

The Single Supervisory Mechanism Regulation: Questions of *ne bis in idem* and implications for the further integration of the system of fundamental rights protection in the EU

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Abstract

This article discusses the enforcement framework of Regulation No. 1024/2013 (the Single Supervisory Mechanism Regulation, or ‘SSMR’) in light of the potential *ne bis in idem* situations which may arise, both in the interaction between the different modes and instruments of enforcement available to the European Central Bank (ECB) and National Competent Authorities (NCAs) under the SSMR, as well as in relation to national laws.¹ Shared enforcement of the rules for credit institutions under the SSMR transcends the familiar legal divide between the EU and the Member States, and the division of tasks and competences between national and EU authorities that is characteristic of EU law. The question raised here is whether the integrated enforcement architecture of the SSMR is matched by a sufficiently integrated system of fundamental rights protection in the EU, as viewed through the ‘lens’ of the *ne bis in idem* principle.

Keywords

Single Supervisory Mechanism Regulation, Enforcement Measures, Charter of Fundamental Rights of the EU, *Ne Bis In Idem*

1. Due to the fact that the legal framework examined here came about relatively recently, the research for this article was necessarily limited to an assessment of the *potential* risks that can be identified in that connection.

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I. Introduction

A. Subject

This article examines the extent to which the integrated enforcement architecture of the SSMR² is matched by a sufficiently integrated system of fundamental rights protection in the EU. For this purpose, the focus is on one specific Charter right: the *ne bis in idem* principle (Article 50 of the Charter of Fundamental Rights of the EU (the Charter),³ Article 4 of Protocol 7 of the European Convention on Human Rights (ECHR)). *Ne bis in idem* is a fundamental right that bars the possibility of a defendant being prosecuted repeatedly for the same offence, act or facts.⁴ The guarantee aims to ensure that judicial and other authorities can only confront a subject with the legal consequences of a single historical event at one period in time – regardless of whether this takes place in a single set of proceedings, or several well-coordinated sets of proceedings forming a ‘coherent whole’.⁵ One reason for focusing on *ne bis in idem* in particular is that, due to the negative enforcement consequences that follow from it, the guarantee is a particularly useful instrument to identify (wider) gaps in the EU system of protection of fundamental rights. Another reason is that Article 50 of the Charter provides a threshold for the protection to be achieved under that provision where it states that ‘no one shall be (...) tried or punished again (...) within the Union’.⁶

Overall, the findings are that the Single Supervisory Mechanism Regulation (SSMR)⁷ requires a high level of coordination between the ECB and the national authorities, which diminishes the risk of any accumulation of ‘punitive’ measures (that is, measures falling within the scope of application of Article 6 ECHR under its ‘criminal head’ and Article 4 of Protocol 7 ECHR) being imposed on the same entity. The risk of violations of the *ne bis in idem* principle is not however a priori excluded in the SSMR. Three parallel modes of enforcement can be distinguished in the SSMR which, depending on the interpretation of some of the provisions of the SSMR concerning specific aspects of the division of competences between the ECB and the national authorities, may leave

2. 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 L 287/63.

3. Charter of Fundamental Rights of the European Union, [2012] OJ C 326/391.

4. Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *PVC*, EU: C:2002:582, para. 59. In the *Franz Fischer* judgment, the ECtHR confirmed that Article 4 of Protocol No. 7 ‘is not confined to the right not to be punished twice but extends to the right not to be tried twice’. See, ECtHR, *Franz Fischer v. Austria*, Judgment of 29 May 2001, Application No. 37950/97, para. 29. See also, ECtHR, *Sergey Zolotukhin v. Russia*, Judgment of 10 February 2009, Application No. 1493/03. The prohibition of double punishment is therefore a corollary of the *ne bis in idem* principle. For more background reading see, inter alia, B. van Bockel, ‘The “European” *ne bis in idem* principle: Substance, Sources and Scope’, in B. van Bockel (ed.), *Ne Bis In Idem In EU Law* (Cambridge University Press, 2016), p. 13-52.

5. See, ECtHR, *A and B v. Norway*, Judgment of 15 November 2016, Application Nos. 24130/11 and 29758/11, para. 121. If several coordinated legal responses are brought against a subject that form ‘a coherent whole’, an additional requirement from the case law of the ECtHR is that those ‘accumulated legal responses do not represent an excessive burden for the individual concerned.’

6. Emphasis added. As will be discussed later on in this article, this phrase is open to differences in interpretation, which could lead to different possible answers to the question of whether the SSMR is matched by a sufficiently integrated system of EU fundamental rights protection.

7. 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 L 287/63.

some scope for *ne bis in idem* violations.⁸ A second type of situation that may leave scope for a breach of the *ne bis in idem* principle is when a licence is withdrawn, and an administrative pecuniary penalty is simultaneously or consecutively imposed on that same entity.

This may be different in situations in which *some* aspects of the factual conduct of a supervised entity nevertheless fall outside of the scope of the SSMR. National regulators for example remain in charge of supervisory tasks falling outside the scope of the SSMR in areas such as consumer protection, the prevention of money laundering, payment services, and ‘conduct of business’ regulations, and conduct that qualifies as ‘the same act’ (in the sense of *idem*) may infringe both the SSMR and the relevant national legislation. If this leads to the imposition of separate penalties in different proceedings that do not form a ‘coherent whole’, this will violate the *ne bis in idem* principle contained in Article 50 of the Charter.

It is also possible that aspects of the litigious conduct of a supervised entity incidentally infringe national laws that are not enforced by an NCA such as for example criminal or tax law. In itself, this latter possibility is unlikely to be problematic for the functioning of the SSMR because such situations normally fall outside of the scope of application of the Charter.⁹ However, if this leaves supervised entities exposed to a risk of being ‘tried or punished again (. . .) for an offence for [which that entity] has already been finally acquitted or convicted *within the Union*’ this arguably leaves a gap in the protection afforded by Article 50 of the Charter, and some arguments are presented and discussed in article.¹⁰ It is submitted here that, in keeping with the wording of Article 50 of the Charter and the case law of the European Court of Human Rights (ECtHR), the resulting issues should be resolved through the adequate coordination of enforcement at both the EU and national levels. A question that subsequently arises is whether the Charter provides adequate protection in all situations *connected to* EU law, or whether it is the case that additional steps must be taken in view of deepening and widening integration in the EU, and to this effect, some suggestions are made

B. Outline of this article

Following this introduction, the enforcement architecture of the SSMR is described. The *ne bis in idem* principle is subsequently introduced and several developments in the case law of the CJEU on Articles. 51-53 of the Charter are discussed in order to identify the scope for violations of the *ne bis in idem* principle in connection with the SSMR. There are some situations under the SSMR itself, as well as a category of situations that are related to enforcement measures under the SSMR but fall outside of the scope of the Charter that may give rise to *ne bis in idem* issues. These issues provide an indication that further steps in the integration of the enforcement of EU law, like the SSMR, must be backed up by a more strongly integrated EU system of protection of fundamental rights.

8. A. Witte, ‘The application of national banking supervision law by the ECB: Three parallel modes of executing EU law?’, 21 *Maastricht Journal of European and Comparative Law* (2014), p. 97.

9. The EU’s continuing legislative activity has had the effect of widening the scope of application of the Charter also in respect of pre-existing national criminal laws.

10. Emphasis added.

2. The enforcement architecture of the SSMR

A. General

Several events during the recent economic crisis have demonstrated that the pre-crisis system of national banking supervision fell short of adequately safeguarding the financial stability of banks and credit institutions throughout Eurozone. Between 2010 and 2012, a plan to complement the economic and monetary union with a banking union gained political momentum.¹¹ One of the steps taken by the EU legislature was to adopt a new legislative framework for a common level of supervision in the Eurozone area that confers specific prudential supervision tasks upon the ECB.¹² Although the focus of this article is exclusively on the enforcement setup of the SSMR, it is nevertheless helpful to get a sense of the supervisory activities this involves.

The SSMR grants the ECB a supervisory role in whereby it directly and indirectly monitors the financial stability of banks and credit institutions in the participating Member States. The substantive rules to be applied by the ECB are found in, inter alia, the Capital Requirements Directive¹³ and the Capital Requirements Regulation,¹⁴ or: 'CRD IV/CRR', which are the legislative packages implementing, inter alia, the global standards on bank capital requirements from the Basel III Agreement into EU law. Although the Capital Requirements Regulation has brought together much of the substantive rules on banking regulation, other important rules to be enforced through the SSMR are still found in Directives, implemented in national laws. Article 4(3) of the SSMR stipulates that, for the purposes of carrying out the tasks set forth in it, the ECB is competent to apply 'all relevant Union law', including national legislation implementing Directives, and national legislation exercising any 'options' open to the Member States under the relevant Union law.

The supervisory powers of the ECB are determined 'in accordance with the objectives of the SSM Regulation'.¹⁵ The direct enforcement powers of the ECB under the SSMR are rather extensive, ranging from administrative powers to authorize credit institutions and assess qualifying holdings¹⁶ to powers concerning compliance and sanctioning.¹⁷ Amongst other things, the ECB has competences to safeguard the adequacy of internal capital in relation to the risk profile of a credit institution, and to enforce compliance with provisions on leverage and liquidity.¹⁸ The ECB may also take early intervention measures where capital requirements are violated. In the fulfillment of its tasks the ECB may request information from credit institutions and conduct all

11. Recitals 8-10 of the Preamble to the SSMR. See, amongst others, B. Wolfers and T. Voland, 'Level the playing field: the new supervision of credit institutions by the European Central Bank', 51 *Common Market Law Review* (2014), p. 1463; and A. Witte, 21 *MJECL* (2014), p. 89-109.

12. G. Lo Schiavo, 'From national banking supervision to a centralized model of prudential supervision in Europe: The stability function of prudential supervision in Europe', 21 *MJECL* (2014), p. 111.

13. 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 L 176/338.

14. Regulation No. 575/2013/EU of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, [2013] OJ L 176/1.

15. Article 16 of the SSMR.

16. Article 4(1)(c) and Article 15 of the SSMR.

17. Article 4 of the SSMR.

18. Article 5 of the SSMR.

necessary investigations,¹⁹ including on-site inspections.²⁰ All of these enforcement measures are binding, and are therefore capable of restricting the fundamental rights of a credit institution.²¹

B. Division of tasks and competences between the ECB and NCAS

The enforcement architecture of the SSMR is premised on the distinction between ‘significant’ and ‘less significant’ credit institutions.²² The ‘significance’ of a credit institution is assessed on the basis of five alternative criteria: (i) size; (ii) relevance for the economy of the EU or any participating Member State; (iii) volume of cross-border activities; (iv) ranking amongst the three most significant institutions in a participating Member State; and (v) direct public assistance. A credit institution will not be deemed as ‘less significant’ if the value of its assets exceeds €30bn, or alternatively, 20% of national GDP.²³ The ECB assumes the primary responsibility of directly enforcing compliance with regulatory requirements, where ‘significant’ credit institutions are concerned, while ‘less significant’ credit institutions in the Eurozone-countries continue to be supervised by the NCAs.

To this end, Article 6(6) of the SSMR re-delegates some of the powers of the ECB back to the national authorities in respect of ‘less significant’ credit institutions in Art. 6(6) SSMR. The ECB exercises oversight over the activities of national authorities²⁴ and it can decide at any time to exercise direct supervision over any one of these credit institutions, in order to ensure the consistent application of high supervisory standards.²⁵ The latter competence is somewhat ambiguous, however. It is important to point out that it is not clear whether the ECB can choose to intervene on a case-by-case basis, or whether such intervention will have the effect of ‘freezing’ the supervisory competence of the national authority in respect of that bank, either temporarily or permanently.

C. Enforcement ‘modes’: direct competences and powers of instruction

Although the ECB is responsible for the effective and consistent functioning of the SSM alone, national supervisory authorities play a significant role. EU banking regulation takes shape in a joint effort between the ECB and national supervisory authorities, which assist the ECB in the exercise of its tasks.²⁶ To this end, Joint Supervisory Teams (JSTs) have been established to conduct the day-to-day supervisory work, including data collection and analysis. These JSTs are made up of ECB staff as team leaders and staff from national authorities.²⁷

19. Article 10 and Article 11 of the SSMR.

20. Article 12 of the SSMR.

21. A. Witte, 21 *MJECL* (2014), p. 94

22. *Ibid.*, p. 93

23. Article 6(4) of the SSMR.

24. Article 6(7) of the SSMR.

25. Article 6(5)(b) of the SSMR. See also, B. Wolfers and T. Volland, 51 *CMLRev.* (2014), p. 1468; and A. Witte, 21 *MJECL* (2014), p. 94.

26. A. Witte, 21 *MJECL* (2014), p. 89.

27. The ECB was recently criticized by the European Court of Auditors in a special report for over-reliance on the NCA’s in the execution of its supervisory tasks through (inter alia) JST’s. See, European Court of Auditors, ‘Special report: Single Supervisory Mechanism – Good start but further improvements needed’, http://www.eca.europa.eu/Lists/ECADocuments/SR16_29/SR_SSM_EN.pdf.

Apart from the direct exercise of the competences of the ECB from the SSMR itself, the ECB also has extensive powers to instruct the national authorities to act. According to Article 6(3) of the SSMR, the national authorities 'shall follow the instructions given by the ECB when performing the tasks mentioned in article 4'. These powers are formally binding. The decision instructing the national authority is an act under EU law, which the national authority subsequently complies with by addressing a decision to the credit institution in question.²⁸ As Witte points out by drawing a comparison with the field of state aid, such instruction powers are rare but not wholly unparalleled in EU law.²⁹ The ECB may however instruct national authorities to make use of their powers under national law where the SSMR does not 'confer such powers on the ECB' (Article 9(1)(3) of the SSMR). Witte further argues that this provision 'appears to imply such a broad interpretation' that it 'would allow the ECB to 'have the final say in virtually every situation'.³⁰ This provision raises many interesting questions, not least as to whether such a provision is legal, as it appears to extend the ECB's powers of instruction beyond any specific competences attributed to it under the SSMR.

Article 4 of the SSMR (to which Article 6(3) of the SSMR refers) lists the full range of supervisory activities conducted at the national level. As previously mentioned, Article 6(6) of the SSMR re-delegates some of the powers of the ECB back to the national authorities in respect of 'less significant' banks. Article 6(3) refers back to Article 4 in general, without any distinction between 'significant' and 'less significant' credit institutions, so it appears that the ECB may instruct the national authorities to act both in respect of 'significant' and 'less significant' banks. There is however ambiguity in the wording of the SSMR on this point, which therefore means that this is only one possible interpretation of ECB's instruction powers.

Nevertheless, if the distinction between 'significant' and 'less significant' institutions permeates the whole of the SSMR (and all of its provisions must consequently be interpreted in the light of this distinction) there are at least two other possible interpretations of Article 6(3) of the SSMR. Under the first of those two interpretations, the ECB would only be able to instruct national authorities to take decisions under national law in respect of 'significant' supervised institutions. An alternative reading could be that that instructions to act addressed to national authorities would precisely only concern 'less significant' banks. This reading would perhaps accord better with the purpose of the distinction between 'significant' and 'less significant' banks within the framework of the SSMR, but it appears to be contradicted by Article 6(5)(a) of the SSMR, which states that the ECB may 'issue regulations, guidelines or general instructions to national competent authorities' (from which it would follow that the ECB cannot intervene in the supervision of 'less significant' banks in individual cases). Then again, there is also the very notable exception of the power to 'step in' and to take over the supervision of a bank, as per Article 6(5)(b) of the SSMR, that could be pointed out so that in the end, the SSMR is inconclusive on this point. These ambiguities also raise questions of *ne bis in idem* that will be further dealt with below.

D. A unicum in EU law: the ECB's competence to apply national law directly

Apart from the direct exercise of the competences of the ECB from the SSMR and the powers to instruct the national authorities, the SSMR provides the ECB with the power to 'apply the national

28. A. Witte, 21 *MJECCL* (2014), p. 98

29. *Ibid.*, p. 99

30. *Ibid.*, p. 103

legislation' implementing EU Directives (Article 4(3) of the SSMR). Because of the fact that a portion of banking regulation is still found in Directives (which essentially form a particular legislative instruction to the Member States, and do not apply directly unless in specific and established circumstances), the ECB needs recourse to the relevant national legislation in order to enforce those parts of EU banking regulation. The competence of an EU institution to apply national law is unprecedented in EU law and transcends the familiar divide between national and EU law.

Witte compares the direct application of national law by the ECB to the manner in which 'international law is implemented by states that follow the dualist tradition', arguing that the ECB's competence on this point could either be compared to a 'transformation' of ECB banking supervision powers into national law, or a 'command to apply' national law.³¹ The application of national law by an organ of an international organization would however seem to accord more with monist rather than with dualist theories of the relationship between national and international law, and the phrase 'command to apply' bears no apparent relation to any theory of the relationship between international and national law that this author is aware of.

Another explanation could be that Article 4(3) of the SSMR (directly) transfers *sovereignty* from the Member States to the EU. As Huet and Koering Joulin explain in their authoritative handbook on international criminal law, the concept of territoriality is a *fausse notion claire* which is subject to two assumptions: that of 'formal territoriality' and that of 'substantive territoriality'.³² In the formal sense, law is 'territorial' if its application is exclusively reserved for the authorities of a state.³³ In comparison to private law, criminal and administrative law are *formally territorial* because their application is exclusively reserved for the authorities and courts of the state that adopted those laws. The fact that a provision in an EU Regulation gives an EU institution the competence to apply national administrative law (in the sense of *lex fori*) is therefore a matter of formal territoriality, and therefore of *sovereignty*. The result is that some sovereignty is now shared between the EU and national levels insofar as the application of the relevant provisions of national legislation is concerned, giving both an EU institution as well as the NCAs the competence to apply that legislation. Otherwise, it would be difficult to see how Article 4(3) of the SSMR could function in practice. A conclusion is that the SSMR establishes a form of executive federalism that differs significantly from the way in which sovereignty is generally 'transferred' in the EU context. It is, however, also clear that this legislative move is born out of practical necessity and this (perhaps) places some limitations on the extent to which more general conclusions could (or should) be drawn from it.³⁴

E. Infringements, penalties, and withdrawal of licences

The ECB has the competence, in accordance with Article 18(1) of the SSMR, to impose 'administrative pecuniary penalties' on a credit institution of up to twice the amount of profits gained or

31. *Ibid.*, p. 106-108.

32. A. Huet and R. Koering Joulin, *Droit Pénal International* (Presses Universitaires de France, 2005), p. 200-201.

33. *Ibid.*, p. 201. In other words, formal territoriality is synonymous with the *lex fori*. In the substantive sense, jurisdiction is territorial if it is linked to a place rather than to a person.

34. The ECB's competences also raises legal questions, such as the question of which court is competent to review the legality of the ECB's actions when it applies national law. These questions however deserve separate discussion elsewhere.

losses avoided, or up to 10% of annual turnover, and to impose sanctions in accordance with Regulation (EC) 2532/98³⁵ for ‘failure to comply with ECB decisions or regulations’.³⁶ Furthermore, as stipulated by Article 14(4) of the SSMR, the ECB has the competence to withdraw the authorization of a credit institution. The ECB also has the competence to remove members from the management bodies of credit institutions (Article 16(2)(m) of the SSMR).

In situations covered by Article 18(5) of the SSMR (breach of national law), the ECB cannot impose administrative pecuniary penalties, but it can require NCAs to open proceedings against significant supervised entities leading to the imposition of sanctions (Article 6(3) of the SSMR). The ECB has no competence to impose sanctions on natural persons, but the NCAs are competent to impose administrative penalties on natural persons and to impose administrative penalties where there is a breach of national law, including a national law that transposes a Directive.

The different ‘modes’ of enforcement which have been previously discussed should be kept in mind, in particular the ECB’s far-reaching instruction powers. The ECB can effectively impose sanctions *indirectly*, by requiring national authorities to act on their instructions. Article 18(5) of the SSMR however provides an adequate safeguard against any duplication of penalties, in the form of Article 18(1) of the SSMR where it states that ‘*in the cases not covered by paragraph 1 of this article* the ECB may require national competent authorities (...) to ensure that appropriate penalties are imposed’.³⁷

With regards to the sanctions contained in Article 18(7) of the SSMR, an ECB regulation or decision may also apply to a ‘less significant’ entity in which case the ECB retains the exclusive competence to impose sanctions. The power to revoke the licence of a supervised entity lies exclusively with the ECB.

3. The *ne bis in idem* principle in EU law

A. Introduction

Before examining the *ne bis in idem* questions raised by the different aspects of the enforcement ‘architecture’ of the SSMR, the main features of the *ne bis in idem* principle will be (briefly) identified in the following paragraphs.

The principle of *ne bis in idem* is a fundamental principle of law, which restricts the possibility of a defendant being prosecuted repeatedly for the same offence, act or facts.³⁸ In essence, what the principle requires from judicial and other authorities is that a subject is confronted with the legal consequences of a single historical event only *once*, regardless of whether this takes place in a single set of proceedings or several well-coordinated sets proceedings which form a ‘coherent

35. Council Regulation No. 2532/98/EC of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, [1998] OJ L 318/4.

36. Article 18(7) of the SSMR.

37. Emphasis added.

38. Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99P *PVC*, para. 59. In the *Franz Fischer* judgment, the ECtHR confirmed that Article 4 of Protocol No. 7 ‘is not confined to the right not to be punished twice but extends to the right not to be tried twice’, ECtHR, *Franz Fischer v. Austria*, para. 29. See also, ECtHR, *Sergey Zolotukhin v. Russia*, para. 110. The prohibition of double punishment is therefore a corollary to the *ne bis in idem* principle. For more background reading see (inter alia): B. van Bockel, in B. van Bockel (ed.), *Ne Bis In Idem In EU Law*, p. 13-52.

whole'.³⁹ In areas of EU law characterized by different forms of shared enforcement between the national and EU authorities, this requires a high degree of coordination of enforcement measures at both the EU and national levels. For most areas of EU law potentially affected by this broad requirement from the case law of the ECtHR, its possible implications are still very much understudied.⁴⁰

The *ne bis in idem* principle comprises two main elements: 'bis' and 'idem'. As to the former – 'bis' – the guarantee only bars further proceedings once the outcome of the first set of proceedings has become irrevocable, or *final*.⁴¹ According to established case law, this is the case when 'no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them.'⁴² The requirement from this is that the outcome of the first proceedings must be 'final' in order to trigger the protection offered by *ne bis in idem*. However, in *A and B v. Norway*, the Grand Chamber nuanced this requirement by holding that this does not mean that proceedings which are 'sufficiently connected in time' and form a coherent whole must be conducted 'simultaneously from beginning to end'.⁴³

There are, generally speaking, two different ways of approaching the question of whether the basis for the prosecution is 'the same' (*idem*): by taking into account the historical facts (the 'act'), or the legal qualification (the 'offence') of the conduct at issue in the first and second set of proceedings.⁴⁴ It is now established case law before both the ECtHR and the CJEU (although only in its case law on Article 54 of the Convention Implementing the Schengen Agreement) that the *only* relevant criterion for its determination is whether both sets of proceedings concern *substantially the same facts*.⁴⁵ The circumstance that those facts may fall under different legal qualifications or provisions is irrelevant in this regard, even if the elements of those offences under the law differ substantially across different fields of law. In the case of *Lucky Dev*, the ECtHR clarified that bookkeeping fraud and the filing of an incorrect tax statement are sufficiently separate to constitute different substantive facts for the application of the *ne bis in idem* principle.⁴⁶

Problems may arise if the first proceedings merely concern one or more aspects of the litigious behavior regulated under provisions of administrative law such as the failure to comply with a road traffic regulation or the failure to control the vehicle, whereas the second proceedings under criminal law regard more serious aspects of the event, such as involuntary manslaughter or the causing of severe bodily harm.⁴⁷ As previously mentioned, the Grand Chamber of the ECtHR in its recent judgment in *A and B v. Norway* confirmed that the *ne bis in idem* principle contained in Article 4 of Protocol No. 7 ECHR leaves Member States of the Council of Europe free to 'choose complementary legal responses to socially offensive conduct', provided, however, that these

39. See, ECtHR, *A and B v. Norway*, para. 121. If several coordinated legal responses are brought against a subject forming such a coherent whole, an additional requirement from the case law of the ECtHR is that those 'accumulated legal responses do not represent an excessive burden for the individual concerned.'

40. One possible reason for this is that this requirement has only very gradually surfaced in the case law of the ECtHR.

41. See, Joined Cases C-187/01 and C-385/01 *Gözütok and Brugge*, EU: C:2003:87. See also, Opinion of Advocate General Colomer in Case C-297/07 *Staatsanwaltschaft Regensburg v. Klaus Bourquain*, EU: C:2008:206, para. 58.

42. ECtHR, *Sergey Zolotukhin v. Russia*, para. 107.

43. ECtHR, *A and B v. Norway*, para. 134.

44. For a discussion of the case law and the debate in legal literature see, inter alia, B. van Bockel, *The ne bis in idem principle in EU law* (Kluwer Law International, 2010), Chapter 4, para. 10 et seq.

45. Case C-436/04 *Van Esbroeck*, EU: C:2006:165; Case C-150/05 *Van Straaten*, EU: C:2006:614; ECtHR, *Sergey Zolotukhin v. Russia*.

46. ECtHR, *Lucky Dev*, Judgment of 27 November 2014, Application No. 7356/10.

47. The ECtHR has struggled in its case law to deal with these issues.

responses ‘form a coherent whole so as to address different aspects of the social problem involved’, and that ‘the accumulated legal responses do not represent an excessive burden’.⁴⁸ It follows directly from this that *ne bis in idem* issues that may arise between different legal proceedings of a different nature and with a different purpose must be resolved *exclusively* through the adequate coordination of those procedures.⁴⁹

The interpretation of the ‘*idem*’ element in the case law of the CJEU in competition matters has, however, developed along different lines.⁵⁰ It is useful to provide some further background on the *Walt Wilhelm* judgment, given that it has been of seminal importance for the development of the *ne bis in idem* principle in the EU legal order, and continues to form a source of profound misunderstanding.⁵¹ It is argued here that the doctrine postulated in that judgment is no longer good law, and that there are no viable arguments to apply the rule from that judgment any longer, either in the context of competition law or in any other area of EU law, like the SSMR. In order to further substantiate this and to later on draw out the implications for the potential for violations of the *ne bis in idem* principle in relation to national law in general and for Article 9(1)(3) of the SSMR in particular, the judgment will be briefly discussed below.

Walt Wilhelm concerned an agreement between a group of German undertakings. The German Federal Cartel Office (*Bundeskartellamt*) initiated proceedings under German competition law, after the Commission had done the same on the basis of ex Article 85 EC (now Article 101 TFEU). The Competition Chamber (*Kartellsenat*) of the Berlin Court (*Kammergericht Berlin*) referred several questions to the (then) European Court of Justice of the European Union (CJEU) in preliminary ruling proceedings asking whether national authorities are at liberty to ‘apply to the same facts the provisions of national law’ after the Commission initiated proceedings in the same case. In addition, the CJEU was asked whether ‘the risk of its resulting in a double sanction imposed by the Commission (. . .) and by the national authority with jurisdiction in cartel matters renders impossible the acceptance for one set of facts of two parallel procedures’.⁵² The Court replied that Regulation 17/62⁵³ only dealt with the competence of the authorities of the Member States in so far as they are authorized to apply the Treaty provision in situations in which the Commission has not taken action, and did not apply to situations in which national authorities apply national competition laws.⁵⁴ According to the Court, ‘Community and national law on cartels consider cartels from different points of view. Whereas [ex] Article (. . .) 85 [now Article 101 TFEU] regards them in the light of obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context’.⁵⁵

Therefore, although the ‘economic phenomena and legal situations’ concerned may well be ‘interdependent’, ‘one and the same agreement may, in principle, be the object of two sets of

48. ECtHR, *A and B v. Norway*, para. 121

49. *Ibid.*

50. For an in-depth discussion, see in particular, R. Nazzini, ‘Parallel Proceedings in EU Competition Law’, in B. van Bockel (ed.), *Ne Bis In Idem In EU Law*, p. 131 et seq.

51. Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt*, EU: C:1969:4.

52. *Ibid.*, ‘grounds of the judgment’, para. 3.

53. EEC Council Regulation No. 17 First Regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ L 13/204.

54. Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt*, ‘grounds of the judgment’, para. 3.

55. *Ibid.*

parallel proceedings'.⁵⁶ In the judgment, the Court emphasized that ex Article 83 EC (now Article 103 TFEU) authorizes the Council 'to determine the relationship'⁵⁷ between national competition laws and the competition provisions from the Treaty, but that the Council had not availed itself of this particular competence in adopting Regulation 17/62. This left the Member States free in the application of national competition laws, with the important proviso that

if the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules.⁵⁸

Advances in EU integration have fundamentally changed the legal context since the time of *Walt Wilhelm*, and the likelihood that the same court would rule in the same way today seems negligible.⁵⁹

A change that affects *every* area of EU law has been the introduction of the Charter. Now that the Charter has become legally binding, the question addressed by the Court in *Walt Wilhelm* has ostensibly become a question of the 'scope of EU law',⁶⁰ that is whether a given situation falls within the scope of the Charter. Applying this question to competition law, although it cannot be said that national competition law 'implements' EU law directly, it arguably does so indirectly (with the purpose of creating a 'level playing field'). As a result, substantively the same competition rules apply across the board and throughout the EU, as was expressly intended in the drafting of Regulation 1/2003.⁶¹ For this reason alone it would seem that there can be little or no doubt that national competition laws fall 'within the scope of EU law' and therefore within the scope of the Charter. Another argument supporting this finding is found in the *Walt Wilhelm* judgment itself, where the Court stated that the application of national competition laws may not 'prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in the implementation of those rules.'⁶² The conclusion from the case law of the CJEU on the scope of application of the Charter, that will be discussed later on in this article, is that these requirements from EU law are sufficient to bring those competition laws within the scope of the Charter (even in situations *not* affecting trade between the Member States). Insofar as it was ever possible to transpose the *Walt Wilhelm* doctrine to other areas of EU law,⁶³ it is submitted here that *Walt Wilhelm* no longer applies in EU competition law either, and cannot

56. *Ibid.*

57. *Ibid.*, 'grounds of the judgment', para. 4

58. *Ibid.*

59. One reason for this that is in itself sufficient is that the enforcement architecture of EU competition law has changed drastically. These changes are however not necessarily relevant to other areas of EU law like the SSMR, and will not therefore be discussed here.

60. As further clarified by the Court in Case C-617/10 *Akerberg Fransson*, EU: C:2013:105, which will be discussed later on in this article.

61. Council Regulation No. 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

62. Case 14/68 *Walt Wilhelm v. Bundeskartellamt*, grounds of the judgment para. 4.

63. Due to the particular characteristics of the enforcement architecture of EU competition law at the time, that factor played a pivotal role in how that case was decided, and that differed and continues to differ considerably from those of other areas of EU law including prudential supervision.

be relied on in order to avoid infringements of the *ne bis in idem* principle between EU and national law.⁶⁴

Finally (as recently confirmed by the CJEU) it makes sense to treat a *legal entity* and its representatives as separate culpable subjects.⁶⁵ This means, for example, that a sanction imposed on a credit institution would for example not stand in the way of the subsequent prosecution of one of its CEOs. By analogy, in the case of entities within a single corporate structure, the rule from the competition cases is that if they ‘form an economic unit in which the subsidiary has no real economic freedom’, the subsidiary cannot be treated as a separate culpable subject.⁶⁶ Subsidiaries would therefore enjoy *ne bis in idem* protection after a parent company has been fined.

B. The objective scope of application of the *ne bis in idem* principle in EU law

For the EU legal order, three provisions must be taken into account: Article 50 of the Charter, Article 4 of Protocol No. 7 to the ECHR, and Article 54 of the CISA.⁶⁷ Although there are differences in wording, all three provisions lay down the same legal principle and this places some logical limitations on the extent to which the interpretation of the *ne bis in idem* principle in EU law can vary according to the characteristics of different policy fields. In addition, Article 52(3) of the Charter stipulates that Charter rights ‘corresponding’ to rights guaranteed by the Convention shall have the same ‘meaning and scope’ as under the Convention.⁶⁸ Article 50 of the Charter reads as follows: ‘[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law’.

The last phrase where it mentions ‘within the Union’ is particularly interesting. According to the Explanatory Memorandum to the Charter, the *ne bis in idem* principle contained in Article 50 of the Charter applies ‘not only within the jurisdiction of one state but also between the jurisdictions of several Member States’.⁶⁹ This offers no clarification of the scope of application of the provision within EU law, or between national law and EU law. Article 51 of the Charter however states that: ‘[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’.

64. It should be pointed out that the Court reiterated the *Walt Wilhelm* doctrine in its judgment in Case C-17/10 *Toshiba*, EU: C:2012:72. Although it is beyond the scope of this contribution to discuss the merits of this case in sufficient detail, there may be good grounds to consider that the judgment is flawed, or at least on this specific point. It could be pointed out in this regard that the facts of the case (which specifically concerned accession of a new Member State to the EU) differed significantly from those at issue in *Walt Wilhelm*, and that the relevance of *Walt Wilhelm* is not obvious in that context. A different issue is that the Court may have overlooked is the fact that no violation of the *ne bis in idem* principle actually presented itself in *Toshiba*. For some further comments, see, G. Monti, ‘Managing decentralized antitrust enforcement: Toshiba’, 51 *CMLRev.* (2014).

65. Joined Cases C-217/15 and C-350/15 *Orsi and Baldetti*, EU: C:2017:264.

66. Case 30/87 *Corinne Bodson*, EU: C:1988:225.

67. There is a considerable body of case law on the interpretation of Article 4 of the CISA which must be taken into account, also in areas of EU law other than the Area of Freedom, Security and Justice.

68. Despite this, Article 50 of the Charter and Article 4 to Protocol 7 of the ECHR cannot simply be seen as complimentary guarantees. This is because one applies in the EU legal order and the other applies exclusively on the national level. Charter rights are for instance backed up by EU law requirements such a primacy, direct effect and effectiveness, whilst the legal force of Convention rights varies widely between the Member States.

69. ‘Explanation on art. 50 of the Charter’, [2007] OJ C 303/31.

The fact that the Charter is ‘addressed to the institutions and bodies of the Union’ confirms that, like all Charter rights, Article 50 primarily applies *within* the Union legal order. The scope of application of Article 50 of the Charter in the interaction between national and EU law follows from the last phrase of Article 51 of the Charter, which states that the Member States are bound by Charter rights ‘only when they are implementing Union law’. In the *Åkerberg Fransson* judgment, the CJEU shed some more light on the interpretation of this particular phrase.⁷⁰ The case concerned a Swedish national accused of serious tax offences (including VAT fraud) by providing false information in his tax returns. He was ordered to pay punitive tax surcharges after which criminal proceedings were brought against him in respect of the same facts. The Swedish court thereupon stayed proceedings and referred several questions to the CJEU asking, inter alia, whether Fransson’s criminal prosecution violated the *ne bis in idem* principle contained in Article 50 of the Charter. On the basis of the wording of Article 51 of the Charter, it was not obvious that this was the case. The only link with EU law was found in the Sixth VAT Directive,⁷¹ which harmonized the VAT tax base. Otherwise, the facts of the case and the applicable Swedish tax laws were very much domestic in nature.⁷² There was no cross-border aspect involved that could trigger the free movement provisions from the Treaty, and it could not be said that the relevant Swedish legislation ‘implemented’ EU law in any (immediate) way.⁷³ For those reasons, Advocate General Cruz Villalón concluded in his Opinion that the case was ‘unquestionably (...) domestic’ in nature.⁷⁴

The CJEU however ruled that the situation fell within the scope of application of the Charter, and clarified that ‘the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter’.⁷⁵ The scope of application of the Charter therefore goes beyond the narrower category of the ‘implementation’ of EU law mentioned in Article 51 of the Charter, and coincides with the scope of application of EU law itself, but crucially, it goes no further than that – in accordance with Article 51(2) of the Charter. In the case of *Pfleger*, the CJEU confirmed that the rule created in *Åkerberg Fransson* also covers the situation in which a Member State *derogates* from EU law by relying on an exception from the Treaty.⁷⁶

From the *Siragusa* judgment and the order in *Sindicato dos Bancários do Norte*⁷⁷ it appears, however, that not every connection with EU law is sufficient to trigger the application of the Charter, and this presently leaves an area of uncertainty.⁷⁸ The case of *Sindicato dos Bancários do Norte* concerned bank personnel in Portugal litigating against a nationalized bank which had significantly reduced wages from January 2011, in order to comply with the national budget law providing for wage reduction in respect of all civil servants with a view to meeting the

70. Case C-617/10 *Åkerberg Fransson*.

71. Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, [1977] OJ L 145/1.

72. The Sixth VAT Directive has since been replaced by the recast VAT Directive, i.e., Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1.

73. B. van Bockel and P. Wattel, ‘New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after *Åkerberg Fransson*’, 38 *European Law Review* (2013), p. 867.

74. Opinion of Advocate General Cruz Villalón in Case C-617/10 *Åkerberg Fransson*, EU: C:2012:340, para. 2.

75. Case C-617/10 *Åkerberg Fransson*, para. 21-22. For further comments see, inter alia, B. van Bockel and P. Wattel, 38 *ELR* (2013), p. 871-883.

76. Case C-390/12 *Pfleger*, EU: C:2014:281. For further comments see, B. van Bockel and P. Wattel, 38 *ELR* (2013), p. 873-875.

77. Case C-128/12 *Sindicato dos Bancários do Norte*, EU: C:2013:149.

78. *Ibid.*; Case C-206/13 *Siragusa*, EU: C:2014:126.

requirements of the EU Stability and Growth Pact (SGP). Even though the national legislation was adopted in order to comply with Portugal's obligations under the SGP, the CJEU ruled that it was not competent to address the questions referred to it by the Portuguese court as there was no 'implementation of EU law' in the sense of Article 51 of the Charter.⁷⁹ This ruling does not, perhaps, sit very comfortably with the broad rule laid down in *Åkerberg Fransson* that the applicability of EU law 'entails applicability of the fundamental rights guaranteed by the Charter'.⁸⁰ However, if the Court had held otherwise this would likely have brought national cutback laws, and even entire national systems of taxation, within the scope of the Charter and therefore also within the jurisdiction of the CJEU. Such a ruling would run counter to the principle of subsidiarity contained in Article 6(1) TEU and Article 51(2) of the Charter.

The *Sindicato dos Bancários do Norte* judgment forms an indication that there is a category of situations that are in some way connected to EU law, but not sufficiently so to consider that the Member States are bound by the Charter rights. A 'grey area' results from this in situations in which the influence of EU law is clearly felt, but that *formally* escape the 'scope of EU law' due to the wide variety of ways in which national and EU law interact. In turn, this could result in a gap in EU fundamental rights protection. For most Charter rights this gap in protection may not be a big issue in practice as those Charter rights are also protected at the national level, given that the Member States are all signatories to the ECHR.⁸¹ This may however be different where the protection of fundamental rights must be realized in the *interaction* between EU and national law. The *ne bis in idem* principle is one example of a right that cannot be fully realized on either the EU or the national level, but rather requires some form of integration between the two. To give one example of the kinds of questions this may raise: in view of the reciprocity that is implicit in the application of the *ne bis in idem* principle in the relationship between national and EU law, a question is whether the EU is similarly released from its obligations under Article 50 of the Charter in a situation where a Member State is not bound by the Charter. This issue, which may carry important implications for many areas of EU law, is explored in the following section.

C. The reciprocal application of the *ne bis in idem* principle in EU law

The international (or *transnational*, in the case of Article 54 of the CISA) application of the *ne bis in idem* principle is reciprocal in nature. The reason for this is simply that the international applicability of the principle in practice is only made possible when different jurisdictions mutually (or multilaterally) agree to accept the negative enforcement consequences of each other's *res judicata*. This reciprocity, although necessary to effectuate the international application of the *ne bis in idem* principle in practice, is not recognized anywhere as a *legal* requirement or a precondition for the application of the *ne bis in idem* principle. This may perhaps also be evidenced by the fact that a number of states unilaterally accept the binding force of a foreign acquittal or conviction in their national legislation under certain conditions, regardless of any reciprocity or of any public international law obligation to do so.

For EU law, the reciprocal nature of Article 54 of the CISA, which establishes the *ne bis in idem* principle in its application *between* different Member States, necessarily follows from the

79. Case C-128/12 *Sindicato dos Bancários do Norte*, para.11.

80. *Ibid.*, para. 11.

81. Although levels of compliance with ECHR standards may vary (significantly).

provision itself. For Article 50 of the Charter, however, this is less obvious. There is no doubt that Article 50 of the Charter *mutually* binds the EU and the Member States in situations falling entirely within the scope of application of the Charter. It could perhaps be inferred from this that the ‘bodies and institutions’ of the EU are not bound vis-à-vis the Member States in other situations (therefore, in situations in which the Member States are not bound by Charter rights), but this does not follow from the wording of Articles 50 and 51 of the Charter. Article 51 of the Charter merely limits the scope of *Member States’* obligations under the Charter (that is, when they are ‘implementing’ EU law), not that of the bodies and institutions of the EU. This is not surprising if one considers that the question of the reciprocal application of the principle in EU law is a question that is specific to Article 50 of the Charter, whereas Article 51 is a provision that applies to all of the Charter rights. Any further limitation of the scope of application of Article 50 of the Charter would therefore logically have to follow from that provision itself. That provision however merely states that ‘[n]o one shall be liable to be tried or punished again (. . .) *within the Union*’.⁸² If taken literally, this would imply that Article 50 of the Charter one-sidedly binds the EU bodies and institutions in relation to national law, in situations *connected* to EU law (that is to say where one instance of prosecution originates in EU law) that fall *outside* of the scope of the Charter as far as Member States’ obligations are concerned. To clarify: under this interpretation, the bodies and institutions of the EU bound by Article 50 of the Charter *vis-à-vis* the Member States, also in situations in which those Member States are *not* reciprocally bound by that provision for reasons that the national decision falls outside of the scope of the Charter. Although many would no doubt object to such an interpretation for the obvious reason that it sacrifices the enforcement of substantive EU law for the protection of fundamental rights, it must be admitted that this reading is at least defensible on the basis of a reading of the provisions. Arguably, such an interpretation would also make some logical sense in view of the possibility of a ‘grey area’ discussed in the previous paragraph (where it was argued that there are certainly situations in which a person or entity risks being prosecuted or punished twice ‘within the Union’, in a situation *that is connected* to EU law but falls outside the scope of the Charter as far as the Member States’ obligations are concerned). Although there are good reasons why the Member States are not bound by the Charter in those situations, it is not necessarily clear why the protection offered under the Charter should be withheld as far as the EU legal order and the actions of the ‘bodies and institutions’ of the EU is concerned in order to avoid, in as much as possible, ‘gaps’ in the system of EU fundamental rights protection. Needless to say, the position taken here is not limited to the context of the SSMR as it potentially carries wider implications for the relationship between EU and national law.

D. The material scope of application of the *ne bis in idem* principle in EU law

With regard to the material scope of application of the *ne bis in idem* guarantee, the ECtHR has consistently held that

the legal characterization of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of non bis in idem under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention.⁸³

82. Emphasis added.

83. ECtHR, *Sergey Zolotukhin v. Russia*, para. 78.

In the first paragraph, Article 4 of Protocol No. 7 refers to ‘criminal proceedings’, which echoes the term ‘criminal charge’ contained in Article 6 of the ECHR. The scope of application of Article 4 of Protocol No. 7 is accordingly determined as an autonomous concept under the Convention by reference to three criteria, commonly referred to as the ‘*Engel* criteria’, which were similarly adopted by the CJEU in the *Bonda* judgment.⁸⁴ The *Engel* criteria are as follows: (i) the legal classification of the offence under national law; (ii) the nature of the offence; (iii) the degree of severity of the penalty that the person concerned risks incurring.⁸⁵

The *Engel* doctrine leads to a presumption that the charges against a subject are ‘criminal’, ‘a presumption (...) which can be rebutted entirely exceptionally, and only if the deprivation of liberty cannot be considered appreciably detrimental given their nature, duration or manner of execution’.⁸⁶ In applying these criteria it is the maximum potential penalty for which the relevant law provides which must be taken into account here; the sentence that was actually imposed ‘cannot diminish the importance of what was initially at stake’.⁸⁷

According to settled ECtHR case law, the second and third *Engel*-criteria are ‘alternative and not necessarily cumulative’, which does not exclude ‘a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge’.⁸⁸ Apart from the legal classification of the offence, the ECtHR will – amongst other things – take into account the seriousness of the conduct itself, and the manner in which the misconduct is classified in other Member States.⁸⁹ In *Demicoli* it was held that if the subject holds a particular position (in this case, a politician), this does not remove the prosecution from the criminal sphere if the same legal provision *could*, by its nature also apply to others.⁹⁰ Similarly, in the case of *Grande Stevens*, the ECtHR held that the Italian rules prohibiting market manipulation generally aim to safeguard the proper functioning and transparency of financial markets and to protect the confidence of the general public in the functioning of those markets.⁹¹

As for the third *Engel* criterion, the ECtHR has not set a lower limit for its application.⁹² The case law so far shows that not only the deprivation of liberty, but even a relatively modest fine can

84. ECtHR, *Engel and Others v. Netherlands*, Judgment of 8 June 1976, (Series A-22); and Case C-489/10 *Bonda*, EU: C:2012:319. In the *Bonda* judgment, the CJEU proclaimed its own ‘*Engel* doctrine’ with particular emphasis on the need to protect the own financial means of the Union.

85. See, inter alia, the Court’s ‘Guide on Article 6 ECHR’, http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

86. ECtHR, *Sergey Zolotukhin v. Russia*, para. 56.

87. *Ibid.*

88. *Ibid.*, para. 53; ECtHR, *Putz v. Austria*, Judgment of 22 February 1996, Application No. 18892/91, para. 31.

89. In the *Öztürk* judgment, the ECtHR found it sufficient that the charges brought against the subject under provisions of administrative law were part of the criminal law in many Member States: ECtHR, *Öztürk*, Judgment of 21 February 1984, Application No. 8544/79.

90. ECtHR, *Demicoli v. Malta*, Judgment of 27 August 1991, Application No. 13057/87.

91. ECtHR, *Grande Stevens v. Italy*, Judgment of 4 March 2014, Application Nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, para. 96 and 97. According to the ECtHR, these market rules serve the ‘general interests of society’ normally protected by criminal law, and therefore belong to the sphere of criminal law for the purposes of the Convention. It follows that the Court focuses on the nature of the rule at issue and on the question whether the *rule* is of a specific character rather than on the question whether the *subject* belongs to a specific group, or profession in applying the second *Engel* criterion.

92. This is not a criticism, as it may be difficult to justify the setting of any particular amount of a fine as a ‘minimum threshold’ due to the differences in circumstances between individual cases.

be sufficient to bring a case within the criminal law sphere for the purposes of the Convention.⁹³ The possibility of the withdrawal of a licence under the SSMR also falls under the third *Engel* criterion. In *Nilsson v. Sweden*,⁹⁴ the ECtHR found that the temporary suspension of a driving license belonged to the criminal law sphere in that case because the suspension was not an ‘automatic’ or ‘immediate and foreseeable’ consequence of the subject’s conviction for a serious road traffic offence.⁹⁵ Because some time had passed between the time of the subject’s conviction and the moment his driving licence was suspended, the ECtHR concluded that the ‘prevention and deterrence for the protection of the safety of road users could not have been the only purposes of the measure’ and that ‘retribution must also have been a major consideration’.⁹⁶ In the *Haarvig* case, the temporary revocation of a medical license was not considered to be of a ‘criminal law nature’ given that the provision in question laid down a professional standard and did not aim to punish and deter, but only to prevent further damage to the subjects’ patients.⁹⁷

Finally, the finding of a criminal charge may be based on a combination of factors. In the *Matyjek* case, the ECtHR considered that a ban from taking certain government positions was sufficiently serious to constitute a criminal charge, even though it was not accompanied by a fine or any other form of punishment.⁹⁸ The reason for this was, according to the ECtHR, that

the prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. (...) This sanction should thus be regarded as having at least partly punitive and deterrent character.⁹⁹

E. Differentiated standards of protection under the Charter and the ECHR?

Article 53 of the Charter reads as follows:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

In the *Åkerberg Fransson* and *Melloni*¹⁰⁰ judgments, the Court arrived at a somewhat cryptic interpretation of this provision. It was held that the Charter applies regardless of the extent to which national law is ‘determined’ by EU law, and therefore regardless of the degree of discretion which was available to or was exercised by the national legislator. The CJEU however added that if

93. The ECtHR has consistently held that ‘the relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character’. See, ECtHR, *Ruotsalainen v. Finland*, Judgment of 16 June 2009, Application No. 13079/03, para. 43.

94. ECtHR, *Nilsson v. Sweden*, Judgment of 13 December 2005, Application No. 73661/01.

95. *Ibid.*, (assessment).

96. *Ibid.*, (assessment).

97. ECtHR, *Knut Haarvig v. Norway*, Judgment of 11 December 2007 (admissibility), Application No. 11187/05, (assessment).

98. ECtHR, *Matyjek v. Poland*, Judgment of 30 May 2006 (admissibility), Application No. 38184/03.

99. *Ibid.*, para. 55.

100. Case C-399/11 *Melloni*, EU: C:2013:107.

national law is not ‘entirely determined’ by EU law, higher national standards may be applied provided the ‘primacy, unity and effectiveness of European Union law are not thereby compromised’.¹⁰¹ Amongst other things, this arguably implies that if an EU institution or other EU body applies national law, *implementing* EU law directly, that institution will also be bound by any relevant higher national standards of fundamental rights protection in situations in which those national laws are not ‘entirely determined’ by EU law. Such a situation is foreseen in Article 4(3) of the SSMR which was previously discussed, and which grants the ECB the competence to apply national legislation transposing (relevant) Directives, as well as national legislation exercising options available to the Member States under any relevant regulations. Because that legislation forms part of a national legal order, the ECB will arguably also have to take national constitutional rights and standards into account when applying the relevant national legislation.

4. The scope for infringements of the *ne bis in idem* principle under the SSMR

A. Introduction

By combining the different elements of the *ne bis in idem* principle, the scope of Charter rights, and some characteristics of the enforcement architecture of the SSMR discussed in the foregoing paragraphs, it is possible to identify the potential scope for infringements of the *ne bis in idem* principle under the SSMR. As already mentioned, the ECB and NCAs are under a duty to cooperate in good faith and to exchange information and this will no doubt mitigate the risk of violations of the *ne bis in idem* principle in situations falling exclusively under the SSMR.¹⁰² In general terms, this risk exists because, similarly to Regulation No. 1/2003, the SSMR does not contain a general *ne bis in idem* rule.¹⁰³

A first question that arises is what types of situations fall within the scope of the Charter. Clearly, both EU law and national law implementing EU law fall within the scope of the Charter, including any options that were exercised in national legislation.¹⁰⁴ The situation under Article 18(5) of the SSMR which empowers the ECB to require NCAs to open proceedings ‘with a view to

101. *Ibid.*, para. 60.

102. See Article 20 of the ‘Framework Regulation’ (Regulation No. 468/2014/EU of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17), [2014] OJ L 141/1.), which establishes the rules and procedures governing the cooperation between the ECB and NCAs to ensure a good functioning of the SSMR. Pursuant to Article 6(7) of the SSMR the Framework Regulation sets out (see Article 1 Framework Regulation):

- a. the methodology for assessing and reviewing the criteria laid down in the SSM Regulation for determining whether a credit institution is significant or not;
- b. the procedures governing the cooperation between the ECB and NCAs as regards the supervision of significant credit institutions; and
- c. the procedures governing the cooperation between the ECB and NCAs as regards the supervision of less significant credit institutions.

103. This is also confirmed by Recital 36 of the Preamble to the SSMR, where it states that ‘national authorities should remain able to apply penalties in case of failure to comply with obligations stemming from national law transposing Union Directives.’

104. The Charter also applies when the ECB acts under the rules of the European Stability Mechanism.

taking action in order to ensure that appropriate penalties are imposed in accordance with (...) any national legislation which confers specific powers which are currently not required by Union law' appears less certain. Looking at the *Åkerberg Fransson* judgment, the national legislation at issue would not fall within the scope of EU law (and therefore within the scope of the Charter).

It is submitted that the fact that the ECB may legally *require* NCAs to open proceedings *should* bring the situation within the scope of EU law and therefore within that of the Charter. The reason for this is that an act that is legally binding under EU law (the instruction by the ECB to apply national legislation) is at the root of the exercise of authority (the enforcement of the national law in question). In addition, Article 18(5) of the SSMR itself requires that the penalties must be 'effective, proportionate, and dissuasive', and these are the requirements from EU law which form the very *raison d'être* of fundamental rights protection in the EU. Although there is, at the time of writing, no case law to confirm this, it would seem to defeat the very purpose of EU fundamental rights protection if a provision in EU law made it possible for an EU institution to act in a legally binding way whilst escaping the observance and application of Charter rights. The same applies to the very wide powers of instruction provided for in Article 9(1)(3) of the SSMR. The power to require national authorities to open an investigation is capable of infringing the *ne bis in idem* principle if it leads to a second 'prosecution' within the meaning of Article 50 of the Charter.

As previously discussed it appears sufficiently certain that 'administrative pecuniary penalties' (Article 18(1) of the SSMR) and penalties for failure to comply (Article 18(7) of the SSMR), which are both comparable in size to the penalties found in competition law, constitute a 'criminal charge' within the meaning of the *Engel/Bonda* criteria. One could perhaps speculate that the sanctions under Article 18(7) of the SSMR (a maximum amount of €500,000) are not sufficient to meet the *Engel/Bonda* criteria given the kinds of sums that supervised entities normally work with, but there is no evidence in the case law of the ECtHR to support such a claim and both administrative penalties share a clear deterrent purpose.

As for the withdrawal of a licence, the aim of this type of decision is different but this does not exclude the possibility that it may fall within the *Engel/Bonda* criteria.¹⁰⁵ It should be noted in this connection that:

- i. the decision withdrawing a licence as such is not *always* necessarily punitive in nature, and different circumstances may even lead to different findings in individual cases;
- ii. the combination of the withdrawal of a licence and the imposition of a fine is not necessarily problematic as long as those measures are sufficiently connected and coordinated so as to form a 'coherent whole'.

The ECB is therefore well advised to carefully coordinate the procedure leading to a decision to withdraw the licence of a credit institution with any other procedures or instructions to national authorities, and in particular the procedure leading up to the imposition of a administrative pecuniary penalty (Article 18(1) of the SSMR).

105. According to Recital 20 of the Preamble to the SSM Regulation, 'prior authorisation for taking up the business of credit institutions is a key prudential technique to ensure that only operators with a sound economic basis, an organisation capable of dealing with the specific risks inherent to deposit taking and credit provision, and suitable directors carry out those activities. The ECB should therefore have the task of authorising credit institutions that are to be established in a participating Member State and should be responsible for the withdrawal of authorisations (...).'

B. The scope for infringements of the *ne bis in idem* principle within the SSMR

The powers of the ECB from the SSMR which may leave some scope for violations of the *ne bis in idem* principle in situations falling (exclusively) under the SSMR have been identified at different stages of this paper. These are:

- i. The power of the ECB to exercise direct supervision over a ‘less significant supervised entity’ as per Article 6(5)(b) of the SSMR;
- ii. The very broad powers of instruction provided by Article 6(3) of the SSMR and Article 9(1)(3) of the SSMR;
- iii. The power to withdraw the licence of a supervised entity in combination with the power to impose administrative pecuniary penalties from Article 18(1) and/or the power to instruct national authorities under (ii).

As for the power to exercise direct supervision over a ‘less significant supervised entity’ from Article 6(5)(b) of the SSMR, it was pointed out in the foregoing that it is not clear from the wording of the SSMR whether the ECB can step in on a case-by-case basis (and therefore irrespective of any ongoing enforcement efforts by a national authority), or whether this power has the effect of ‘freezing’ the powers of the national authority. If the former is the case, the potential scope for infringements of the *ne bis in idem* principle is clear. This does not mean it will necessarily materialize; it will be up to the ECB to take into account any previous penalty or any other relevant decision in accordance with Article 50 of the Charter. If the latter is the case and the exercise of the power contained in Article 6(5)(b) of the SSMR essentially ‘freezes’ any enforcement powers of the national authority in respect of that supervised entity, then this removes any scope for violations of the *ne bis in idem* principle.

A similar ambiguity affects the very broad powers of instruction of the ECB under the SSMR. The first sentence of Article 18(5) of the SSMR however limits the ECB’s power to instruct national authorities in situations ‘not covered by’ Article 18(1) of the SSMR. This forms an adequate safeguard against violations of the *ne bis in idem* principle as far as the administrative pecuniary penalties of Article 18(1) of the SSMR are concerned. As previously discussed, Article 6(3) of the SSMR refers to Article 4 of the SSMR, which lists the full range of supervisory activities conducted at the national level. As discussed in Section 3.A. of this article, Article 6(6) of the SSMR redistributes some of the powers of the ECB back to the NCAs. If this could be interpreted as meaning that the ECB has the power to instruct national authorities to take enforcement action under national law where the ECB has done the same under EU law in respect of the same infringement, there would be a risk of violating the *ne bis in idem* principle. It is however also possible that an alternate reading of the SSMR, under which the distinction between ‘significant’ and ‘less significant’ supervised entities permeates throughout the whole of the enforcement architecture of the SSMR, prevails. Under this reading, the ECB would be able to instruct national authorities only in respect of ‘*less significant*’ supervised entities. This latter reading would perhaps also make the most sense in the light of the purpose of the distinction between ‘significant’ and ‘less significant’ supervised entities in the SSMR, and would also remove any possible *ne bis in idem* issues.

C. The scope for infringements of the *ne bis in idem* principle in relation to national law

The scope for infringement of the *ne bis in idem* principle of this kind is more difficult to gauge, because the SSMR does not as such refer to national criminal laws, tax laws or national laws of any

other kind. A provision which may provide some further guidance on this point is Article 3(10) of Regulation 2532/98/EC, which reads as follows:

If an infringement also relates to one or more areas outside the competence of the ESCB, the right to initiate an infringement procedure on the basis of this Regulation shall be independent of any right of a competent national authority to initiate separate procedures in relation to such areas outside the competence of the ESCB. This provision shall be *without prejudice to the application of criminal law* and to prudential supervisory competencies in participating Member States.¹⁰⁶

It should be noted that Regulation 2532/98/EC only applies 'in so far as relevant' to administrative pecuniary penalties (Article 18(4) of the SSMR). Given that the SSMR provides us with a detailed decision-making procedure in Article 26 (the ordinary decision making procedure), Regulation 2532/98/EC has therefore probably lost much, if not all, of its relevance under the SSMR. The provision is nevertheless worth citing here, because it may reflect the approach taken to the interaction between national and EU law in the drafting of the SSMR, and this appears to find some confirmation in the similarities in drafting between this provision and Article 9(1)(3) of the SSMR. The wording of Article 3(10) of Regulation 2532/98/EC appears to have been drafted 'in the spirit' of the *Walt Wilhelm* doctrine discussed earlier, and if the same applies to Article 9(1)(3) of the SSMR this does not augur well for *ne bis in idem* issues. Given that *Walt Wilhelm* is no longer 'good law', the only legally relevant question (now that the Charter has acquired binding legal force) is whether or not a given situation falls 'within the scope of the Charter'. The wording of Article 3(10) of Regulation 2532/98/EC is therefore conducive to violations of the *ne bis in idem* principle because it confirms that there is a 'right' to 'initiate separate proceedings in relation to such areas outside the competence of the ECB' in addition to any infringement proceedings available under Regulation 2532/98/EC, and 'without prejudice to the application of criminal law and to prudential supervisory competencies in participating Member States'. In situations falling within the scope of the Charter, the potential for violations of the *ne bis in idem* principle from this is clear. Article 50 is a provision of the Charter which finds itself on par with EU primary law and is therefore hierarchically positioned above a provision in secondary EU law like Article 3(10) of Regulation 2532/98/EC or Article 9(1)(3) of the SSMR. There are indications that the 'spirit' of the *Walt Wilhelm* judgment from Article 3(10) of Regulation 2532/98/EC has found its way into the drafting of Article 9(1)(3) of the SSMR, given the similarities between the provisions, and the fact that Article 9 of the SSMR does not contain any reservation similar to that found in the first sentence of Article 18(5) of the SSMR.

It is worth pointing out again that in all situations concerning national law (whether or not through the power contained in Article 9(1)(3) of the SSMR), the central question is (or so it is assumed) whether both penalties or instances of prosecution fall *within the scope of the Charter*. It was already mentioned in the introductory paragraph that national authorities remain in charge of supervisory tasks falling outside the scope of the SSMR in areas such as consumer protection; the prevention of money laundering; payment services and 'conduct of business' regulation, and much of this legislation is sufficiently 'connected' to various sources of EU law to fall within the scope of the Charter. The same is not true for national criminal law, which is not enforced by those same authorities, although a variety of national legislative responses to financial misconduct emerged during and after the recent financial crisis, and in financial criminal law there is generally more

106. Emphasis added.

relevant EU legislation to consider than in many other fields of criminal law. The possibility of a situation occurring in which a single infringement triggers different enforcement responses by the ECB and/or an NCA as well as national criminal prosecutors is not imaginary, and it can be concluded that this leaves scope for infringements of Article 50 of the Charter.

It was also argued earlier on (see Section 2.C.) that the scope for *ne bis in idem* violations may be wider than suggested by the *Akerberg Fransson* judgment. There is a 'grey area' in which a person or entity runs the risk of being prosecuted or punished twice 'within the Union', but falling outside of the scope of the Charter, and it was argued that *ne bis in idem* protection should apply to those situations under the Charter. Although there is no case law to confirm this, this position is at least defensible on the basis of the wording of Articles 50 and 51 of the Charter, and this would leave a much wider scope for violations of the *ne bis in idem* principle in connection with enforcement efforts under the SSMR.

The conclusion from this is that the SSMR potentially leaves considerable scope for violations of the *ne bis in idem* principle in relation to a variety of possible national laws. Given that Article 52(3) of the Charter requires that Charter rights corresponding to ECHR rights are given the same meaning and scope as the latter, the aforementioned judgment of *A and B v. Norway* arguably requires the ECB and the NCAs to coordinate their enforcement efforts closely not only with each other, but also with national authorities in charge of enforcing laws that are not related to prudential supervision in the event that a bank's conduct leads to a variety of legal responses. The coordination mechanisms required to ensure that different legal responses form a 'coherent whole' are not in any way provided for or foreseen by the SSMR, and coordination may therefore be difficult to achieve for the ECB and the NCAs in practice. In keeping with the aim of this contribution the point of all this is not to argue that the enforcement architecture of the SSMR is flawed, but to demonstrate that the system of fundamental rights protection in the EU is at present not sufficiently developed or integrated to effectively match rapid advances in the shared enforcement of EU law, of which the SSMR forms an example.

5. Conclusion

The question raised in this article was whether the integrated enforcement architecture of the SSMR is matched by a sufficiently integrated system of fundamental rights protection in the EU, as viewed through the 'lens' of the *ne bis in idem* principle. In order to answer this question, the elements of that principle and some developments in the case law on Articles 50-53 of the Charter were presented and discussed, as well as the enforcement architecture of the SSMR.

The overall findings are that there are some situations under the SSMR which may leave scope for infringements of the *ne bis in idem* principle, but that the main risk of violations of the *ne bis in idem* principle presents itself in relation to national law. This risk may arise under the very broad powers of instruction provided for in Article 9(1)(3) of the SSMR, but also in situations whereby the ECB has not issued any instruction. The *Walt Wilhelm* doctrine cannot be relied on in such situations in order to avert the risk of violations of the *ne bis in idem* principle for several reasons, one of which is that it is no longer 'good law'. Perhaps more importantly, however, it would be paradoxical to attempt to rely on that doctrine in the context of the SSMR precisely in the light of the highly integrated enforcement architecture that was established under that regulation, which transcends the divide between national and EU law in ways that are novel to EU law. Now that the Charter has become legally binding, the appropriate question under EU law is whether the relevant national laws fall 'within the scope of EU law' within the meaning given to that term in the case law of the CJEU on Article 51 of the Charter.

Although there is no case law to confirm this, it was argued that any national law that is applied as a result of an instruction by the ECB under Article 9(1)(3) of the SSMR *should* fall within the

scope of EU law and therefore that of the Charter, for that reason alone. Otherwise, a provision found in a Regulation would make it possible for an EU institution to act in a legally binding way, whilst escaping its obligations under the Charter rights in doing so, something that would seem to defeat the very purpose of the Charter.

It was also argued that on the basis of the wording of Articles 50 and 51 of the Charter, an interpretation of those provisions under which the bodies and institutions of the EU bound by Article 50 of the Charter *vis-à-vis* the Member States – also in situations in which those Member States are *not* reciprocally bound by that provision (for reasons that the national decision falls outside of the scope of the Charter) – is at least defensible. Such an interpretation also seems logical in view of a ‘grey area’ that was identified where a person or entity risks being prosecuted or punished twice ‘within the Union’, in a situation *that is connected* to EU law but falls outside the scope of the Charter as far as the Member States’ obligations are concerned. The conclusion is that the enforcement architecture of the SSMR is not matched by a sufficiently integrated system of fundamental rights protection at the EU level (or at least not under a more restrictive interpretation of the wording of Article 51 of the Charter) in particular if the ECB’s wide powers of instruction under the SSMR reach beyond the limits of the scope of Charter rights as defined by the case law of the CJEU on the interpretation of Article 51 of the Charter. The same can, however, be said about other situations in relation to national law where the ECB has not used its instruction powers (and which therefore will normally fall outside of the scope of the Charter).

The example discussed here is but one example, and one should always be careful not to draw too many far-reaching conclusions. If this example can provide some indication that the system of EU fundamental rights protection cannot ‘keep up’ with advances in EU integration like the SSMR, the risk that this will undermine further advances in European integration appears very real because the protection of fundamental rights is a source of legitimacy that is of prime importance to the European project.

What could be done? For one, fundamental rights concerns could perhaps be given a stronger role in drafting of EU legislation. This is a rallying call for the EU legislator not to leave important procedural details in EU legislation open to resolve themselves, and above all not to ignore any possible fundamental rights in the interaction between EU law and *unrelated* national law (and this is something that the EU legislator appears somewhat inclined to do). Due to the nature of the relationship between the Charter and Convention rights based on Article 52(3) of the Charter, and the complexity of the interaction between national and EU law in areas of shared enforcement of EU law like the SSMR, the fact that the EU is not a signatory to the ECHR does not appear to alleviate any fundamental rights concerns. This places increasingly high demands on the EU legislator. A more ‘minimalist’ approach to the drafting of EU legislation was perhaps understandable and even wise in the past (for example in the drafting of the subsequent procedural regulations for competition law Regulations 17/62 and 1/2003), given that many finer procedural details were best left to be dealt with by authorities and the judiciary at the time. The Charter however has changed this, and the example explored and discussed in this article was that of the possible implications of a more literal (but certainly defensible) combined reading of articles 50 and 51 of the Charter for the SSMR. The *ne bis in idem* problems that may arise from this form an example of why the EU legislator needs to step up and pay more meticulous attention to any possible fundamental rights implications of EU legislation, and where possible to *articulate* those implications in more detail in the relevant legislation itself. A recommendation is that new and ‘pioneering’ EU legislation like the SSMR would greatly benefit from more detailed fundamental rights ‘visibility’ in the manner in which it is drafted.