuant to Article 51(1) of the Charter. Article 52(3) of the Charter states that 'in so far the Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]' and EU law may still provide more extensive protection.

23 See, for instance, for a discussion of law enforcement by EU authorities, together with national authorities in different fields: M Scholten and M Luchtman (eds), *Law Enforcement by EU Authorities, Implications for Political and Judicial Accountability* (2017) (Law Enforcement by EU Authorities).

is adopted.[24] This paper will focus on the way in which a full judicial review of the substantial law at issue can be ensured.[25] This is discussed hereafter.

Looking at the nature of the law at hand, it must be noted that the authors consider that national law retains its national character within this particular context.[26] This seems to be the approach of the CJEU as well, as it unambiguously refers to and discusses the 'national law' of the recent cases mentioned in the previous paragraph. The national character may lead to a limitation of the CJEU's jurisdiction, as a result of the wording of the relevant provisions of the Treaty on the Functioning of the European Union (TFEU) which constitute

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24 See, for instance, M Eliantonio, 'Judicial Review in an Integrated Administration: the Case of "Composite Procedures"' (2014) 2 Review of European Administrative Law 65; HCH Hofmann and AH Türk, 'Legal challenges in EU administrative law by the move to an integrated administration', in HCH Hofmann and AH Türk (eds), *Legal Challenges in EU Administrative Law, Towards an integrated administration* (2009) 355-379 ; F Brito Bastos, 'Derivative illegality in European Composite Administrative Procedures' (2018) 55 Common Market Law Review 101; S Alonso de León, *Composite Administrative Procedures in the European Union* (2017) (Alonso de León) 215-320; HCH Hofmann, 'The Right to an Effective Judicial Remedy and the Changing Conditions of Implementing EU law' (2013) University of Luxembourg Law Working Paper 2/2013, 17 <https://papers.ssrn.com/sol3/papers.cfm?abstractid=2292542> accessed 1 November 2019 (Hofman), and R Widdershoven and P Craig, 'Pertinent Issues of Judicial Accountability in EU Shared Enforcement', in *Law Enforcement by EU Authorities* (n 23) 330-352.

25 Challenges with respect to the actual judicial review that can be carried out by the competent court are not limited to the application of Article 4(3) of the SSM Regulation. Academics have analysed additional cases and highlighted the legal issues stemming from situations where national law has a role in the broader context of an administrative decision resulting from composite procedures. See in this respect Hofmann (n 24) and Gaja (n 21). The common element of all such cases is the important principle according to which rights arising from EU law in general have to be effectively protected in each case, and this principle takes different shapes based on the context in which it is applied in practice with relation to national law. See in this respect Case C-179/84 *Bozzetti v Invernizzi* [1985] EU:C:1985:306, para 17; Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] EU:C:1986:206, para 18 and cf Hofmann (n 24) 1. As a consequence, the protection of such a right has to be always guaranteed via an effective remedy before a tribunal.

26 One could argue that the national law is transferred into Union law by virtue of Article 4(3) of the SSM Regulation. Witte's comparison to the way in which public international law is implemented by states that follow a dualist approach is interesting in this respect. See A Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?' (2014) 21(1) Maastricht Journal of European and Comparative Law 89 (Witte), 106-108. He discusses two theories to interpret the character of public international law, i.e. the transformation theory and the theory of adoption. On the basis of the transformation theory, the nature of the national law at issue would change into Union law by virtue of Article 4(3) of the SSM Regulation. On the basis of the theory of adoption, on the other hand, Article 4(3) would be interpreted as commanding the ECB to apply the national rule. In the latter interpretation, the character of the national law at hand would not change. The authors support this latter view. Recital 34 of the SSM Regulation can be read as a command to the ECB to apply relevant national law rather than a way to transform national into Union law. Furthermore, the regulation keeps referring to 'national' law. cf Witte (above), 108; M Lamandini, D Ramos and J Solana, 'The European Central Bank (ECB) Powers as a Catalyst for Change in EU Law. Part 2: SSM, SRM and Fundamental Rights' (2017) 23(2) Columbia Journal of European Law 51.

the basis for reviewing EU decisions. Thus, even when the CJEU is competent to review an ECB decision based on national law, it is uncertain if effective judicial protection can be ensured.

Firstly, the legal basis for reviewing such decisions, i.e. Article 263 TFEU, seems to be written for a "normal" situation in which a Union institution applies Union law.[27] In this respect, and in order to provide a reading in line with such a provision, it could be argued (also further explained below) that the review of national law by the CJEU is envisaged by the system foreseen in Article 4(3) of the SSM Regulation which specifically includes a reference to national law. On the basis of Article 263 TFEU, ECB decisions may be annulled by the CJEU in case of (1) lack of competence, (2) infringement of an essential procedural requirement, (3) infringement of the Treaties or any rule of law relating to their application, or (4) misuse of powers.[28] More particularly, the third ground for annulment may raise issues. Could an infringement of national law be interpreted as an infringement of the Treaties or any rule of law relating to their application? The interpretation seems limited to binding provisions of the Union legal order, so no rules laid down in national laws by Member States.[29] The exact scope of this ground of review is, nonetheless, uncertain. As Craig and De Burca point out, the absence of a legislative history makes it difficult to understand the intended implications.[30] The CJEU has used this ambiguity, for instance, to introduce general principles of law as grounds for review.[31] In the aforementioned recent case law, the General Court took the position according to which, for the purpose of assessing whether the ECB committed the alleged errors of law, it was necessary to establish the meaning not only of a provision of a relevant Directive for that case, but also for that of the national law implementing such a Directive.[32] In its opinion, this approach stems from the structure of Article 4(3) of the SSM Regulation, which envisages *per se* the need for such an assessment.[33] The Court of Justice did not particularly mention this issue in its judgment in the appeal case. It reviewed nevertheless the national

27 The CJEU previously stated, for instance, in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] EU:C:2002:462, para 43, that it would go beyond its jurisdiction to examine and interpret national procedural law, or, in Case 1/58 *DEPE v Storck v Haute autorité* [1959] EU:C:1959:4, para 4(a), that it is not normally required to rule on provisions of national law..

28 TFEU (n 20) art 263 para 4 cjo art 2.

29 K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (2014) (Lenaerts and others) 383. Lenaerts and others mention that the 'rule of law relating to their application' refers to provisions of international law, agreements concluded by the Union itself, customary international law, general principles of Union law and valid, binding acts of Union institutions, bodies, offices or agencies (Lenaerts and others, 383-385).

30 P Craig and G De Búrca, *EU Law, Text, Cases, and Materials* (5th edn, 2011) 525.

31 ibid.

32 *Caisse régionale de crédit agricole mutuel Alpes Provence v ECB* (n 7) para 50.

33 ibid para 48.

law at issue, which indirectly might be seen as an indication that the Court of Justice accepts national law transposing Union law as a ground of review.[34] The above illustrates that this is a novelty in itself, and seems to significantly broaden the grounds of review.

Secondly, decisions of the General Court, which rules at first instance of an action for annulment, are subject to a right of appeal to the Court of Justice on points of law only.[35] An appeal to the Court of Justice shall rest upon: the grounds of lack of competence of the General Court; a breach of procedure before it which adversely affects the interests of the appellant; or, lastly, an infringement of Union law by the General Court.[36] The Court of Justice's competence is thus limited in an appeal to an infringement of *Union* law by the General Court. At first sight, this would exclude any infringement of national law by the General Court. It will depend, however, on the CJEU's interpretation whether this may also include national law.

Thus, although the CJEU's exclusive competence to review the final ECB decision is not debated, it is also not clear-cut that the CJEU has the same competences with respect to national law on which an ECB decision may be based as it does with respect to Union law applied by the ECB. The possible limitations are particularly relevant since, in the authors' view, the national law at issue has the function of a question of law. As discussed by Prek and Lefèvre, when national law is relevant to the CJEU's reasoning of the so-called 'major premise', i.e. when stating a rule, it has the function of a question of law. When national law is considered to be relevant for the so-called 'minor premise', i.e. making an allegation of facts, it acts as a question of fact.[37] In the case of Article 4(3) of the SSM Regulation, it seems appropriate to qualify the national law on which ECB decisions may be based as 'questions of law', since the national rule is relevant for interpreting the applicable rules. Article 4(3) of the SSM Regula-

34 In the *Edwin & Co* case, discussed in Section 3 (i), the Court of Justice concluded that the national law could be considered to be a rule of law relating to the application of the relevant regulation. The relevant regulation stated that an appeal before the Court of Justice was also possible on grounds of an infringement of such rule of application. A similar reference is, however, not included in the SSM Regulation. At the very least, the CJEU only needs to consider this ground for annulment when it is raised by the applicant. It is not bound to raise such infringement of its own motion, as it for instance must do with respect to an alleged lack of competence. See Lenaerts and others (n 29) 366 and the case law mentioned therein. For the ground for annulment concerned, this would have been even more difficult considering the fact that the Court will likely not be familiar with all relevant national rules.

35 TFEU (n 20) art 256 para 1.

36 Protocol on the Statute of the Court of Justice of the European Union [2016] OJ C203/72 (Statute of the Court of Justice), art 58.

37 M Prek and S Lefèvre, 'The EU Courts as "National" Courts: National Law in the EU Judicial Process' (2017) 54 Common Market Law Review 373 (Prek and Lefèvre).

tion does not refer to a specific national rule that must be established and proofed by one of the parties, nor does it contain any limitations to its applicability, which would justify approaching the national law as a question of fact. In other words, the national rule in this context is relevant for stating the rule at issue, i.e. the so-called major premise, and concerns thus a question of law.[38] Should the national law have been considered a question of fact, the establishing of the law would support the interpretation of a Union rule and would not lead to any problems in relation to the third ground of annulment. Moreover, a question of fact can, in general, not be subject of appeal, regardless of whether it concerns Union or national law. The limitations would thus not have been applicable in such case. A question of law requires, on the other hand, greater involvement of the CJEU compared to a question of fact.[39] Besides the possible limitations to the CJEU's jurisdiction discussed above, it is debatable whether the more active role of the CJEU could be applied in the current legal reality.[40]

In the aforementioned cases, the CJEU referred to the interpretation given by national courts in order to interpret the national law involved. Although this might be seen as a way to take the mechanism and the issues underlying the structure of Article 4(3) of the SSM Regulation into account, it does not seem to address all possible legal issues on the table. The settled case law referred to by the General Court in order to emphasize this starting point concerns cases in which the national law is considered to be a question of fact, i.e. action for infringements and preliminary rulings.[41] In these cases, national judgments may help to prove a certain position, or to establish a fact. Although national judgments provide at least some guidance, it is questionable that reference to these judgments is also sufficient in cases where the national rule at hand is a rule that needs to be established. The CJEU would then be taking over the national courts' tasks, which is something explicitly ruled out in case of preliminary rulings or actions regarding the infringement procedures due to the strict separation of tasks, as discussed below. This may be particularly problematic as, since in this context national law acts as a 'question of law', a greater involvement of the CJEU would be required.

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38 ibid 380-381. Prek and Lefèvre are also of the opinion that national law in the context of Article 4(3) of the SSM Regulation must be considered to be a question of law.

39 ibid 373-374. Prek and Lefèvre consider that, where national law is relevant for the major premise, a more active involvement of the CJEU, sufficiently close to and more in line with the CJEU's approach to Union law, in order to ensure that its judicial application is as correct as possible, may be required. On the other hand, when national law is relevant for the minor premise, the involvement of the parties determining the content of the national law seems more justified.

40 ibid 393. Although Prek and Lefèvre come up with some possible solutions to ensure that the Court's role is in line with the function of national law at hand, they acknowledge this is currently not yet the case with respect to national law as a question of law.

41 See also the discussion in Section 3 in this respect.

Moreover, the idea of using the position of national courts as the sole benchmark to verify the correctness of the interpretation of the ECB, although appropriate in this case, could be insufficient on other occasions, and could even fail to help clarify the issue. For example, attention is to be paid to situations where the national benchmark is not provided because the relevant national court has not given its interpretation of the national law implementing the relevant EU Directive, where national judgments conflict with regard to the corresponding national law, or in the case of controversial national judgments.[42] The solution provided for by the CJEU in the Joined Cases C-152/18 P and C-153/18 P, giving it the authority to rule on relevant national provisions in the absence of decisions by competent national court, would cover the gap in a situation where no national court has provided any interpretation of relevant national legislation. However, on the other hand (and as already highlighted by other commentators), it would also completely change the distribution of competences between the EU judicature and the national one and require a reconfiguration of the structure of the dialogue between EU and national courts.[43] The uniformity of national law could be at stake when the CJEU is also allowed to apply and interpret national laws, without any further collaboration arrangements. Furthermore, it does not provide an answer in the case of conflicting or controversial national judgments. It remains thus uncertain whether all questions of law in the judicial review of ECB decisions based on national law can be sufficiently reviewed by the CJEU, and consequently whether effective judicial protection can be ensured in such case, given the CJEU's limited jurisdiction regarding national laws. In the opinion of the authors, there is still enough food for thought on how to ensure effective judicial protection regarding the national law on which an ECB decision is based pursuant to Article 4(3) of the SSM Regulation.

In light of the considerations referred to above, the next Section will look at other cases in which the CJEU was also confronted with national law. Although these cases are not completely similar, a comparison may help to reach better solutions.[44]

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42 See Case C-240/95 *Schmit* [1996] EU:C:1996:259, para 16. The Court even noted itself that reference to a single decision does not enable that interpretation to be regarded as established.

43 See, in this respect, F Comand-Kund and F Amtenbrink, 'On the scope and limits of application of national law by the European Central Bank within the Single Supervisory Mechanism' (2018) 33 Banking & Finance Law Review 133 (Comand-Kund and Amtenbrink).

44 One must bear in mind that the CJEU may be confronted with various scenarios upon reviewing an ECB decision based on national law. The ECB may err in its interpretation of national law, but it is also possible that the national law on which the ECB decision is based is the result of an incorrect transposition of the relevant Union law. The latter raises interesting legal questions as well, but is out of the scope of this paper: cf A Lefterov, 'The Single Rulebook: legal issues and relevance in the SSM context' (2015) ECB Legal Working Paper Series 15/2015, 36-37 <www.ecb.europa.eu/pub/pdf/scplps/ecblwp15.en.pdf> accessed 2 November 2019; Witte

3. Review by the CJEU of national law in different contexts

The CJEU has to often find solutions as to the interpretation or review of national law. Below, cases concerning actions for annulment, preliminary rulings and actions for infringement, will be discussed. It will be analysed to what extent these cases can be compared with an Article 4(3) situation and what this means for the current discussion.

3.1. Action for annulment – Trade Mark Regulation

The CJEU has regularly been asked to deal with national law in the field of Community trade marks, which also relate to actions for annulment cases. A well-known case in this respect is the *Edwin Co. Ltd* case.[45] The case concerned an application for revocation and declaration of the invalidity of a trademark. The Council Regulation (EC) No 40/94[46] (Trade Mark Regulation), applicable to this case but already repealed and replaced, provided relative grounds for invalidity of a trade mark. Article 52(2) of that Regulation provided that a Community trade mark shall be declared invalid where the use of such trade mark may be prohibited pursuant to another earlier right under the Community legislation or national law governing the protection. The relevant implementing regulation stated that, in case an applicant claims to have an earlier right, it must provide particulars showing that he is entitled under the national law applicable to lay claim to that right.[47]

In the *Edwin Co. Ltd* case, such claim was not accepted by the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ("OHIM").[48] The General Court ruled, however, that the Board of Appeal had erred in law in its interpretation of the relevant provision laid down in Italian law and had ruled out, incorrectly, the application of that provi-

(n 26) 109; Coman-Kund and Amtenbrink (n 43) 15.

45 Case C-263/09 P *Edwin v OHIM* [2011] EU:C:2011:452 (*Edwin v OHIM*).

46 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1, which is amended several times. Currently the trade mark rules are laid down in Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1.

47 cf *Edwin v OHIM* (n 45) paras 9 and 49.

48 ibid paras 11-15. The Board of Appeal arrived at an interpretation of the raison d'être of the relevant national provision, which seemed, according to the Board of Appeal, to be confirmed by academic writings of some Italian scholars. The Board stated, however, that there was, to its knowledge, no case law on this point. See Case T-165/06 *Fiorucci v OHMI - Edwin (ELIO FIORUCCI)* [2009] EU:T:2009:157 (*Fiorucci*), para 11.

sion in the case at hand.[49] In the appeal case, the Court of Justice pointed out that any appeal against a decision given by the General Court is on points of law only, and may be based on infringement of Union law by the General Court.[50] Edwin Co. Ltd. claimed that a rule of national law had been infringed by the General Court, a rule which, according to the Court of Justice, had been made applicable to the dispute by the reference made in a provision of Union law.[51] Furthermore, the Court of Justice emphasized that the relevant implementing regulation requires the applicant to provide OHIM with both particulars showing that he satisfies the conditions under national law to have the use of a Community trade mark prohibited by virtue of an earlier right, and particulars establishing the content of that law.[52] The authority and scope of such particulars must be assessed by the competent OHIM bodies in order to establish the content of the applicable national rule.[53] Subsequently, the General Court was competent to assess actions against decisions of the Boards of Appeal on grounds of infringement: of the Treaty, of the relevant implementing regulation or of any rule of law relating to their application. The Court of Justice concluded that, in line with this legal structure, the General Court was competent to

'conduct a full review of the legality of OHIM's assessment of the particulars submitted by an applicant in order to establish the content of the national law whose protection he claims'.[54]

It continued that, in an appeal case, the Court of Justice has the jurisdiction to determine, with respect to the examination of the findings of the General Court with regard to that national law

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49 *Edwin v OHIM* (n 45) paras 20-21. It concluded, *inter alia, that the Board of Appeal's interpretation was not confirmed by the wording of the provision at hand, and that, moreover, it could lead to very divergent applications in practice. The General Court, furthermore, concluded that the extracts from some of the academic writings referred to by the Board of Appeal did not allow the conclusion to be drawn that the Board of Appeal's interpretation was correct. Only one of the academic writings may support such interpretation, but not even explicitly. See Fiorucci* (n 48) para 60, where the General Court concluded that it 'cannot, only on the basis of the opinion of that one author, make the application of the provision in question subject to a condition which does not follow from its wording'. See *Fiorucci* (n 48) paras 47-60.

50 *Edwin v OHIM* (n 45) para 46. cf TFEU (n 20) art 256(1) and Statute of the Court of Justice (n 36) para 58.

51 *Edwin v OHIM* (n 45) para 47.

52 ibid paras 49-50. See Case C-530/12 P *OHIM v National Lottery Commission* [2014] EU:C:2014:186 (*OHIM v National Lottery Commission*), para 34.

53 *Edwin v OHIM* (n 45) para 51. See *OHIM v National Lottery Commission* (n 52) para 35.

54 *Edwin v OHIM* (n 45) para 52. In the same paragraph, the Court concludes that the national law is to be considered a rule of law relating to the application of the regulation at hand and falls, thus, under the scope of the General Court's review according to the relevant provision in the applicable regulation. See Case C-263/09 P *Edwin v OHIM* [2011] EU:C:2011:452, Opinion of AG Kokott, paras 61-67 (Opinion of AG Kokott). See also *OHIM v National Lottery Commission* (n 52) para 36.

'first of all, whether the General Court, on the basis of the documents and other evidence submitted to it, distorted the wording of the national provisions at issue or of the national case-law relating to them, or of the academic writings concerning them; second, whether the General Court, as regards those particulars, made findings that were manifestly inconsistent with their content; and, lastly, whether the General Court, in examining all the particulars, attributed to one of them, for the purpose of establishing the content of the national law at issue, a significance which is not appropriate in the light of the other particulars, where that is manifestly apparent from the documentation in the case-file.'[55]

Following this, the Court of Justice considered that the General Court did not err in its findings with regard to the national legislation at issue and rejected the pleas as unfounded.[56]

In the *National Lottery Commission* case,[57] regarding an application for a declaration that the contested mark was invalid on the basis of a pre-dating copyright under Italian legislation, the Court of Justice focused on the scope of the review that is required before both the OHIM and the General Court with respect to the application of national law in each case.[58] The Court of Justice pointed out that both bodies must carry out the review in light of the requirement to ensure the practical effect of the regulation at hand. One possible consequence of a negative decision may be that the proprietor of the Community trade mark may be deprived of a right that has been granted to him. Such scope implies that the authority taking such decision is not limited to the role of mere validation of the national law as submitted by the appellant for a declaration of invalidity.[59] Furthermore, the judicial review conducted must meet the requirements of the principle of effective judicial protection. The CJEU should not be deprived of the real possibility of exercising an effective review as a result of possible lacunae in the documents submitted as evidence of the applicable national law. The Court of Justice continues: 'To that end, it must therefore be able to confirm, beyond the documents submitted, the content, the conditions of application

55 *Edwin v OHIM* (n 45) para 53. See Case C-76/11 P *Tresplain Investments v OHIM* [2011] EU:C:2011:790, para 66 and Lenaerts and others (n 29) 638.
56 *Edwin v OHIM* (n 45) paras 54-58.
57 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 [2013] OJ L287/63 (SSM Regulation).
58 ibid para 38.
59 ibid paras 40-43.

and the scope of the rules of law relied upon by the applicant for a declaration of invalidity.'[60]

Both cases concern actions for annulments and illustrate how the CJEU possibly could approach a review of an ECB decision based on national law. However, certain important elements in the trade mark cases differ from an Article 4(3) situation. The relevant regulation provides, first of all, for the possibility to bring actions before the General Court on grounds of infringement of the Treaty, of Regulation No 40/94 or of *any rule of law relating to their application* (Italics added). The CJEU concludes that the national rules are to be considered a rule of law relating to the application of Regulation No 40/94, and the General Court thus has jurisdiction to conduct a full review of the legality of OHIM's assessment of the particulars submitted by an applicant, in order to establish the content of the national law whose protection he claims.[61] The CJEU allows hence for a broad interpretation of its competences, which stem from the Treaties, via secondary legislation. Where secondary legislation cannot limit the right of effective judicial protection on the basis of the Treaties, it may arguably broaden this right, according to the Court's reasoning in this case. In the same vein, it could be argued that even though the SSM Regulation does not provide for such an explicit additional ground of review, it still envisages, via the mechanism enshrined in Article 4(3) of this Regulation, a system whereby national law plays a role within the scope of such a provision. As a consequence, national law becomes relevant and might be captured by the scope of the CJEU's review by virtue of the structure of Article 4(3) referred to above. In other words, the application of national law is essential for the ECB to carry out its tasks and duties and therefore to adopt acts of EU law on which the CJEU would have jurisdiction. This type of reasoning may then allow to conceive the scope of the review of the CJEU as in line with the scope of Article 263 TFEU, since this Article, as discussed in Section 2 above, refers to any rule relating to the application of the Treaties.

Moreover, in the trade mark cases, a rule of national law was made applicable to the dispute by the reference made in a provision of Union law,[62] and the implementing regulation explicitly states that an applicant must provide particulars showing that he is entitled, under applicable national law, to lay claim to the right at issue. Thus, the national legal position is, in the wording of Advocate

60 ibid para 44. See Prek and Lefèvre (n 37) 393-394: according to them, this hybrid approach is an answer of the Court to the mismatch of the desired role of the Court in case of national law as a question of law and the Court's actual possibilities.

61 *Edwin v OHIM* (n 45) para 52.

62 ibid para 47.

General Kokott, 'more on a par with the submissions on the facts'.[63] At the same time, and as discussed above, the Court of Justice interprets the General Court's role more broadly. It is questionable if this case could be applied *mutatis mutandis* to ECB decisions based on national provisions. Contrary to the trade mark cases, the SSM Regulation does not contain a reference to a specific national rule. It is a general 'command' or 'order' to the ECB to apply the national law transposing relevant Union law in general.[64] Additionally, the ECB applies the national provisions autonomously. Thus, the national provisions are not relied upon by a person in order to claim protection, but may actually be held against the person at hand by the administrative authority. The SSM Regulation does not provide for the obligation of one of the parties to present the facts nor the burden of proof to establish the national law at issue. Therefore, it does not seem to be explicitly reduced to a 'submission on the facts'.

It nonetheless may be interesting to see how the approach used in the trade mark case could work out for an Article 4(3) situation. Assuming it is approached as a mere submission on the facts, what could be the extent of a possible obligation to present the facts and a burden of proof, and which of the parties would be imputed with such obligation and burden? Could one argue that the national rules at issue are included in the scope of the discussion by means of the 'order' to apply national rules and that, consequently, the order itself must be the subject of the burden of proof (i.e. what is the scope and meaning of the order at hand)? National law covered by the order would then be subject to the procedure to the extent that parties fulfill their obligation to present the facts and the burden of proof, comparable to the duty to prove the entitlements to rights under national law in trade mark cases. This may, in the authors' view, unjustifiably limit the scope of the review of the national law at issue to the facts and evidence presented by the parties. Although the CJEU might still find a way to review the national law at issue more extensively – and beyond the documents submitted - via a broad interpretation of the *National Lottery Commission* case (see above), the legal question is still considered to be a question of fact instead of a question of law.[65] Consequently, the involvement of the parties at hand would be more than desirable in case of a question of law.[66] The next question

63 Opinion of the AG Kokott (n 54) para 47.

64 This is in line with the theory of adoption, according to which the character of the law does not change, as explained by Witte (n 26).

65 The same applies to the trade mark cases, in which the national law seems also relevant for the so-called major premises, and would thus be a question of law, but is approached as a question of fact. See Prek and Lefèvre (n 37) 374, 279 and 380. Prek and Lefèvre mention the Trade Mark Regulation as an example in which national law remains necessary for the proper application of the relevant Union law.

66 ibid 395. They point out that the General Court cannot be deemed to be in a position to verify the legal qualification of pleas based on national law without minimal information about the relevant national law provisions. This would justify in their opinion a higher involvement of the parties in order to assist the General Court.

would concern the party to be imputed with the obligation to state and prove the facts. Should the ECB, as the administrative authority applying the national law, present the facts of such national law even though it is, in the end, a Union institution?[67] Or would National Competent Authorities (NCAs) be required to assist the ECB in proving it, on the basis of, for example, the general Union duty of loyal cooperation or of the ECB's power to request information under the SSM Regulation, with the ECB remaining ultimately responsible? And what would the role be, in this respect, for the credit institution addressed by the ECB decision based on national law? Would the credit institution have to defend its case by first providing particulars about the national law at hand? These questions illustrate that the approach chosen in the trade mark cases cannot simply be applied *mutatis mutandis* to the situation at hand.

Another issue arising from the trade mark cases relates to an appeal before the Court of Justice. Only points of law of the General Court's decision can be subject to the right of appeal, and an appeal can rest upon a limited number of grounds.[68] As discussed, the CJEU found ways to justify a review of the national law at stake. However, in the *Edwin Co. Ltd* case, the Court of Justice took a stricter view in the case of national law as a question of law than it usually takes when Union law is relevant for the question of law. Although, in general, the relevant ground for appeal to the Court of Justice in the case of questions of law is an infringement of Union law by the General Court (see above), the Court of Justice seems to put a higher standard in trade mark cases where reference is made to the national law involved. In *Edwin Co.* Ltd, the Court limited its review of the examination of the General Court's findings of the national law at hand to whether the General Court 'distorted the wording of the national provisions at issue or the national case-law relating to them'.[69] This standard was applied by the CJEU also in cases where national law was considered to be a question of fact.[70] This may make an intervention of the CJEU more complicated, with a subsequent impact on the degree of judicial protection.

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67 Just as the Commission is obliged to in case of an action for infringement, for instance (see Section 3 below).

68 See Section 3.

69 *Edwin v OHIM* (n 45) para 53.

70 Prek and Lefèvre (n 37) 397 and the case law mentioned therein. This approach seems logical where the national law is a question of fact, since in such cases – where the General Court wrongly represents the evidence adduced or distorts it – the legal issue regarding the facts will constitute a question of law which can be subject of appeal. See Lenaerts and others (n 29) 637.

3.2. Preliminary rulings

Pursuant to Article 267 TFEU, the CJEU is competent to give preliminary rulings. It must be considered if the CJEU's approach regarding national law in case of preliminary rulings can be applied to the issue at hand.[71]

It is crucial for a reference for a preliminary ruling that there is a question on a point of Union law and that the answer to that question determines the outcome of the national case.[72] The CJEU is limited to the questions at hand raised by the referring national court.[73] In these cases, the Court emphasizes the clear separation of functions between itself and the national courts. The former is only empowered to rule on the interpretation or validity of Union provisions on the basis of the facts which the national court puts before it. It is up to the national court to apply the rules of Union law to a specific case, and the CJEU is precluded from ruling on facts and points of national law and on the compatibility of national rules with Union law.[74] Questions of law to be answered by the CJEU in this case concern, thus, the relevant Union law, not national law.[75] In order to answer the questions referred to it, the CJEU must take account of the factual and legislative context as described in the order for reference.[76] The CJEU relies on the national courts' findings of the facts[77] and on the interpretation provided by the referring court of the provisions of the

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71 The authors do not consider this scenario is to be a way to gain judicial protection in the case of an Article 4(3) situation, as it would imply the existence of a national procedure, which seems, given the CJEU's exclusive competence to review ECB decisions, unlikely in case of an Article 4(3) situation.

72 KPE Lasok and D Lasok, "*Law and Institutions of the European Union*" (2001) (Lasok and Lasok) 359.

73 ibid 360 and the case law mentioned therein.

74 Lenaerts and others (n 29) 233; Lasok and Lasok (n 72) 360. See, for relevant case law: Case C-253/03 *CLT-UFA SA* v *Finanzamt Köln-West* [2006] EU:C:2006:129, paras 35-36; Case C-489/04 *Alexander Jehle and Weinhaus Kiderlen* v Land Baden-Württemberg [2006] EU:C:2006:527, para 36; Case C-282/00 *Refinarias de Açúcar Reunidas SA (RAR)* v *Sociedade de Indústrias Agricolas Açoreanas SA (Sinaga)* [2003] EU:C:2003:277, paras 46-47; Case C-177/98 *Bizzaro* [1999] EU:C:1999:486, paras 37-38; Case C-357/06 *Frigerio Luigi & C. Snc* v *Comune di Triuggio* [2007] EU:C:2007:818 (*Frigerio Luigi & C. Snc v Comune di Triuggio*), para 16; Case C-345/09, *van Delft and Others* [2010] EU:C:2010:610, para 114.

75 cf Prek and Lefèvre (n 37) 384-385.

76 Case C-518/08 *Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos (VEGAP)* v *Société des auteurs dans les arts graphiques et plastiques (ADAGP) and Others* [2010] EU:C:2010:191, para 21; Joined cases C-378/07-380/07 *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis* (C-378/07), *Charikleia Giannoudi* v *Dimos Geropotamou (C-379/07) and Georgios Karabousanos and Sofoklis Michopoulos* v *Dimos Geropotamou* (C-380/07) [2009] EU:C:2009:250, para 48. See, for the exact content of the request for a preliminary ruling, the Rules of Procedure of the Court of Justice [2016] OJ L217/69, art 94.

77 Case C-251/06 *Firma ING. AUER - Die Bausoftware GmbH* v *Finanzamt Freistadt Rohrbach Urfahr* [2007] EU:C:2007:658, para 19.

national law at issue.[78] The CJEU is not competent to question or verify the correctness of such interpretation.[79] It can, however, request from the referring court clarification on the basis of Article 101 of the Rules of Procedure of the Court of Justice.[80] Regardless of its limited competence with respect to national law, the CJEU must still provide the referring court with an answer that will be of use and enable the referring court to determine the case before it.[81] In other words, at times the CJEU also has to find more creative solutions when dealing with preliminary questions and the national law at hand.[82]

The above analysis reveals that a comparison with Article 4(3) of the SSM Regulation seems questionable. It emphasizes the strict separation between the responsibilities of the CJEU and national courts. Despite the CJEU's attempts to provide useful preliminary rulings, the CJEU may rule about the interpretation of the Treaties or the validity and interpretation of Union acts only. Article 4(3) of the SSM Regulation, on the other hand, directly concerns the review of the national rules at stake. The activity and the scope of review of the CJEU in the context of a preliminary ruling thus appears to be quite different. As such, it also does not provide an appropriate solution as to how the CJEU could fully review an ECB decision based on national law. The General Court refers, nevertheless, to the way in which the Court uses national courts' judgments to interpret national law in this context. It is, as discussed in Section 2, questionable if this reference is fully appropriate.

3.3. An action for infringement

The CJEU is also confronted with national law if it reviews a case concerning the possible failure of a Member State to transpose a directive in case of an action for infringement under Article 258 TFEU. The possible failure may concern the practical conduct of a Member State, but will more often

78 Case C-483/09 *Gueye and Salmerón Sánchez* [2001] EU:C:2011:583 (*Gueye and Salmeròn Sánchez*), para 42; Case C-409/06 *Winner Wetten GmbH* v *Bürgermeisterin der Stadt Bergheim* [2010] EU:C:2010:503, para 35.

79 *Gueye and Salmerón Sánchez* (n 78) para 42.

80 cf Lenaerts and others (n 29) 234 and the case law mentioned therein.

81 Case C-279/06 *CEPSA Estaciones de Servicio SA* v *LV Tobar e Hijos SL* [2008] EU:C:2008:485, para 31 and Case C-98/06 *Freeport plc* v *Olle Arnoldsson* [2008] EU:C:2007:595 (*Freeport*), para 31.

82 See for instance: *Freeport* (n 81) para 31; Case C-244/78 *Union laitière normande, a group of agricultural co-operatives* v *French Dairy Farmers Limited* [1979] EU:C:1979:198, para 5; Case C-311/85 *ASBL Vereniging van Vlaamse Reisbureaus* v *ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] EU:C:1987:418, para 11 and *Frigerio Luigi & C. Snc v Comune di Triuggio* (n 74) para 17. See also Lenaerts and others (n 29) 237-238 and the case law mentioned therein. See also Prek and Lefèvre (n 37) 384.

concern the compatibility of national legislation with the relevant Union law.[83] The failure to adopt all the measures necessary within its national legal system to ensure a directive is fully effective is considered to be a failure to fulfill an obligation under the Treaty, and can be brought before the CJEU by the EU Commission in accordance with Article 258 TFEU.[84] The CJEU can only conclude that a Member State has failed to fulfil an obligation under the Treaties (i.e. give a declaratory judgment) and specify the act or omission leading to the failure, but it cannot tell what the Member State must do in order to be compliant with the Treaties or declare the relevant national measure void.[85] When assessing whether or not the Member State has failed to implement a directive, the scope of national laws, regulations, or administrative provisions must be assessed in light of the interpretation given to them by the national courts.[86]

Although it is firstly up to the EU Commission to prove that the obligation has not been fulfilled,[87] the CJEU also sees a role for the Member State at issue. Where it must ensure that the relevant national provisions are applied correctly in practice, the EU Commission, which does not have investigatory powers of its own in this respect, is largely reliant on the information provided by the complainants, public or private bodies, the press, or the Member State concerned.[88] And while the EU Commission must establish the content of national law in light of the possible non-compatibility of its provisions with Union law, any failure concerning the practical conduct of a Member State can only be established by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or court.[89] The Member State is obliged to provide the information requested by the Commission.[90]

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83 Prek and Lefèvre (n 37) 383.

84 TFEU (n 20) arts 258-259. See, for more about the entire procedure: A Dashwood and others, *Wyatt and Dashwood's European Union Law* (6th edn, 2011) (Dashwood and others)135-143; Lenaerts and others (n 29) 186-214.

85 Dashwood and others (n 84) 142-143; Lenaerts and others (n 29) 205.

86 Lenaerts and others (n 29) 199 and the case law mentioned therein; Dashwood and others (n 84) 148 and the case law mentioned.

87 Case C-434/01 *Commission of the European Communities* v *United Kingdom of Great Britain and Northern Ireland* [2003] EU:C:2003:601 (C-434/01 *Commission v Ireland*), para 21; Case C-263/99 *Commission of the European Communities* v *Italian Republic* [2001] EU:C:2001:293, para 27; Case C-297/08 *European Commission* v *Italian Republic* [2010] EU:C:2010:115 (C-297/08 *Commission* v *Italy*), para 101; Case C-490/04 *Commission of the European Communities* v *Federal Republic of Germany* [2007] EU:C:2007:430, para 48, and Lenaerts and others (n 29) 198-200.

88 C-297/08 *Commission* v *Italy* (n 87) para 101; C-434/01 *Commission v Ireland* (n 87) para 43.

89 Case C-287/03 *Commission of the European Communities* v *Kingdom of Belgium* [2005] EU:C:2005:282, para 28; Prek and Lefèvre (n 37) 391 and the case law mentioned therein.

90 Prek and Lefèvre (n 37) and the case law mentioned therein; Lenaerts and others (n 29) 200-201 and the case law mentioned therein.

Again, a comparison with the way in which the CJEU reviews national law in case of Article 258 TFEU with the Article 4(3) situation at hand does not seem adequate. In case of an action for infringement, the CJEU is, in principle, directly assessing national law. However, the CJEU's jurisdiction in these cases is limited to the identification of a possible failure in the implementation of Union law on the basis of the facts and proof provided by the respective parties. In Prek and Lèfevre's words, the relevant Union law concerns the major premise of the CJEU's legal reasoning, i.e. the question of law, and the conduct of the Member States, including the national law at issue, concerns the minor premise.[91] Thus, the national law is considered to be a question of fact in such case. The CJEU cannot either prescribe what the Member State must do to be compliant nor can it declare the relevant national measure void. The benchmark is the Union law at hand, and it does not imply an unlimited discretion with respect to the relevant national law. The latter, nevertheless, seems desirable in case of an ECB decision based on national law. The assessment criteria used by the CJEU in case of an action for infringement may also imply a lower standard than desirable in case of an ECB decision based on national law. Whereas in case of an infringement procedure it is sufficient to assess whether the Member State has infringed Union law,[92] an assessment of an ECB decision would require, in principle, precise knowledge and full review of the national law at issue. The first assessment only involves an assessment of the 'lower boundary',[93] whilst the latter requires a full assessment of the relevant national rules. If the CJEU takes the 'lower boundary' as a benchmark, it could only look

91 Prek and Lefèvre (n 37) 383. A similar reasoning applies to cases in which the CJEU has to assess whether or not the Member State has complied with its judgment pursuant to Article 260 TFEU. Prek and Lefèvre point out that in such case the major premise is the Court's ruling at issue and the minor premise is the Commission's interpretation of the amendments of the relevant national legislation. The assessment of the Commission is the point of the litigation and the relevant national law is part of the factual background of the case. Prek and Lefèvre (n 37) 385-387: consequently, the relevant national law is dealt with as a matter of fact. Another example in this respect concerns a Commission decision in the area of State aid. The Commission must first establish the exact content of the national law, before carrying out the assessment if the aid granted by a state or through state resources is not compatible with the internal market or being misused as referred to in Article 108(2) TFEU. See Prek and Lefèvre (n 37) 385-386. An applicant may bring an action for annulment against such decision of the Commission, in which case the CJEU will review the Commission decision, including the establishment of the content of the relevant national law by the Commission. Again, an applicant must demonstrate that the Commission's assessment of the national law at issue is wrong, just as it would have to do with regard to an erroneous factual basis of a decision. See Prek and Lefèvre (n 37) 392.

92 Lenaerts and others (n 29) 159.

93 Witte speaks about 'lower boundary' since the Court only has to ascertain whether a Member State did enough to transpose a directive. Any additional national rules or specificities do not have to be addressed by the Court. See A Witte, 'When does national law transpose a directive?' (*European Central Bank*, 6-7 October 2016), 255 <www.ecb.europa.eu/pub/pdf/other/escblegalconference2016201702.en.pdf> accessed 2 November 2019.

at the relevant Union law at hand. Such an approach would ignore the country-specific implementation and seems to be too general to provide effective judicial protection in light of the national rules at hand. Looking at this procedure, it seems again questionable whether reference to the approach with respect to national law in judgments adopted in this context is an appropriate solution in an Article 4(3) situation.

It is nevertheless interesting to observe how the CJEU imputes the burden of proof on the Member States involved on the basis of their Union obligations. As mentioned before, the SSM Regulation does not include any reference to the allocation of the burden of proof in case of an ECB decision based on national law. However, the obligations imputed on the Member States in the case of an action of infringement may imply a general duty for Member States – and, as such, for NCAs in case of SSM procedures – to provide the requested and necessary information for assessing the national rules at issue.

Taking these lessons learned from other fields into account, the next Section of the paper brings forward possible alternative solutions at the CJEU's disposal in the context of ECB decisions based on national law.

4. Alternative administrative solutions for the CJEU in relation to ECB decisions based on national law

The novelty of a Union institution applying national law seems to put the CJEU in a difficult position. The paragraphs in Section 3 discussed the CJEU's approach in the recent cases handling ECB decisions based on national law, as well as case law related to other contexts in which national law played a role. These discussions illustrate that the CJEU's ability to ensure a proper interpretation of the national law at stake and, as such, ensure effective judicial protection in such cases is not clear cut. This Section looks into ways to strengthen the judicial protection with respect to the national law on which ECB decision may be based. It first discusses useful elements taken from other fields, discussed in Section 3, and subsequently further ideas to increase the CJEU's possibilities to ensure effective judicial protection in these cases.

The previous Section shows that a simple *mutatis mutandis* application of other fields in which the CJEU is facing national law will not be satisfying. Where the national law is considered to be a question of fact, i.e. in case of preliminary rulings and actions for infringements, the CJEU strictly distinguishes between its own role and the role of the national courts. It stays away from interpreting national law and leans on the interpretation provided by the national court of the relevant national law instead. This approach seems logical where the national law is considered to be a question of fact. In these cases, the

facts consist of the legal national context and the actual application and implementation of the national rule, which comprises the interpretation of such national rule by the national courts. These 'facts' must be established to answer the question of law. This approach seems however too limited with respect to national law where it is a question of law, as in an Article 4(3) situation. The CJEU must not simply gain information about how that law is interpreted and applied in a national context, but it may also need to actually interpret that law as it is part of the question of law at issue. National judgments seem to be the right starting point for this, but, as discussed in Section 2, it is likely that they may not provide a satisfying interpretation, if an interpretation is provided at all by a national court of the relevant rule, in order to ensure effective judicial protection. The General Court also acknowledged this gap by suggesting it would need to interpret national law itself.[94] This solution brings us, however, back to the challenges identified in Section 2. Regardless of the differences, both the preliminary ruling and action for infringement do have interesting features with respect to gaining information about national law, which could be helpful tools for the CJEU when reviewing an ECB decision based on national law. These are further discussed below.

The action for annulments in the context of trade mark cases are more similar to, and therefore perhaps more helpful in finding a solution for, the current discussion. Although the legislator addresses the national law as a mere question of fact by including a burden of proof on the claimant, the national law has the function of a question of law in trade mark cases.[95] This may explain the CJEU's broad interpretation of its jurisdiction with respect to the relevant national law in these cases. The review of an Article 4(3) decision would probably require a similar, or perhaps even more far-reaching approach, since it is a pure question of law. In the trade mark cases, the CJEU refers to the specific context of trade mark rules to reason its broad interpretation, such as the grounds for actions of infringement included in the Trade Mark Regulation and a duty to proof for the claimant that it is entitled under the national law applicable to lay claim to a right. Unfortunately, the SSM Regulation does not provide for such specificities, but Article 4(3) does refer explicitly to national law in general. One can imagine that the CJEU is willing to find a way to broaden its scope of review to national law in an Article 4(3) situation as well, and uses a broad reading of the SSM Regulation (secondary legislation) to broaden its jurisdiction under the Treaty. At the same time, contrary to the trade mark cases in which the CJEU justified its far-reaching approach by stressing the importance of guaran-

94 *Crédit mutuel Arkéa v ECB* (I) (n 9) para 132 and *Crédit mutuel Arkéa* v *ECB* (II) (n 9) para 131. See the reference to this statement in the judgment in appeal: *Crédit mutuel Arkéa* v *ECB* (n 7) para 99. See Section 2.

95 See Section 3.

teeing a person's rights granted under Union law,[96] decisions based on national law in the context of Article 4(3) of the SSM Regulation may actually be held against the persons at issue. Nonetheless, a limited review of the national law seems still be detrimental to guaranteeing an effective judicial protection against ECB decisions and, as such, a broader approach of the CJEU's competences seems necessary and justifiable in the authors view.

Thus, assuming the CJEU must, in line with the trade mark cases, have the possibility to confirm the content, conditions of application and the scope of the rules of the national law on which an ECB decision is based, it must be seen how the CJEU can do so with respect to national law. As pointed out by Advocate General Bot, the Brocard *iura novit curia* does not extend to national law, of which the EU judicature is not deemed to be aware.[97] How then must the national law be interpreted in these cases?

A practical solution may be found by increasing the applicant's role. Prek and Lefèvre use a broad interpretation of Articles 76(d) and 81(c) of the Rules of Procedure of the General Court, and Articles 120(c) and 142(b) of the Rules of Procedure of the Court of Justice, to assume a first burden of proof for the applicant similar to what is laid down in the trade mark regulations.[98] They acknowledge that this would mean 'a higher level of requirement on the part of the applicant for the plea to be declared admissible'.[99] Applicants should, in such cases, not only provide clarity about the object of their pleas, but also of applicable laws. They consider this to be justified because the CJEU is not in a position to do so.[100] In the authors' view, there seems to be an unreasonable increase of the burden of proof on credit institutions given the differences between the trade-mark situations and an Article 4(3) situation (see above). Due to the lack of possibilities for the CJEU to review national law in case of a 'question of law', the applicants are worse off in Article 4(3) situations. Increasing the role of NCAs in this respect may be useful, in line with the general obligation to provide information, imposed by the CJEU on Member States, in

96 *OHIM* v *National Lottery Commission* (n 52) paras 43-44.

97 *Case C-530/12 P OHIM v National Lottery Commission [2014] EU:C:2014:186*, Opinion of the AG Bot, para 71.

98 Prek and Lefèvre (n 37) 393-394. Requesting this information about the national law from the parties via a measure of organization or a measure of inquiry (cf Rules of Procedures of the General Court [2015] OJ L105/9, ch 6 and Rules of Procedures of the Court of Justice [2016] OJ L217/69, ch 7) does not seem possible, given the different purposes of those requests. These measures must respectively ensure an efficient conduct of the procedure and prove the veracity of the facts (cf Lenaerts and others (n 29) 764-773), while more information about the interpretation of the national law at issue is necessary in Article 4(3) cases.

99 Prek and Lefèvre (n 37) 395.

100 ibid 395.

case of actions for infringements. Regardless, there seems to be an unjustified difference in judicial protection compared to the judicial protection available in the case of 'normal' ECB decisions based on EU law. Although this might become practice due to the lack of alternatives, it would, in the authors' views, be more appropriate to look at possibilities for the CJEU to review national law.

First, the experts on national law of the CJEU's research and documentation Directorate[101] could be asked to provide assistance with respect to the national laws at stake.[102] These experts prepare research notes on approaches taken in national legal systems to be able to make comparisons of national laws on request of one of the courts of the CJEU.[103] This system could possibly be used more intensively, not only for comparisons to national law, but also in order to better understand the national rules at hand in the case of decisions taken pursuant to Article 4(3) of the SSM Regulation.

Having regard to the elements referred to above, in the authors' view, it would be important to envisage a system allowing the CJEU to ask questions to the highest relevant national competent court. The authors believe that such a system would ensure a more effective judicial protection in the case of an ECB decision based on national law, due to better knowledge of the national law at hand as well as the possibilities in such case to ensure unity of national law within a Member State in general. The latter could otherwise be at stake, since the CJEU would rule about the interpretation of national law without the involvement of a national court, even though such an interpretation is normally the responsibility of the (highest) competent national court. The highest national competent court should, therefore, be in a position to give its opinion about, or provide a formal ruling on, the national law at stake. Informal cooperation, such as the informal network of Councils of States and Supreme Administrative Jurisdictions of the Union, could first of all facilitate a closer cooperation and, consequently, a better understanding by the CJEU of the national law at hand.[104]

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101 See 'Research and Documentation Directorate' (CURIA) <https://curia.europa.eu/jcms/jcms/Jo211968/> accessed 2 November 2019.

102 See also Prek and Lefèvre (n 37) 395.

103 See 'Research and Documentation Directorate' (*CURIA*) <https://curia.europa.eu/jcms/jcms/Jo211968/> accessed 2 November 2019 and K Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52(4) The International and Comparative Law Quarterly (Lenaerts) 873, 900 and 906. The CJEU often uses the comparative law method to – in Lenaerts' words – *take the pulse* of national legal systems in order to find the best solutions or to ensure a solid foundation of its decisions. This method could be helpful too. See, for a discussion of the use of the comparative law method when judging the compatibility of a national provision with the objectives of the Union. See Lenaerts (above), 898-905.

104 The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. See 'History' (*ACA Europe*) <www.aca-europe.eu/index.php/en/historique-en> accessed 2 November 2019; cf JH Jans, S Prechal and RJGM Widdershoven (eds), 'Europeanisation of Public law' (2nd edn, 2015) (Jans, Prechal and Widdershoven) 365.

Furthermore, it may be of interest to explore the possibility of involving the national courts on the basis of the principle of sincere cooperation, as laid down in Article 4(3) TEU. Could the CJEU require, for instance, that the national courts, in reference to this obligation, provide information or interpretations about the national law needed to answer the question of law about national provisions in a case? A more far-reaching solution, which would better guarantee the national court's last say, would consist of the introduction of a reverse preliminary procedure.[105] The national court would then be requested to provide a ruling about the validity of national law. However, a binding national ruling would affect the CJEU's exclusive competence to rule on the validity of ECB decisions, which the CJEU would probably not accept without a legal basis in the Treaty.[106] The authors are, moreover, aware of the possible lack of sufficient legal ground for such a procedure. However, given the novelty of a Union institution applying national law, one could consider whether the CJEU could base such a reversed preliminary request on the principle of sincere cooperation as laid down in Article 4(3) of the TEU. As elaborated upon by Jans, Prechal and Widdershoven, this Article is more often used to develop forms of judicial cooperation other than the institutional form of cooperation within the preliminary procedure.[107] Perhaps this could also provide legal ground for finding an appropriate solution to ensure effective judicial protection in an Article 4(3) situation. Needless to say, this would require a broader approach than the one currently taken by the CJEU with respect to both the possibility of filing such request to a national court and its exclusive jurisdiction to review ECB decisions, and may, for this reason, not yet be a feasible solution in the current legal framework.[108]

Alternatively, the authors consider that this type of relationship between the CJEU and the national courts could be envisaged, under the current legislative scenario, via the use of Article 24(2) of the Statute of the Court of Justice of the European Union, which provides that "*The Court may also require the Member*

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105 This has been more often suggested by scholars. See for instance: HCH Hofmann, 'Composite Decision Making Procedures in EU Administrative Law' in HCH Hofmann and AH Türk (eds), *Legal Challenges in EU Administrative Law* (2009) 159; Alonso de León (n 24) 357.

106 In the case *Berlusconi and Fininvest*, the Court confirmed its exclusive competence to review ECB decisions, including national non-binding preparatory measures. See *Berlusconi and Fininvest* (n 20) paras 42-46: according to the Court, only in cases where a division of powers was aimed at by the legislator, the national court has to ensure judicial protection. If no division of powers is intended, the Court is competent to review the final EU decision, including any national non-binding preparatory measures.

107 Jans, Prechal and Widdershoven (n 104) 362. See, for examples of such other forms of judicial cooperation, 362-365.

108 One could also consider a solution as proposed by Alonso de León (n 24) 357: he suggests to approach an inverse preliminary ruling as an incident procedure, and amend the Statute of the Court of Justice, the Rules of Procedure of both European Courts and a directive to ensure all necessary national law amendments, to make this possible.

States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings". Although national courts are not formally mentioned in this provision,[109] some authors have pointed out that, in the past, the CJEU has addressed this type of requests to national courts regardless, and have stated that this provision expressed a quite general principle that the CJEU has interpreted in a broad way.[110] The authors consider that the wording of Article 24(2) referred to above and the way it has previously been interpreted by the CJEU might make it a useful tool for the CJEU to address the issue relating to the interpretation of national law. This could be seen as one of the ways for the CJEU to use and implement the principle of sincere cooperation with the aim to require the national courts to actually provide the requested information. This mechanism would create the possibility of a constant dialogue between the CJEU and the national courts, with the aim of ensuring a coherent interpretation of the provisions of national law by the CJEU.

When resorting to the system laid down in Article 24(2) of the Statute of the Court of Justice of the European Union it must be borne in mind that it does not lead to a binding national ruling. As pointed out by Advocate General Kokott, it is not 'a binding judicial ruling on the legal position which applies to a particular set of facts'.[111] Although a binding national ruling would perhaps be helpful, the authors believe a non-binding opinion of a national court is more in line with the CJEU's exclusive competence to review ECB decisions pursuant to Article 263 TFEU.[112] In this respect, Article 24(2) of the Statute of the Court of Justice of the European Union could be considered as a tool for the CJEU to fulfil its own exclusive tasks and duties pursuant to the Treaties, and consequently as a tool to fulfil its ultimate competence to have jurisdiction over acts adopted pursuant to EU law. Therefore, in light of the above, the authors believe that the consultative procedure laid down in Article 24(2) could be a helpful tool for the CJEU to review decisions taken by the ECB based on national law and pursuant to Article 4(3) of the SSM Regulation. The authors also con-

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109 On the contrary, it is worth mentioning that this mechanism is formally envisaged by Article 101 of the Rules of Procedure of the Court of Justice even though in the context of a preliminary ruling. In this respect, see Article 101 of the Rules of Procedure of the Court of Justice [2016] OJ L217/69, art 101 'Request for clarification', which states that: '1. Without prejudice to the measures of organisation of procedure and measures of inquiry provided for in these Rules, the Court may, after hearing the Advocate General, request clarification from the referring court or tribunal within a time-limit prescribed by the Court' and '2. The reply of the referring court or tribunal to that request shall be served on the interested persons referred to in Article 23 of the Statute'.

110 See in this respect C Amalfitano, M Condinanzi and P Iannnuccelli (eds) 'Le regole del processo dinanzi al Giudice dell'Unione Europea' (2017) 149.

111 Opinion of AG Kokott (n 54) para 52.

112 *Berlusconi and Fininvest* (n 20).

sider that further analysis should be performed regarding the selection of which national court should receive a formal request to supply information pursuant to Article 24(2) of the Statute of the Court of Justice of the European Union. In particular, given the nature of Article 4(3) of the SSM Regulation, the addressee of the request could vary depending on the role of national courts in the various legal orders of the Member States.[113] As mentioned above, the authors preliminarily consider the highest competent national court to be the court solely eligible to receive such a request. This approach would ensure the possibility for the CJEU to receive a more settled interpretation of the relevant national law based on a position adopted by the highest national judicial authority.

5. Conclusions

The aim of this paper is to analyse the judicial protection in the case of ECB decisions based on the new structure envisaged in Article 4(3) of the SSM Regulation. According to this provision, the ECB, in carrying out the tasks conferred on it, has the power and the duty to apply all relevant Union law, including, where the Union law is composed of Directives, national legislation transposing them. A decision adopted by the ECB pursuant to Article 4(3) of the SSM Regulation should be reviewed in principle by the CJEU according to Article 263 TFEU. However, questions arise with respect to the CJEU's possibilities to review national law on which an ECB decision may be based, and thus whether effective judicial protection can be guaranteed in these cases.

As discussed in Section 2, the CJEU has recently been asked to review such ECB decisions in various cases. The General Court concluded that the ECB was required to apply both relevant Union law and national laws pursuant to Article 4(3) of the SSM Regulation, and that it consequently had to assess the legality of the contested decision in light of both laws. Thus, it needed to establish not only the meaning of the relevant Union law provisions underlying the ECB decisions, but also that of the national law at hand. It accepted, in principle, the interpretation given to them by national courts, but also underlined in one case the need for it to interpret national law itself. However, taking the position of national courts as the sole benchmark to verify the correctness of the ECB's interpretation of national law seems not to cover all possible cases, especially where relevant national courts do not provide an interpretation of the relevant national law, or in cases of controversial or conflicting national judgments on the same national provisions. Also, an interpretation by the CJEU of national

[113] A similar construction is proposed by Alonso de León (n 24) 358, in the context of an inverse preliminary ruling procedure: he proposes contact points per Member State, who either answer the question directly or forward it to the competent national court according to national rules.

law is not as simple as it sounds: thus, the CJEU's approach of reviewing ECB decisions based on national law is, in the authors' opinion, not fully satisfying in order to ensure effective judicial protection.

The authors concluded that, as the national law involved maintains, in the authors' view, its national character, the CJEU's competences may be limited due to the wording of Articles 263 and 256 TFEU. This may especially cause friction since the national law must be qualified as a question of law, instead of a question of fact, in this context. As a consequence, this would require a closer involvement of the CJEU. Even assuming the competence of the CJEU to review the national law in this context, the closer involvement will be challenging to live up to.

A possible rationale for the CJEU's competence to review national law in this case could be found in the trade mark cases. As discussed in Section 3, in these cases the CJEU showed its willingness to interpret broadly its competences with respect to national law in order to ensure effective judicial protection. It referred to specific elements in the Trade Mark Regulation justifying the broader interpretation of the scope of its jurisdiction, such as the additional grounds for an action for annulment in that Regulation. The relevant secondary legislation was thus used to broaden the CJEU's jurisdiction. Such elements are, however, not included in the SSM Regulation. The General Court found, nonetheless, a justification for a broader interpretation via the explicit reference to national law in Article 4(3) of the SSM Regulation. This seems a way to gain judicial protection for the national law at issue. Although the Court of Justice did not explicitly adopt this view, it did review the relevant national law. Had the CJEU refused to apply and interpret national laws on which an ECB decision is based, an applicant would very likely not have any judicial protection with regard to such national law. Due to the exclusive competence of the CJEU to review ECB decisions, as recently and explicitly confirmed in the *Berlusconi and Fininvest* case, the national courts will assumingly not be able to provide any judicial protection. It is thus questionable whether there is a real alternative to ensure effective judicial protection other than the CJEU directly applying and interpreting the national law at hand.

The approaches taken by the CJEU in other fields, where national law is also at stake, provide interesting elements that can be used to find ways in which the CJEU would be able to apply and interpret the national law at hand. However, a simple solution such as applying these approaches *mutatis mutandis* to the case discussed is not possible in the authors' view, due to the differences between these fields and an Article 4(3) situation. In this respect, cases in the field of the Trade Mark Regulation are the most similar to the case discussed, as these cases also concern actions for annulment and the national law also has the function of a question of law in that context. That being said, national law has

quite a limited and precisely defined role and is treated more as a question of fact in the applicable rules. The national law may only be relied upon in a very specific situation, and the Trade Mark Regulation describes the burden of proof in such cases. In an Article 4(3) situation, national law is not limited to a specific situation. The provision of the SSM Regulation contains a general obligation according to which national law must be applied by the ECB, and the applicable rules do not refer to any burden of proof to establish the national law at hand at all. The CJEU must thus gain knowledge about the national law in question in order to be able to apply and interpret it. Even if, in an Article 4(3) situation, the CJEU would take a similar approach and treat the national law as a mere question of fact, this solution is not that straightforward. There seems to be no easy answer to the question of which party would be imputed with the burden of proving the content of the national law. Allocating this responsibility to the ECB (the administrative body applying the national law) may be difficult, given the fact that it would again be a Union institution that has to interpret the national law. Imputing this burden on the credit institution may create an unfair balance between the administrative body adopting the decision and the addressee of such a decision. A middle ground may be to resort to the support of the NCA involved, even though it would not be party to the case. The NCA would then provide the necessary information about the national legal context on the basis of the general duty of loyal cooperation – upon the ECB's request.

As regards the other proceedings discussed in the paper, namely the preliminary ruling and the action for infringement, national law is to be considered as a real question of fact. Establishing facts requires a very different approach than answering a question of law, while the latter needs to be answered in an Article 4(3) situation. The General Court's stance that the scope of national laws must be assessed with regard to the interpretation given to them by national courts is also usually applied in case of preliminary rulings or actions for infringements – thus, fields in which the national law is a question of fact. Where national law is a question of fact, and therefore necessary to establish the facts, one must take into account the national court's interpretation of the national law in order to establish the 'facts' correctly, namely to establish the actual implementation and interpretation of the national law at issue. This is different where the national law is a question of law, and must be interpreted in order to come to a ruling. Interpretations given by national courts seem then to be a logical starting point for the CJEU to interpret national law but, in the authors' view, more tools will be necessary for a satisfactory judicial review of the national law at stake.

In light of this, the authors brought forward the possibility of using alternative means to deal with such situations and enhance the dialogue between the CJEU and the national courts. The authors suggested increasing the informal cooperation, via networks for instance, or considering a more creative and

possibly less feasible scenario where one would broadly interpret Article 4(3) TEU to create a legal basis for a reverse preliminary procedure. Another more feasible tool could be the use of the mechanism envisaged by Article 24(2) of the Statute of the Court of Justice of the European Union, on the basis of which the CJEU may be able to request additional information from national courts. This would be considered a non-binding opinion with respect to the national law. Such an opinion would need to be taken into account by the CJEU, without it being able to affect the CJEU's exclusive competence to review ECB decisions. This approach may contribute to establishing a more intense cooperation between the CJEU and national courts, in order to avoid any possible drawbacks of having a Union court interpret national laws.

Therefore, taking into account the elements mentioned in this paper, as well as the legal argumentations brought forward by it, the authors' view is that finding actual ways in which the CJEU can ensure effective judicial protection with respect to the national law on which an ECB decision may be based pursuant to Article 4(3) of the SSM Regulation could be quite challenging. In particular, the current structure of Article 4(3) of the SSM Regulation and the way the provision is conceived carry forward concrete risks of creating a system whereby the right to effective judicial protection could be affected in many instances. To this end, the authors are of the view that possible impacts on the right to effective judicial protection would be concrete not only in a situation where the CJEU fully lacks jurisdiction, but also where the scope of the CJEU's jurisdiction would be limited – in terms of the depth of its assessment – due to the nature of the scrutiny performed over national law.

That being said, and in order to overcome such a complex legal issue – whose relevance exceeds the field of banking supervision, and represents a more fundamental problem in both EU administrative and constitutional law in case of judicial protection in composite procedures – one would require firstly a broad interpretation of the CJEU's competences and, subsequently, a creative use of the CJEU's toolkit to apply and interpret the national law without putting the uniformity of such law at stake. This approach would then allow the CJEU to adequately and effectively deal with this novelty under Union law.