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Asen Lefterov **The Single Rulebook:
legal issues and relevance
in the SSM context**

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Note: This Legal Working Paper should not be reported as representing the views of the European Central Bank (ECB). The views expressed are those of the authors and do not necessarily reflect those of the ECB

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Abstract

This working paper discusses the concept of the Single Rulebook as well as its interaction with the Single Supervisory Mechanism (SSM) from a legal perspective. It aims to provide a comprehensive overview of the scope of the Single Rulebook, with a specific focus on banking legislation. It further considers the application of the Single Rulebook, in particular by the European Central Bank as part of the SSM, and flags potential challenges and possible solutions. Based on these findings the author considers that the further development of the Single Rulebook, both in terms of subject areas and granularity of rules, will make the operation of the SSM more efficient, while the operation of the SSM may also improve the content of the Single Rulebook.

1 Introduction

In 2004 Tommaso Padoa-Schioppa argued for ‘a streamlined, uniform and flexible regulatory framework across the EU’¹. He called it the single rulebook, referring to the rules applicable in the financial services sector. The roots of the Single Rulebook could also be sought in the developments preceding Padoa-Schioppa’s speech and more specifically the Lamfalussy process, which started in the area of securities.

The concept of a Single Rulebook has been constantly evolving since the 2004 speech. It has already been rolled out in the financial services sector – an important regulatory development which merits detailed analysis, both as regards its innovations which may have an impact on Union law, and as regards the challenges that it faces. This working paper can only present a snapshot description of the Single Rulebook. It will set out a definition of the Single Rulebook based on the intentions expressed thus far by the Union legislator, which may of course change in the future as the concept of the Single Rulebook evolves.

There are two aspects of the Single Rulebook which are often mentioned. On the one hand it represents an approach to devising regulation in the EU financial services sector. On the other hand it could be understood as the outcome of the execution of this approach – the actual legislation in force and its application by public and private entities and persons. These two aspects are intrinsically interlinked, with the characteristics of the approach to regulation affecting the application of the adopted legislation and vice versa. While aiming to cover both aspects, this working paper places a specific emphasis on the latter aspect, i.e. the Single Rulebook as a body of law to be applied by administrative authorities and market participants. Such an analysis could serve law practitioners who are called on to apply and interpret the Single Rulebook. The second aspect is moreover particularly relevant in the SSM context. The SSM, which has at its centre the ECB as a competent authority, in particular for significant institutions, is greatly dependent on the Single Rulebook in its day-to-day tasks – especially considering the absence of a clear ECB rule-making capacity.

¹ Padoa-Schioppa, ‘How to deal with emerging pan-European financial institutions?’, The Hague, 3 November 2004.

2 The Single Rulebook as a body of Union law

2.1 History and evolution of the concept of a ‘Single Rulebook for financial services legislation’

The concept of the Single Rulebook can be traced back to more than 10 years. In order to understand the rationale for advocating a Single Rulebook, one has to consider how the legislative landscape looked at that time. Following the introduction of the Commission Financial Services Action Plan (FSAP) a number of regulatory measures were adopted in the field of financial services². The adoption of these measures was carried out in conjunction with the introduction of the Lamfalussy process and the establishment of the Lamfalussy committees³. These processes led to significant progress in terms of harmonisation of EU financial services legislation covering activities which were either not regulated at all, or only regulated in some Member States’ national laws⁴.

This leads to the question – if the FSAP has achieved so much why then the necessity for another sudden jump in the form of the Single Rulebook? In 2004 Padoa-Schioppa already identified that the Lamfalussy process was not utilised to its full potential⁵. Moreover, following the crisis in the financial sector, the de Larosière report in 2009 identified, among other things, regulatory, supervisory and crisis management failures in the EU leading up to the crisis⁶. The key recommendation that launched the Single Rulebook was arguably Recommendation 10 of that report:

‘In order to tackle the current absence of a truly harmonised set of core rules in the EU, the Group recommends that:

- *Member States and the European Parliament should avoid in the future legislation that permits inconsistent transposition and application;*
- *the Commission and the Level 3 Committees should identify those national exceptions, the removal of which would improve the functioning of the single financial market; reduce distortions of competition and regulatory arbitrage; or improve the efficiency of cross-border financial activity in the EU. Notwithstanding, a Member State should be able to adopt more stringent*

² See Communication from the Commission – Implementing the framework for financial markets: action plan, COM(1999) 232 final.

³ The creation of the Level 2 and Level 3 Lamfalussy Committees was done in implementation of the report prepared by the Committee of Wise Men, chaired by Baron Alexandre Lamfalussy. ‘Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets’, Brussels, 9 November 2000.

⁴ See press release ‘EU financial services policy for the next five years’, IP/05/1529, Brussels, 5 December 2005.

⁵ Padoa-Schioppa (see footnote 1).

⁶ See ‘Report by the High-level Group on Financial Supervision in the EU’, Brussels, 25 February 2009.

national regulatory measures considered to be domestically appropriate for safeguarding financial stability as long as the principles of the internal market and agreed minimum core standards are respected.'

The de Larosière report argued that future legislation should be based, wherever possible, on regulations (which are of direct application). When directives were used, the Union legislator had to strive to achieve maximum harmonisation of the core issues⁷.

In June 2009, the European Council embraced the de Larosière recommendations, agreeing on the need to establish a European single rule book applicable to all financial institutions in the Single Market⁸. The Council's goal was consistent with the Commission's call for one harmonised core set of standards (a single rulebook) to be defined and applied throughout the EU by all supervisors⁹.

The first acts to be proposed to fulfil this ambitious goal were the founding regulations for the three new European Supervisory Authorities (ESAs)¹⁰. Building on the mandates of the existing Level 3 Committees and the innovations of the Lisbon Treaty in the area of EU implementing measures¹¹, and supplementing them with ad hoc procedures for the adoption of technical standards, the proposals equipped the new ESAs with the rule-making tools to write the new Single Rulebook in all but name¹². The ESAs were given a crucial role in the preparation of the Single Rulebook due to their technical expertise¹³.

The ESAs were however not the only actors that were called on to spell out the Single Rulebook. The existing Union institutions were entrusted with a role in the elaboration of a set of rules in a new area of Union law to be very densely regulated. In line with their role as co-legislators, the Parliament and the Council had to determine the defining principles, i.e. the Level 1 of the Single Rulebook. As in the past, for many areas where additional implementation was necessary at EU level, the Commission further specified these rules at Level 2, predominantly via delegated acts but on some occasions through implementing acts.

It is important to note that these elements are not necessarily innovative, as they were present in the Lamfalussy process albeit in the legal form of Commission directives. Most of the fields now regulated at Levels 1 and 2 were already subject to some EU rules as a result of the FSAP and the Lamfalussy process. The Single

⁷ Ibid, paragraph 109.

⁸ See European Council, Presidency Conclusions, Brussels, 18/19 June 2009.

⁹ Interestingly the term 'Single Rulebook' was not used in the de Larosière report but was rather a term advanced by the Commission in its Communication 'European Financial Supervision', COM(2009) 252 final.

¹⁰ See press release 'Commission adopts legislative proposals to strengthen financial supervision in Europe', IP/09/1347, Brussels, 23 September 2009.

¹¹ In particular Article 290 of the Treaty on the Functioning of the European Union (TFEU) provides for the adoption of delegated acts and Article 291 TFEU regulates the adoption of implementing acts.

¹² In compliance with the case law of the Court of Justice of the European Union (CJEU) and in particular Case 9/56 Meroni v High Authority [1958] ECR 133.

¹³ See for example Proposal for a regulation of the European Parliament and of the Council establishing a European Banking Authority, COM(2009) 501 final, recital 14.

Rulebook approach to law-making is thus novel mostly 'vertically', i.e. in the areas previously left for implementation by Member States, now regulated by the ESAs via their technical standards and guidelines¹⁴, taking away some of the Member States' discretion in these areas.

The Single Rulebook has expanded in coverage since the first proposal for substantive rules in this area in 2009 – the Omnibus Directive¹⁵. Revisions of almost all existing directives in the financial services sector were adopted, very often in the form of directly applicable regulations¹⁶. In addition some new areas were regulated¹⁷. The Union legislator has mostly had recourse to the 'universal' legal basis of Article 114 TFEU which, unlike other legal bases,¹⁸ allows for Level 1 legal acts to be adopted also in the form of regulations.

Under the Single Rulebook approach, the Commission has just about kept the workload that it had with previous implementing measures under the Lamfalussy process, but there has been a definite increase in the number of Commission regulations endorsing technical standards. Apart from technical standards, the ESAs have also produced numerous guidelines and several recommendations. The body of Union law in the area of financial services has therefore soared in a matter of several years. Many of the acts adopted as part of the Single Rulebook did not regulate completely unregulated areas but have simply meant a shift of regulation already existing at national level to the EU level. For these fields the Single Rulebook meant a shift of law-making from national to EU level.

At the same time the move towards a Single Rulebook has not been completely unopposed. Following the very strong initial push for harmonisation, opinions against the advancing of the Single Rulebook approach have been voiced¹⁹. Evidence of the changing sentiment could be also found in the inclusion of various opt-out and

¹⁴ The ESAs' guidelines benefit from the 'comply or explain' mechanism – strengthened in the case of the ESAs under Article 16 of the ESAs regulations compared to the European Systemic Risk Board and Articles 16 to 18 of Regulation (EU) No 1092/2010.

¹⁵ Proposal for a directive of the European Parliament and of the Council amending Directives 1998/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC, and 2009/65/EC in respect of the powers of the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority, COM(2009) 576 final.

¹⁶ Worth mentioning are Directives 2006/48/EC, 2006/49/EC, 2004/39/EC and 2003/6/EC, which have all been replaced to a certain extent by regulations.

¹⁷ See in particular Regulation (EU) No 648/2012.

¹⁸ Directive 2013/36/EU (the Capital Requirements Directive (CRD)) and Directive 2014/65/EU (MiFID II) are based on Article 53(2) TFEU and Directive 2014/57/EU (MAD) is based on Article 83(2) TFEU which are specific legal bases and require recourse to directives. On the other hand, recently regulated areas of the financial services sector did not face this constraint, but could rather be effected under the legal basis of Article 114 TFEU, which does not explicitly determine the type of legal act to be adopted. This has allowed for regulations governing the provision of services by central clearing counterparties, central securities depositories (CSDs) and even some specific types of investment funds – such as venture capital funds.

¹⁹ See Financial Times Editorial, 'Blocking the way to bank stability', 2 August 2011, available at www.ft.com.

derogation clauses in recent Level 1 texts²⁰. The decision to create an EU Banking Union will likely counter such trends over time.

2.2 Defining the Single Rulebook. Determining the exact scope.

In order to discuss the legal issues pertaining to the Single Rulebook, one should first seek an appropriate definition for the concept. Admittedly the Single Rulebook is not *per se* a legal term. It is more of a political concept and it is unlikely that e.g. the CJEU would recognise it as a stand-alone legal concept²¹. Conversely it is logical to assume that future judgements of the CJEU will continue to utilise a case by case approach, used thus far in disputes as regards the scope of harmonisation intended by the legislator in each case. It is indeed relatively difficult to develop an absolute over-arching legal doctrine on what the Single Rulebook approach to regulation encompasses. However it is still possible to examine and explain how each of the elements in the Single Rulebook function, including how they interact with each other. And once these mechanisms have been identified, they can be usefully applied in all branches of the Single Rulebook, not only in the context of supervision of credit institutions.

There are potentially at least three different viewpoints from which to examine the exact meaning of the Single Rulebook – a simple textual analysis; an approach seeking the broader intention of the legislator; and an analysis of the structure of the Single Rulebook and the properties of the different legal acts that form part of it. Each viewpoint gives additional indications as to the exact definition of the concept.

Textual analysis

Let us examine the name of the concept given by the EU policy makers first. If the Single Rulebook is indeed ‘single’, it also corresponds to a unique set of rules, possibly crafted in one place. If it is indeed a ‘rulebook’, it must encompass a set of rules that are precise and apply directly to public entities and private sector participants and govern fully their activities.

The first element of the ‘singleness’ indeed comes from the centralisation of rule-making. The rule-making has moved from 28 individual legislators to the Union institutions and bodies. Thus the legal acts that are part of the Single Rulebook are adopted by the Council and the Parliament, the Commission and the ESAs. From this perspective national measures adopted in implementation of directives or guidelines, or even regulations, do not at first sight comply with the ‘singleness’

²⁰ A large number of national options and discretions remained in Directive 2013/36/EU and Regulation (EU) No 575/2013. In addition see Article 458 of Regulation (EU) No 575/2013, and Article 21 of the proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions, COM(2014) 43 final.

²¹ The CJEU has not referred to the concept of a Single Rulebook in any of its judgments so far.

criterion. Nevertheless, as will be explained below, these could and should be considered as part of the Single Rulebook.

Seen as a 'rulebook' – a body of law – it encompasses Union substantive law in the designated fields (an indication of the exact sectoral scope follows below). This entails all forms of Union legal acts as specified in Article 288 TFEU. The textual analysis of the term does not however answer the question whether quasi-legislative acts adopted by Union bodies – as is the case with the ESAs' guidelines and recommendations – would form part of the Single Rulebook. The answer should be sought in the analysis of the typology of acts (see below).

Thus from a textual analysis point of view a useful definition of the Single Rulebook would be to consider it as a body of unique EU substantive rules, adopted and applicable at a pan-European level²².

The Union legislator's intention

The references to the Single Rulebook in recently adopted Union legislation as well as the *travaux préparatoires* and some political statements can help identify the different elements associated with the concept. Reading the preambles of the different pieces of Union legislation can be useful to determine the Union legislator's intention as regards the meaning of a Single Rulebook²³. The recurrent topic is harmonisation and furthering the single market, but also ensuring a level playing field between financial institutions. In addition the 'rulebook' element has arguably been more emphasised rather than the 'single' element. The Rulebook can thus be seen as a general concept used by the legislator to denote the regulation of the activities of all participants in the financial services sector.

Structure and types of legal acts that make it up

The Single Rulebook could simply be considered as a collection of individual legal acts, each with its particular characteristic. The structure of the Single Rulebook is somewhat hierarchical. At the very top are the Level 1 regulations and directives, containing the general principles, but sometimes also quite granular rules. Below Level 1 are the Union implementing measures (Level 2) – Commission delegated and implementing acts, specifying and implementing these general principles. A particular category of these Commission acts are the technical standards (which this working paper considers also as Level 2). The technical standards are elaborated by the ESAs and in general the Commission only endorses them, without any changes. The reason for this is that within the framework of the ESAs regulations²⁴ an

²² Admittedly some of these acts require national implementation in order to bring about obligations on private parties.

²³ See for example recital 22 of Regulation (EU) No 1093/2010, recital 14 of Regulation (EU) No 575/2013 and recital 58 of Directive 2014/65/EU.

²⁴ See Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

objection to the draft technical standard by the Commission significantly slows down the adoption process. Thus the Commission has been reluctant to oppose the draft technical standards unless it was in major disagreement with the ESAs²⁵.

The Single Rulebook also includes national laws implementing and giving effect to the relevant Union directives. In view of the prohibition of reverse vertical direct effect²⁶, it is necessary to include the laws which spell out concrete obligations for market participants. National laws also form part of the foundation of substantive law to be applied within the set-up of the EU Banking Union both within the SSM and the Single Resolution Mechanism (SRM). Finally national laws could in principle implement acts adopted by Union institutions and bodies at any of the 3 levels.

If faced with the question whether ESAs' guidelines and recommendations form part of the Single Rulebook, the CJEU would likely focus on the nature of these acts in particular – being non-binding²⁷ it would be difficult to construe them as a part of a single body of Union law. At the same time, the qualified procedure that is the 'comply or explain' mechanism and the special role that the ESAs occupy in the decision-making process in the financial sector²⁸ are factors that need to be taken into account. The mere fact that the onus is on a Member State (or its administration) to justify why it adopted divergent measures or abstained from action altogether could lead to the conclusion that the guideline/recommendation's proposition, while not legally binding, is the actual standard. The ESAs' guidelines and recommendations exert an influence on national legislation in a way which is very similar to that of directives. Because of their subject matter and their direct link to Level 1 and 2 legislation these acts cannot be easily ignored by the Member States. The binary choice of 'comply or explain' places ESAs' guidelines and recommendations close to minimum harmonisation directives in that they seek to ensure a minimum level of converging practices. Moreover the Union legislator has recently chosen to reinforce the standing of these acts vis-à-vis the Union institution, at a magnitude beyond the 'comply or explain' obligation²⁹.

For the above reasons, this working paper considers the ESAs' guidelines and recommendations as composite elements of the Single Rulebook³⁰. For ease of reference they will be referred to as Level 3, as they also conveniently correspond to the work done in the past by the Level 3 committees, when they had only soft powers under the Lamfalussy process. Classifying guidelines and recommendations

²⁵ It suffices to say that up to this point the Commission has rejected only one technical standard prepared by the European Securities and Markets Authority (ESMA). See in this regard Commission Decision of 28.1.2014 rejecting the draft implementing technical standards to amend Implementing Regulation (EU) No 1247/2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories under Regulation (EU) No 648/2012.

²⁶ See Section 3.3. below.

²⁷ As noted by Lenaerts, binding legal acts must have a legitimate legal basis, reflect the definitive position of a Union institution, body, office, or agency, and be intended to have legal effects. See Lenaerts, Maselis and Gutman, *EU Procedural Law*, Oxford University Press, 2014, p. 261.

²⁸ As exemplified in the judgment in the Short selling case – Case C-270/12 United Kingdom v Parliament and Council [not yet published in the European Court Reports (ECR)].

²⁹ See in particular Article 4(3) of Council Regulation (EU) No 1024/2013 and Article 5(2) of Regulation (EU) No 806/2014.

³⁰ One could also argue that soft tools such as guidelines adopted by the ECB and the Single Resolution Board (SRB) could also be considered as part of the Single Rulebook. See also Section 2.3.3.

one level below the technical standards also does justice to the hierarchy between those different acts. It is only unfortunate that the legal basis for the adoption of the guidelines and recommendations is usually (but not always³¹) in the Level 1 legislative act. To this end the Level 3 acts do not necessarily require Level 2 acts to come into being.

If one attempts to define the Single Rulebook by reference to its structure and the characteristics of the different legal acts that form part of it, the most appropriate definition is: a multilevel regulatory structure, comprising both Union acts and national law – which are applied in conjunction with each other.

Isn't the Single Rulebook simply maximum harmonisation across the board?

Very often the Single Rulebook is understood simply as maximum harmonisation in the financial services sector – a concept often associated with moving rule-making fully to EU level by effectively taking away all implementing powers from Member States. Such a conclusion would be rather imprecise. The concept of maximum harmonisation is in reality different.

Academic literature does not consistently refer to the concept of maximum harmonisation but uses different terms³². Uses of 'exhaustive', 'full', 'total', and 'complete' harmonisation seem to denote similar terms to maximum harmonisation. To complicate things further the CJEU also uses different terms in its judgements, even if they appear interchangeable³³. This paper uses the term 'maximum' harmonisation, as it is the one term that has been used consistently by the co-legislators in the context of the preparation of the Single Rulebook. A recurrent characteristic in all analyses of maximum harmonisation is that it is an approach to legislation which entails the full exhaustion of a Member State's discretion in the implementation of a certain Union rule.

It would be incorrect to equate the concept of the Single Rulebook with maximum harmonisation. The Single Rulebook is an approach to regulation, but it does not always entail maximum harmonisation across the board, but rather a rebalancing of the elements in the vertical construction of implementation of Union law (i.e. EU – Member State interaction). The distinction is important not only from a terminological

³¹ The ESAs have sufficient legal basis to adopt guidelines and recommendations within their scope of action solely under Article 16 of their founding regulations, without the need for an express mandate in the sectoral legislation. This is also consistent with their general task of fostering supervisory convergence.

³² Barnard speaks of 'exhaustive harmonisation' (Barnard, *The Substantive Law of the EU*, Third Edition, Oxford University Press, 2010, p. 626). Maletic uses the same term (Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, Edward Elgar, 2013). Dougan refers to the concept of 'total harmonisation' (Dougan, 'Minimum Harmonization and the Internal Market', *Common Market Law Review* 37, 2000, pp. 853-885).

³³ For example in the *Plus Warenhandelsgesellschaft* judgement, the Court uses the term 'full harmonisation' (Case C-304/08, paragraph 41), while in *Commission v Greece* it refers to 'exhaustive harmonisation' (Case C-178/05, paragraphs 31-32). Yet in *TNT Express Worldwide*, the Court also refers to 'maximum harmonisation' (Case C-169/12, paragraph 31).

perspective. As will be discussed later, the CJEU has consistently held that in fields subject to maximum harmonisation Member States may not maintain stricter measures.

The new approach to regulation does not completely squeeze out the Member States from their leading role in the implementation of Union law³⁴. Therefore it is probably more appropriate to link the Single Rulebook not to maximum harmonisation but to another term which is used in the Treaties – approximation of applicable laws³⁵. Thereafter the degree of approximation under the Single Rulebook approach varies in its different elements³⁶.

An additional reason why using the term maximum harmonisation may be misleading in the context of the Single Rulebook concept is that the former term has only been discussed by the CJEU in the context of Union directives. It is almost as if the CJEU had assumed that regulations, being directly applicable, do not leave much scope for Member State action. As will be discussed below, it may also be the case that regulations leave certain provisions to the implementation of Member States³⁷.

2.3 The current composition of the rulebook

As has been explained, the Single Rulebook could be understood as a body of substantive law – covering different levels – but applied to each and every case in conjunction. Exploring the legal characteristics of each of the comprising elements is a helpful foundation to aid in understanding the issues regarding the application of the Single Rulebook. As the legal issues are not identical at each of the 3 levels, it is worth conducting separate analyses.

2.3.1 Secondary legislation adopted by the co-legislators – directives and regulations (Level 1)

Secondary legislation with principles

At Level 1 of the Single Rulebook there is a string of secondary legislation with principles. While this working paper predominantly refers to the banking sector parts (in view of their relevance for the SSM) the Single Rulebook goes much further than what is commonly referred to as the Capital Requirements Directive (CRD) and the

³⁴ Member States remain in charge of implementing EU rules under Article 291(1) TFEU and also Article 5 of the Treaty on European Union (TEU).

³⁵ See Article 114 TFEU.

³⁶ For example Directive 2014/49/EU aims to fully approximate certain provisions as regards deposit guarantee schemes, e.g. coverage and pay-out delay, without allowing Member States discretion in their implementation, whereas the different capital add-ons in Directive 2013/36/EU provide national designated authorities with significant discretion.

³⁷ See in particular Commission Implementing Regulation (EU) No 650/2014 for a list of some of the existing options and discretions.

Capital Requirements Regulation (CRR)³⁸. A useful proxy for the scope of Level 1 of the Single Rulebook is the scope of the tasks conferred on the ESAs under their founding regulations. In particular Article 1(2) of each regulation specifies the relevant acts within which the ESAs have to exercise their powers³⁹. There are a number of additional acts which while not strictly forming part of the Single Rulebook are also potentially within the ESAs' scope of action⁴⁰.

As noted earlier, following on from the recommendations of the de Larosière report, the Union legislator has made a conscious choice to have recourse to regulations rather than directives in regulating the financial services sector whenever possible. This has meant that most of the recently-adopted measures are directly applicable conferring obligations on both supervisors and financial institutions. Such an approach removes the additional layer of complexity which is present when the Member States are tasked with the transposition of the provisions of directives into national law, only having to achieve the results sought in the directives, while largely being free in the means of achieving them (Article 288 TFEU).

The impact of the distinction between regulations and directives is however often overstated. First, Union law and in particular CJEU case law has gone a long way from the initial clear-cut distinction between directives and regulations in the early days of the European Community. Not only has the CJEU allowed exceptionally the direct effect of provisions of directives where certain conditions were met⁴¹, but it has also sought to broaden this exception⁴². This has even led some academics to argue for abolishing the distinction between the two instruments⁴³. Second, it is some time since the Union legislator has provided a mix of measures in the nominal form of a directive, some of which effectively removed Member States' discretion in implementation⁴⁴. Recent examples in the financial services sector, even before the rollout of the Single Rulebook, were the Directive amending the Deposit Guarantee Schemes Directive⁴⁵ and the old Capital Requirements Directives⁴⁶.

³⁸ Directive 2013/36/EU and Regulation (EU) No 575/2013.

³⁹ The core Level 1 acts that are applied by the EBA and the ESMA are relatively few so far (only 22), but may be complemented in the near future:

Directive 2013/36/EU, Regulation (EU) No 575/2013, Directive 2002/87/EC, Directive 2007/64/EC, Regulation (EC) No 1781/2006, Directive 2014/49/EU, Directive 2014/59/EU, Directive 2014/65/EU, Regulation (EU) No 600/2014, Directive 2014/57/EU, Regulation (EU) No 596/2014, Regulation (EC) No 1060/2009, Directive 2011/61/EU, Directive 2009/65/EC, Regulation (EU) No 236/2012, Regulation (EU) No 648/2012, Directive 97/9/EC, Directive 98/26/EC, Directive 2003/71/EC, Directive 2004/109/EC, Directive 2001/34/EC and Directive 2002/47/EC.

⁴⁰ Directive 2005/60/EC, Directive 2002/65/EC and Directive 2009/110/EC.

⁴¹ Case 152/84 Marshall [1986] ECR 723, paragraph 46; Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraph 29.

⁴² Case C-144/04 Mangold [2005] ECR I-9981, paragraphs 75-77.

⁴³ See Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions', *European Law Review* 3, 2009, pp. 349-377.

⁴⁴ See for example the Consumer Credit Directive (Directive 2008/48/EC).

⁴⁵ See Directive 2009/14/EC and in particular the amended Article 7.

⁴⁶ See the annexes to Directive 2006/48/EC.

The Level 1 principles vary in level of prescriptiveness – some options and discretion for Member States still remain

While often described as high level principles some of the provisions in the Level 1 acts are quite prescriptive and granular. At the same time it is true that national options and discretions have remained in limited fields. The CRR for example is a directly applicable regulation, but in certain cases an obligation is placed on Member States or competent authorities to achieve a result within specific limits⁴⁷. Such an approach is permissible under the case law of the CJEU which has already stated that also regulations may require further implementation by the Member States in order to be applied vis-à-vis individuals⁴⁸. As the CJEU has already noted in the context of sanctions, where a regulation empowers Member States to impose sanctions for infringements of the regulation it cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that regulation⁴⁹.

Consequently not all provisions of a regulation have actual direct effect. This holds true also for the Single Rulebook regulations. Thus the concept of national options and discretions, long associated with supervision⁵⁰, while being further limited is not made redundant under the Single Rulebook approach. In fact it is exactly in the context of directly applicable regulations that it is most relevant⁵¹.

2.3.2 Delegated and implementing acts (Level 2)

‘Pure’ Commission delegated and implementing acts

At the intermediate level in the Single Rulebook (or Level 2) are the Commission delegated and implementing acts adopted under the new legal bases in the Lisbon Treaty. The Commission participation in the preparation of the Single Rulebook is similar to the role that it had in the Lamfalussy process to adopt the ‘implementing measures’ via the Comitology procedures. Since the Treaty change in 2009 the Commission has at its disposal the delegated and implementing acts under Articles 290 and 291 TFEU. These require further reflection especially in the context of the Single Rulebook.

While the Treaty aims to differentiate the scope of delegated and implementing acts, the Union legislature has discretion when it decides to confer a delegated power on

⁴⁷ See for example the provisions on the adjustment of risk weights – Articles 124(2) and 164(4) of Regulation (EU) No 575/2013.

⁴⁸ See Case C-367/09 SGS Belgium and others [2010] ECR I-10761, paragraph 33.

⁴⁹ See Case C-60/02 Criminal proceedings against X [2004] ECR I-00651, paragraphs 61-63.

⁵⁰ See for example the Committee of European Banking Supervisor’s (CEBS’s) second advice on options and national discretions’, 10 June 2009.

⁵¹ Note also that Article 4(3) of Council Regulation (EU) No 1024/2013 solely refers to national options and discretions that are ‘currently’ granted by EU regulations but not directives.

the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU. Consequently, judicial review is limited to manifest errors of assessment⁵².

The mandate for the Commission to elaborate on a certain delegated Level 2 act of the Single Rulebook stems directly from an empowering provision in the Level 1 act. According to Article 290 TFEU the mandate has to be specific enough to be amenable to review, while the European Parliament and the Council maintain the right to revoke the delegation at any point. In practice this has meant that whenever the legislator decided that a certain part of the Single Rulebook had to be drafted by the Commission, it was called upon to elaborate in detail in the Level 1 act on the exact scope of delegation. The case law of the CJEU according to which some provisions of a regulation may not have direct effect, unless implemented by Member States, poses the very important question: to what extent can the provisions in Level 1 acts empowering the Commission and the ESAs be relied on as a source of direct obligations for individuals. In the specific example of the Liquidity Coverage Requirements, the chosen approach was in line with the rationale of the above case law. While indeed the CRR provided for a transitional period during which institutions had to hold liquid assets⁵³, and further specified the exact amounts⁵⁴, it was only with the adoption of a Commission delegated act⁵⁵ that these obligations became enforceable.

If one excludes the implementing technical standards (discussed below), the recourse to implementing acts in the context of the Single Rulebook has been rather limited. Some examples of this in practice include the Commission's powers under the CRR to specify grandfathering rules⁵⁶.

Technical standards

A specific type of Level 2 measures in the Single Rulebook are the technical standards. Strictly speaking these are adopted in the form of Commission delegated or implementing acts. At the same time, those familiar with the Lamfalussy process may find it confusing that the former Level 3 committees draft the technical standards and have a significant say in their content. This working paper unambiguously classifies technical standards as Level 2 measures because their final form is a Commission delegated or implementing act, but also because the technical standards are mandated by the Level 1 text directly, i.e. they are in no way subordinate to another Level 2 measure.

⁵² See case C-427/12 Biocides [not yet published in the ECR], paragraph 40.

⁵³ Article 412 of Regulation (EU) No 575/2013.

⁵⁴ The phasing-in steps are provided for in Article 460 of Regulation (EU) No 575/2013.

⁵⁵ See Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions, OJ L 11, 17.1.2015, p. 1.

⁵⁶ See for example Commission Implementing Regulation (EU) No 591/2014.

The technical standards are a major innovation of the Single Rulebook. As indicated before, they tend to cover areas that were previously subject to Member State implementation. From this perspective it is therefore unfortunate that technical standards are adopted both as delegated acts and implementing acts, when strictly speaking they touch upon the division of implementation powers between the Union and the Member States which under the Lisbon Treaty is governed by Article 291 TFEU. There could be an argument in principle that the technical standards could exist only as implementing acts. At the same time it was mentioned that the CJEU considers that the Union legislature has significant discretion in the choice of the Level 2 act⁵⁷. Moreover this rule should probably apply *mutatis mutandis* also in the context of choosing between regulatory and implementing technical standards.

It must be noted that the choice of the legislator not to create a new type of legal act, specifically tailored for the financial services sector, has not necessarily been a voluntary one. The initial proposals by the Commission on the ESAs regulations foresaw the ESAs having the power to adopt binding rules⁵⁸. However it was due to the very restrictive interpretation of the *Meroni* doctrine⁵⁹ that the legislator chose to resort to the existing legislative tools. The recent judgement of the CJEU in the *Short selling* case⁶⁰ may however be considered as an indication of the loosening of the strict conditions of *Meroni*. It seems that, under specific conditions, future revisions of the ESAs regulations could grant limited discretion to them (in full compliance with the Treaties), including the power to adopt technical standards independently⁶¹.

From a practical perspective it cannot be denied that the ESAs regulations introduced two new sub-types of Union legal acts: regulatory and implementing technical standards. Due to the limitations of Article 288 TFEU they are not recognised as separate legal forms, but rather subsumed under the existing classes of binding legal acts – regulations, directives and decisions⁶². This classification brings with it the characteristics and consequences of these very well-known types of Union legal acts – at least until the CJEU has the chance to assess whether technical standards should be treated in a special manner.

Council implementing acts?

One more unusual type of act that forms part of the Single Rulebook is the Council implementing act. It remains to be seen to which extent this act will be used in the future. Council implementing acts are adopted under the general legal basis of Article 291 TFEU, but are not subject to any safeguards similar to those foreseen for

⁵⁷ Case C-427/12 Biocides, paragraph 40.

⁵⁸ See for example Proposal for a regulation of the European Parliament and of the Council establishing a European Banking Authority, COM(2009) 501 final.

⁵⁹ Case 9/56, *Meroni*.

⁶⁰ Case C-270/12 United Kingdom v Parliament and Council.

⁶¹ Case C-270/12 United Kingdom v Parliament and Council, paragraphs 45 and 53.

⁶² In reality the ESAs have only proposed technical standards in the form of regulations, which the Commission has willingly endorsed.

the Commission in the recent Comitology Regulation⁶³. Recourse to this instrument is quite rare and the couple of uses have not been uncontroversial. First there could be doubts as to whether a Council implementing act rejecting national measures which derogate from parts of the CRR⁶⁴ really forms part of the Single Rulebook. It appears more like the Council acting as guardian of Single Rulebook, with its task of objecting to any derogations from it. But this then poses the question why should there be any derogations from the Single Rulebook in the first place. Another example of a Council implementing act is a provision in the SRM Regulation which provides for the calculation of ex ante contributions to the resolution fund⁶⁵. The novelty here is that this Level 2 implementing act is adopted within the framework of another Level 2 act – a Commission delegated act⁶⁶ adopted under the Bank Recovery and Resolution Directive (BRRD)⁶⁷. Thus the Council implementing act had to comply with both the empowering clause in Level 1 and with another Level 2 act. Such cross-dependencies between Level 2 acts are likely to be commonplace in future versions of the Single Rulebook.

Choice of Level 2 instruments

With the introduction of the technical standards, an obvious question is what is the usefulness of pure Commission delegated or implementing acts (at least in the financial service sector), especially considering the significant technical expertise of the ESAs in this area. The answer should be sought in the limitations faced by the different instruments. Article 290 TFEU vests in the Commission the power to amend or supplement 'certain non-essential elements' of a legislative act (or a Level 1 act under the Single Rulebook terminology), while as regards implementing acts Article 291 TFEU foresees these being used where uniform conditions for the implementing legally binding Union acts are needed. On the other hand the European Banking Authority (EBA) Regulation⁶⁸ allows the EBA to only adopt regulatory technical standard where these would not imply strategic decisions or policy choices⁶⁹. It is within this middle ground, which is 'too high' for the technical standards, that the Commission 'pure' delegated or implementing acts are the most useful. Indeed experience has shown that such powers have been granted to the Commission in highly politically-charged areas⁷⁰.

⁶³ Regulation (EU) No 182/2011.

⁶⁴ See Article 458(4) of Regulation (EU) No 575/2013.

⁶⁵ Article 66(3a) of Regulation (EU) No 806/2014. See Council Implementing Regulation (EU) No 2015/81.

⁶⁶ Commission Delegated Regulation (EU) No 2015/63.

⁶⁷ Directive 2014/59/EU.

⁶⁸ Regulation (EU) No 1093/2010.

⁶⁹ Articles 10(1) and 15(1) of Regulation (EU) No 1093/2010.

⁷⁰ Consider the example of the Liquidity Coverage Requirements, whose phasing-in steps were determined in Article 460 of Regulation (EU) No 575/2013, but the requirements themselves were further specified in a Commission delegated act. Another example is the implementing act under Article 103(8) of Directive 2014/59/EU to determine the calculation of ex ante contributions for resolution purposes.

2.3.3 Recommendations and guidelines (Level 3)

As already noted the structural analysis of the concept of the Single Rulebook leads to the conclusion that both recommendations and guidelines⁷¹ should be considered as part of the rulebook. In this regard, the contribution of recommendations and guidelines produced by the ESAs (and previously Level 3 committees) to achieving convergence of rules and practices has been positive. It cannot be denied that in many instances it was exactly these Level 3 committees guidelines that laid the groundwork that allowed for the elaboration of technical standards⁷².

Nevertheless the introduction of technical standards has not led to the disappearance of the ESAs' recommendations and guidelines. While indeed the number of guidelines has shrunk at the expense of technical standards, the former are still a useful tool, especially in seeking convergent implementation of directives⁷³. In addition since the introduction of the Single Rulebook, guidelines have become more focused and granular in the areas that they cover. The ESAs' recommendations have remained more limited, often seeking to temporarily cover gaps in EU action⁷⁴.

In addition to the ESAs' soft tools, the Banking Union has granted certain rule-making powers in the field of financial services regulation to the ECB as well as the SRB. The ECB has been granted the soft powers to adopt guidelines and recommendations, and take decisions subject to and in compliance with the relevant Union law⁷⁵ but without replacing the exercise of the EBA tasks. The SRB has been granted broader rule-making powers, being empowered to adopt guidelines and general instructions to national resolution authorities in accordance with which tasks are performed and resolution decisions adopted by national resolution authorities⁷⁶. While not strictly speaking part of the Single Rulebook, as their institutional scope of application is narrower, these tools assist the Single Rulebook approach in seeking further convergence.

⁷¹ By guidelines this paper refers only to the ESAs' guidelines. Conversely the ECB's guidelines adopted under Articles 6(5) and 7(2) of the SSM Regulation are of a procedural nature and do not strictly form part of the Single Rulebook.

⁷² For example in the area of reporting requirements, the CEBS has already provided harmonised COREP templates since 2006. See 'Guidelines on a common reporting framework (COREP) for the new solvency ratio for credit institutions and investment firms', 13 January 2006.

⁷³ See Directive 2014/59/EU, in particular Articles 5(7) and 17(8).

⁷⁴ Consider the EBA recommendation in anticipation of uniform capital buffers – EBA Recommendation on the creation and supervisory oversight of temporary capital buffers to restore market confidence (EBA/REC/2011/1). Another example is the recommendation which aims to build the way to Union legislation on the administration of benchmarks – Recommendation on supervisory oversight of activities related to banks' participation in the Euribor panel (EBA/REC/2013/01).

⁷⁵ See also Article 6(5)(a) of Council Regulation (EU) No 1024/2013 which empowers the ECB to issue regulations, guidelines or general instructions to national competent authorities regarding the supervision of less significant institutions.

⁷⁶ See Article 31(1)(a) of Regulation (EU) No 806/2014 as well as Articles 8(3) and 12(3).

2.3.4 The ESAs' and the Commission's Questions and Answers documents

The ESAs' Questions and Answers⁷⁷ possess some of the characteristics of an element of the Single Rulebook, but they are neither binding nor authoritative. At the same time they may potentially limit the national authorities' discretion in the interpretation and the application of rules and they also bind at least the issuing organisation to a certain extent. The ESAs' Q&As have progressively merged with the Commission's Q&As⁷⁸.

The adoption of Q&As however is not a competence which is conferred on the ESAs by their founding acts⁷⁹. It rather follows an extension of the Commission's activity in various areas of Union law, including financial services legislation. At the same time the Commission services have provided a disclaimer that the Q&As are in no way constitutive of an interpretative document⁸⁰. In addition to this disclaimer, it should be noted that the Commission's role in this area is at the very least linked to its role of guardian of the Treaties and in particular its role in scrutinising the implementation of directives. The ESAs have a similar power under their founding regulations⁸¹, albeit used only once thus far⁸², and the Q&As would appear to be a step in the direction of exercising this power. The ESAs claim that the overall objective of the Q&As tool is to ensure consistent and effective application of the new regulatory framework across the single market, and hence contribute to the building of the Single Rulebook in banking⁸³. Moreover, as the Q&As have no binding force in law, nor are subject to 'comply or explain', their application will be rigorously scrutinised and challenged by the ESAs and national supervisory authorities given their undoubted practical significance regarding the achievement of a level playing field⁸⁴. It remains to be seen what weight national competent authorities (NCAs) (or as a matter of fact the ECB and the SRB) attribute to the ESAs' Q&As.

⁷⁷ See the 'Single Rulebook Q&A' section on the EBA's website at www.eba.europa.eu.

⁷⁸ Ibid. For example EBA has abstained from issuing answers on a number of questions, reverting instead to the analysis prepared by the Commission. A disclaimer is added to these answers that such questions go beyond matters of consistent and effective application of the regulatory framework and are therefore not answered by the EBA itself.

⁷⁹ At the same time, the ESAs seem to derive this competence from their task of contributing to the consistent application of legally binding Union acts, as set out in Article 8(1)(b) of the ESAs regulations.

⁸⁰ The Commission services further explain that the Q&As do not prejudge the position that the Commission might take on the same matters if developments, including the CJEU rulings, lead it to revise some of the views expressed, and do not prejudge the interpretation that the CJEU might place on these matters. See the 'Questions on Single Market Legislation' section on the Commission's website at www.ec.europa.eu.

⁸¹ Article 17.

⁸² EBA Recommendation to the Bulgarian National Bank and Bulgarian Deposit Insurance Fund on action necessary to comply with Directive 94/19/EC (EBA/REC/2014/2).

⁸³ See the 'Single Rulebook Q&A' section on the EBA's website at www.eba.europa.eu.

⁸⁴ Ibid.

2.4 The principles of subsidiarity and proportionality in the context of drafting the Single Rulebook

The trend in the preparation of the Single Rulebook has recently been to revise existing legislation, usually by strengthening the existing provisions in order to increase the level playing field. Many of the recasts of legislation that happened under the aegis of the Single Rulebook kept and even widened in some occasions the substantive scope of the Level 1 legislation. For example all of the elements of the old Directives 2006/48/EC and 2006/49/EC were kept in the recast CRD/CRR, but also complemented with additional rules, some of which came from international standards.

In addition to the revisions, the Union legislator has aimed to regulate some completely new areas, where no Union regulations and, for some Member States, absolutely no regulation at all, existed. The prime examples are the Credit Rating Agencies Regulation⁸⁵, European Market Infrastructure Regulation (EMIR)⁸⁶ and the Central Securities Depositories Regulation (CSD Regulation)⁸⁷, and the proposed benchmarks regulation⁸⁸. Very often the Union legislator has taken to regulating areas previously in the realm of the Member States – such as investment funds and managers (the AIFM Directive⁸⁹ and the proposed money market funds regulation⁹⁰). These developments bring about the question of compliance with the principles of subsidiarity and proportionality. And while compliance with these two principles may only be determined on a case by case basis, some general remarks can be made, which give an indication as to whether a further expansion of the Single Rulebook would be feasible.

Principle of subsidiarity

Compliance with the principle of subsidiarity is quite relevant in the construction of the Single Rulebook and especially as regards Level 2 and 3 acts. According to Protocol 2, annexed to the Treaties each institution must ensure constant respect for the principles of subsidiarity and proportionality. It should first be noted that this obligation does not *prima facie* cover Union bodies such as the ESAs. A further ambiguity is posed by the fact that Protocol 2 provides for a remedy procedure only for legislative acts. Delegated and implementing acts (as well as the technical standards endorsed via such acts) are not legislative acts under the Lisbon typology and it is not clear if the safeguards apply to them as well.

⁸⁵ Regulation (EC) No 1060/2009.

⁸⁶ Regulation (EU) No 648/2012.

⁸⁷ Regulation (EU) No 909/2014.

⁸⁸ See Proposal for a regulation of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts, COM(2013) 641 final.

⁸⁹ Directive 2011/61/EU.

⁹⁰ Proposal for a regulation to the European Parliament and of the Council on money market funds, COM(2013) 615 final.

Moreover the safeguards of Protocol 2 may be insufficient in the context of the Single Rulebook which has both horizontal and vertical dimensions. The subsidiarity check has different ramifications in the context of the Level 2 acts. One question is therefore to which extent of granularity should Union rules be allowed to go. Under Article 291(1) TFEU the Member States must adopt all measures of national law necessary to implement legally binding Union acts. The application and therefore the interpretation of the legal acts is left to the Member States and consequently also to their administrations. A way round this for the Commission could be to legislate in a particular field (via delegated or implementing acts) and thus limit the Member States' discretion. Thus in addition to the visible horizontal dimension of the principle of subsidiarity, the Single Rulebook also has a 'vertical dimension' – how precisely and granularly the matter should be regulated in Union law.

The principle of subsidiarity is arguably more relevant for some Level 2 acts than others. Relevant here could be the distinction developed by Advocate General Cruz Villalón in the *Biocides* case:

'On the other hand, we should not lose sight of the fact that, ultimately, the distinction between delegated acts and implementing acts does not depend only on the difference between legislation (even if it is delegated) and implementation, but also on the fact that delegated acts are the product of the exercise of a normative competence belonging to the European Union itself, whereas implementing acts are the result of the (subsidiary) exercise by the Commission (or the Council) of a competence that belongs predominantly to the Member States.'

In other words, the underlying reason for the dividing line between Articles 290 TFEU and 291 TFEU is not so much (or not only) the need to draw a line between legislation and implementation as successive stages in the EU rule-making procedure, but, more importantly, the desire to make clear the parameters of the respective competences of the European Union and the Member States.⁹¹

Approaching the two types of Level 2 acts (delegated and implementing acts) from the perspective of a division of competences between the Union and the Member States allows having a clearer view on the application of the principle of subsidiarity. If indeed the delegated acts simply represent an opportunity for the co-legislators and the Commission to collaborate in the work of legislating⁹² then the actual delineation of competences between the Union and the Member States is done at Level 1. Thus the delegated acts cannot really be examined for compliance with the principle of subsidiarity, but rather the empowering Level 1 act should be scrutinised. If however implementing acts are indeed rules that empower the Union, through the Commission, to use, in a subsidiary manner, a competence that belongs to the Member States⁹³, the outcome should be different. It would thus appear that each and every implementing act has to, in itself, comply with the principle of subsidiarity.

⁹¹ Opinion of AG Cruz Villalón in Case C-427/12 *Biocides* paragraphs 57 and 58.

⁹² *Ibid* paragraph 36.

⁹³ *Ibid* paragraph 49.

Such questions were not very topical in the past when Levels 1 and 2 were comprised predominantly of minimum harmonisation directives. In this case it was clear that the Member States had the final word in achieving the result sought by the directives, in accordance with Article 288 TFEU. With the shift to regulations at both Levels 1 and 2, the role of the Member States is not so clear. As will be discussed in Section 3, there may be still a role in the implementation of these measures by the Member States. In some cases they may have the power to top up and complement a Union rule. In other cases they would be barred from adopting any additional measures.

Principle of proportionality

The principle of proportionality requires that measures implemented through Union provisions be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it⁹⁴. The principle therefore provides protection for, inter alia, Member States and industry against Union action involving obligations or burdens which are not proportionate to the proposed objective⁹⁵. It would be for the CJEU to examine to what extent the Single Rulebook approach to regulation is justified and not excessive. But it seems logical that all Single Rulebook acts (at Levels 1, 2 and 3) would have to be justified at least by the objective of improving the functioning of the internal market.

2.5 Keeping the Single Rulebook up-to-date

The Single Rulebook approach seeks to ensure a level playing field for the financial institutions in the EU and to allow more cross-border business and a true internal market for financial services. But moving so many detailed rules at an EU level may have certain disadvantages. The legislative process at EU level is arguably not as quick as that at national level and not as flexible in addressing specific concerns. Moreover the drafters of policy at EU level would need to obtain the relevant information for 28 jurisdictions in order to define the appropriate policy. This is also because the rules at EU level have to cater for a larger and more diverse number of relationships. These are of course transitional problems as the Single Rulebook will bring about convergence, which would in turn facilitate the development of uniform solutions. Nevertheless, in the medium term it is quite likely that the need would arise for the modification of the existing parts of the Single Rulebook, in view of the experience with the first rules.

Very generally, the Single Rulebook has the mechanism of flexibility built in through the Commission's key rule-making role. The Commission's power of initiative combined with the procedures set out in Articles 290 and 291 TFEU provide a flexible basis for updates to the different parts of the Single Rulebook. A very similar

⁹⁴ Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 122.

⁹⁵ See Lenaerts and Van Nuffel, *European Union Law*, Sweet & Maxwell, 2011, p. 146.

mechanism has already functioned well in the past with the Commission implementing measures under the Lamfalussy process. The mechanism for updates functions well also at Level 3, where the ESAs have all the necessary tools to revise their existing guidelines and recommendations.

With regard to the specific case of technical standards, the way forward is also relatively clear. In principle the Commission is the only Union institution that has the power of legislative initiative. On the other hand the ESAs regulations constrain the Commission's competences as regards the adoption of technical standards in a very specific procedure⁹⁶. Moreover in accordance with Article 29(1)(d) of the ESAs regulations the ESAs are required to review the application of the relevant technical standards, and of the guidelines and recommendations, and propose amendments where appropriate. Thus the aim to make full use of the ESAs expertise has been reconciled with the Commission's right of initiative. The Commission may in any case issue requests to the ESAs to provide draft updates of the existing technical standards.

⁹⁶ See in particular Articles 10 and 15.

3 Application of the Single Rulebook

Having discussed the elements of the Single Rulebook and their legal nature, this section deals with its application by the competent authorities to the regulated activities.

As noted above, while the Single Rulebook spans more or less ‘horizontally’ – in terms of the areas it covers, it also spans ‘vertically’ – in the level of granularity/prescriptiveness that it requires, thus taking away from Member States discretion in implementation of Union law. In the context of financial supervision, two specificities need to be taken into account – that harmonisation is effected predominantly via directly applicable regulations of general application while day-to-day supervision is done via individual administrative acts. Due to these specificities, it is evident that no level of granularity of the Single Rulebook could establish a simple box-ticking compliance exercise for the supervisory authorities.

3.1 Application and enforcement; regulation and supervision

There is a fine line between the concepts of application and enforcement of a legal act. In regulating a particular relationship, application of law would normally come as a first step, whereas enforcement would be a second step that ensures compliance with the applied rule⁹⁷. Application is usually the responsibility of an administrative body (such as a ministry or an agency), whereas enforcement is the responsibility of a court. In highly regulated fields, where obligations are imposed via administrative measures, such as financial supervision, application relates more to actions by public supervisory authorities vis-à-vis private parties (in this case financial institutions). These actions are an exercise of the supervisory mandate specified in varying levels of detail in an overarching legal act of general application. The specificity here is that enforcement is also part of these supervisory actions, without the need for a court to endorse a certain requirement⁹⁸. To this end application and enforcement cannot be easily decoupled in the context of overseeing financial institutions. It is also for this reason that in the financial services (and other sectors) the concept of supervision has developed, which encompasses elements of both application and enforcement of law.

A similar discussion has been in place for some time on the distinction between regulation and supervision. As the de Larosière report noted:

‘Regulation is the set of rules and standards that govern financial institutions; their main objective is to foster financial stability and to protect the customers of financial services. Regulation can take different forms, ranging from information requirements to strict measures such as capital requirements. On the other hand, supervision is

⁹⁷ Lenaerts and Van Nuffel (see footnote 95), p.892.

⁹⁸ Unless the private party seeks the judicial review of the enforcement action.

*the process designed to oversee financial institutions in order to ensure that rules and standards are properly applied. This being said, in practice, regulation and supervision are intertwined...*⁹⁹

In the simple distinction suggested by the de Larosière report, the Single Rulebook is closest to regulation, while its application is what is described as supervision. But application is also broader than simple supervision, as it may under the current set-up involve the semi-automatic application of rules, simply by requiring compliance and sanctioning non-compliance¹⁰⁰. Also, in certain cases, the implementation of Union rules at national level could be done via individual supervisory decisions, as Article 288 TFEU does not specify that Member States are obliged to implement Union law via a specific act or action¹⁰¹.

The Single Rulebook and the actual application via supervisory actions are in fact often counterparts rather than master and servant. This makes the legal analysis more difficult. However this section does not aim to fully untangle these two complex elements which could only be done on a case by case basis. Rather it adopts a more general overarching terminology which allows examining the impact of the Single Rulebook on selected supervisory activities, regardless of their classification. This paper adopts a definition of application that is based on the definition of the Single Rulebook as a body of substantive law. To this end it refers to the 'application' of the Single Rulebook whenever a supervisory action has been necessitated or made available by the Single Rulebook¹⁰². When the Supervisory and Review Evaluation Process (SREP) is discussed, this paper considers the powers in the CRD and Regulation (EU) No 1024/2013 (the SSM Regulation) as the Single Rulebook and the actual Pillar II requirements imposed on an institution as the application. This is similar for, e.g., sanctioning frameworks in the Level 1 acts and the actual decisions imposing sanctions, but also notably national options and discretions granted to competent authorities and their implementation and also the ESAs' guidelines and the national measures (or actions by the ECB and the SRB) adopted to comply with them.

3.2 Basic set-up of application of banking legislation prior to/outside the SSM

The Single Rulebook was formally recommended in the de Larosière report¹⁰³ as a harmonisation measure. The report however argued for an integrated network of European financial supervisors and at the time centralised supervision was not recommended. The policy recommendations put forward were for a largely

⁹⁹ Paragraph 38.

¹⁰⁰ Consider for example the compliance with the Standardised Approach for the calculation of own funds requirements, or compliance with reporting requirements, which do not require a supervisory decision.

¹⁰¹ See the section on implementation of the Single Rulebook by the Member States, below.

¹⁰² As noted above the national implementation of a directive should also be considered as part of the Single Rulebook, while decisions based on this national law are the actual application of the Single Rulebook.

¹⁰³ Recommendations 10 and 20.

decentralised structure, fully respecting the proportionality and subsidiarity principles of the Treaty¹⁰⁴. Moreover the High-Level Group explicitly took the position that the ECB should not become responsible for the micro-supervision of financial institutions¹⁰⁵. Following up on these recommendations, the original set-up for the application of the Single Rulebook was to allow for the decentralised application of a converging set of rules. In this regard the establishment of the SSM did not fully undo this decentralised approach. There remain areas where national supervisors retain full responsibility for the implementation of the Single Rulebook¹⁰⁶.

Implementation of the Single Rulebook by the Member States

While the aim of the Single Rulebook is to create directly applicable rules which are identical for all institutions conducting business in the EU, it cannot be all encompassing and thus may require some implementation by the Member States. In this context the compatibility of national implementing measures (be they laws, ordinances or concrete supervisory actions) with the Single Rulebook itself becomes important. The principle of primacy of Union law is clear – it is established case law of the CJEU that the national courts have to set aside any provision of national law which may be in conflict with [Community law]¹⁰⁷. Thus in areas regulated by the Single Rulebook conflicting national provisions have to be set aside. In order to determine whether and to which extent an area is regulated by the Single Rulebook, the question of ‘exhaustion’ of the Union’s competence is particularly important. Where competence gaps exist, Member States may have the incentive to legislate and provide additional requirements. Many of the recently adopted Single Rulebook acts (be they at Levels 1 or 2) also leave space for further implementation at national level. While this ensures the flexibility of the Single Rulebook it nevertheless may prejudice its ultimate aim of establishing a level playing field.

In order to determine the extent of matters regulated by the Single Rulebook and therefore whether there are conflicts with national measures, one needs to examine the degree of conferral of competence on the Union legislature to enact an element of the Single Rulebook. In the first place, the legal basis determines the extent of the competence conferred on the Union in a certain field or for the realisation of certain objectives¹⁰⁸. The legal basis therefore determines the ‘vertical’ division of competence between the Union and the Member State¹⁰⁹. A clear indication for the Single Rulebook is that the majority of Level 1 acts are adopted under the legal basis

¹⁰⁴ Ibid, paragraph 184.

¹⁰⁵ Ibid, paragraph 172.

¹⁰⁶ Areas where implementation is still performed in a fully decentralized manner are the areas falling outside the ECB’s exclusive competences, and, to a certain extent, various elements of the supervision of less significant institutions.

¹⁰⁷ Case 106/77 Simmenthal [1978] ECR 629, paragraph 21.

¹⁰⁸ Lenaerts and Van Nuffel (see footnote 95), p. 113.

¹⁰⁹ Ibid.

of Article 114 TFEU¹¹⁰. This is not surprising since the Single Rulebook encompasses the approximation of the rules in the internal market particularly for financial services. As such the Single Rulebook governs an area of shared competences in accordance with Article 4(2) TFEU.

The finding that the Single Rulebook falls within the field of shared competence is very significant for the manner of its implementation/application. According to the doctrine of pre-emption, derived from Article 2(2) TFEU, in the areas of shared competence the Member States may only exercise their competence to the extent that the Union has not exercised its competence¹¹¹. This is reiterated in Protocol 25 to the Treaties on the exercise of shared competence. In accordance with the pre-emption doctrine, the Union's exercise of its competence in a given field will limit the Member State's competence to act to matters that have not yet been regulated by the Union¹¹². The case law of the CJEU is indicative in this regard and in particular the *AETR* case where the CJEU concluded that with regards to specific powers in the area of common transport policy:

*'These community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the community institutions would be incompatible with the unity of the common market and the uniform application of community law.'*¹¹³

In academic research Schütze¹¹⁴ identifies three possible degrees of pre-emption, based on the doctrine developed by the US courts: field pre-emption, obstacle pre-emption and rule pre-emption. The above conclusions in the *AETR* judgement seem to go in the direction of field pre-emption. It would be for the CJEU to determine which category of pre-emption characterises the application of the Single Rulebook. But if other branches of Union law, regulated in a manner comparable to the Single Rulebook (such as agriculture), are an indication, it would seem most likely that the CJEU would opt for field pre-emption. Drawing a parallel to the relevant case law, the Single Rulebook could indeed be considered as an integrated area where 'it is one of the fundamental characteristics of a common organisation of the market that in the sectors concerned the Member States can no longer take action through national provisions adopted unilaterally'¹¹⁵.

In practice it may be difficult to distinguish the degree of pre-emption for each element of the Single Rulebook. But even in cases where this is clear, the actual implementation of the principle of primacy in setting aside the conflicting national legislation would present some interesting results. As already noted by the CJEU,

¹¹⁰ The majority of the recently adopted instruments, and in particular all regulations, are adopted on the legal basis of Article 114 TFEU. Many of the remaining directives are adopted under Article 53(2) which as part of Title IV is also a shared competence as it can be subsumed under the principle area of the internal market under Article 4(2) TFEU.

¹¹¹ Lenaerts and Van Nuffel (see footnote 95), p. 128, and Craig, *EU Administrative Law*, Second edition, Oxford University Press, 2012, p. 379.

¹¹² Lenaerts and Van Nuffel (see footnote 95), p. 129.

¹¹³ Case 22/70 *Commission v Council* [1971] ECR 263, paragraph 31.

¹¹⁴ Schütze, 'Supremacy without pre-emption? The very slowly emergent doctrine of community pre-emption', *Common Market Law Review* 43, 2006, pp. 1023-1048.

¹¹⁵ Case 48/85 *Commission v. Germany* [1986] ECR 2549, paragraph 12.

the duty to set aside conflicting rules applies not only to national courts, but also to public bodies, including administrative bodies¹¹⁶. Such an obligation is likely to also apply to NCAs which should also be under the obligation to set aside conflicting national measures. This conclusion is also therefore relevant in the context of the ECB-NCAs interaction and the performance of tasks following ECB instructions, as it can provide for a pragmatic solution for the ECB to ensure NCAs' compliance with the elements of the Single Rulebook in the form of directives¹¹⁷.

The ESAs' role in enhancing supervisory convergence and in the application of the Single Rulebook

In the application of the Single Rulebook, the ESAs have a particular role to seek convergence of national supervisory practices. The ESAs have in fact gained significant discretion in a number of fields beyond the adoption of technical standards, but also in the actual application of the Single Rulebook. In the example of credit rating agencies, ESMA has been fully entrusted with their supervision, without sharing these tasks with NCAs¹¹⁸. Recently ESMA was given additional intervention powers, under the specific legal basis of Article 9(5) of its founding regulation, to intervene in order to preserve the functioning and integrity of the financial markets and the stability of the whole or part of the financial system¹¹⁹. Already the recent case law of the CJEU has shed light on the limits of the ESAs discretion. It would appear that in areas where technical expertise is required the ESAs are well placed to take final decisions, provided that such power is circumscribed by specific conditions¹²⁰. There is so far no comparable provision conferring intervention powers on the EBA in the area of banking supervision, but the legal basis for such a conferral is also present in the EBA founding regulation and allows for such a potential development in the future.

3.3 Challenges in the application of the Single Rulebook

There could be of course some challenges inherent in the implementation of a brand new approach to Union legislation. But they are of a temporary/transitional nature. While they do pose questions at this time, it is likely that, in any future litigation in the context of supervision, many of these issues would be resolved by an evolving doctrine of the distribution of the competences between the Union and Member States to be developed by the CJEU. It is also very likely that the solutions developed in this process would have a much wider significance for Union law in general, beyond just the Single Rulebook.

¹¹⁶ Case C-103/88 *Fratelli Costanzo*, paragraph 31 and Case C-188/89 *Foster* [1990] ECR I-3313, paragraph 20. See also *Lenaerts and Van Nuffel* (see footnote 95), p. 758.

¹¹⁷ See also Section 4.3. on the application of directives.

¹¹⁸ See Regulation (EC) No 1060/2009.

¹¹⁹ See Article 28 of Regulation (EU) No 236/2012 and Article 40 of Regulation (EU) No 600/2014.

¹²⁰ See Case C-270/12 *United Kingdom v Parliament and Council* [not yet published in the ECR].

Hierarchy of acts in the rulebook

In the established hierarchy of sources of Union law, it has been clear which sources of law prevail over others. Primary legislation comes first, then international law, then principles of Union law and finally Union secondary legislation. This does not however help to establish the hierarchy between the different elements of the Single Rulebook since they are all clustered into only one of the established categories – secondary Union legislation. The intuitive solution would be to consider that Level 1 acts prevail over Level 2 acts, the same way that Level 2 acts prevail over Level 3 acts. As Lenaerts notes in the simple case where one legal act provides the delegation and the other is adopted in implementation of it, an institution may not fail to comply in an implementing act with the conditions which it itself laid down in an earlier regulation, directive or decision upon which that act is based¹²¹. Lenaerts therefore concludes that an act is invalid where it conflicts with the act on the basis of which it was adopted. The Union institutions and the Member States and, in some circumstances, individuals, may obtain a court ruling on the legality of an implementing act¹²².

While this construct works in the isolated case of a contradiction between an empowering Level 1 act and the Level 2 act adopted pursuant to the very same act, this may not be true in all cases in the densely regulated areas of the Single Rulebook. With the entry into force of the Lisbon Treaty, a distinction has been drawn between the legislative acts adopted under a Treaty legal basis (or the Level 1 of the Single Rulebook) and non-legislative acts which are adopted via a delegation in a legislative act (or Levels 2 and 3 in the Single Rulebook). At the same time it has been argued that the Lisbon Treaty does not establish a systematisation and hierarchisation of Union acts like the Constitutional Treaty¹²³. In the system established by the TEU and the TFEU, legislative acts can also take the form of regulations and directives within the meaning of the second and third paragraphs of Article 288 TFEU. The distinction between legislative and non-legislative acts now has mainly procedural significance, for example in Articles 290(1) and 297 TFEU¹²⁴. Thus there is no specific rule that would determine the outcome in the case of contradiction between two substantive rules in the Single Rulebook which do not stem from each other¹²⁵.

The outcome with regards to discrepancy between secondary legislation and ESAs' recommendations and guidelines is in principle clear. The latter are not binding legal acts and thus should be trusted to the extent that they do not contradict a Level 1 or 2 act. But the exact technique to achieve this result is unclear, particularly in the context of the Banking Union. More clarity will likely come in the process of the

¹²¹ Lenaerts and Van Nuffel (see footnote 95), p. 694.

¹²² Ibid.

¹²³ Opinion of Advocate General Kokott in Case C-583/11 *Inuit Tapiriit Kanatami and others v Parliament and Council* [not yet published in the ECR].

¹²⁴ See Opinion of Advocate General Kokott in Case C-583/11 *Inuit Tapiriit Kanatami*, paragraph 42.

¹²⁵ Consider in this regard the obligation of Member States to ensure that institutions meet, at all times, a minimum requirement for own funds and eligible liabilities (Article 45(1) of Directive 2014/59/EU). While it is not certain whether the NCA would be entrusted with implementing this requirement, it would nevertheless have to take it into account in its everyday work, and is thus also subject to it.

implementation of the SRM. In particular national resolution authorities are required to apply the relevant provisions of the SRM Regulation, while at the same making use of their powers under national law transposing the BRRD in accordance with the conditions set out in such national law. Should any conflict arise between the SRM Regulation and national law implementing the EBA guidelines, the latter may have to be effectively disapplied in some manner.

Granularity of the rulebook and impact on application

One significant challenge in the application of the Single Rulebook is to appropriately determine the level of granularity sought by the legislator in each case and the consequent degree of pre-emption in the actions of Member States¹²⁶. Since often the NCAs carry out a significant amount of implementation via application, the degree of pre-emption would determine their room for manoeuvre. In this regard, while the Single Rulebook is in general beneficial for market participants, it cannot be excluded that some Member States may still seek super-equivalent rules to fit their particular needs (something referred to as ‘gold-plating’). According to the recent case law of the CJEU on the consumer credit directive¹²⁷, the scope of maximum harmonisation has to be interpreted rather narrowly. Whether in the specific area of the Single Rulebook the case law of the CJEU would adopt a similar narrow approach or would evolve more in the direction of the ‘*effet utile*’ concept, similar to the field pre-emption discussed above, remains to be seen.

Impact of the prohibition on reverse vertical direct effect

As already noted, parts of the Single Rulebook are still in the form of not directly applicable provisions (be they part of a directive or a regulation). This requires a discussion of the constraints of the prohibition on the so-called ‘reverse vertical direct effect’. Because of Article 288 TFEU, the Union cannot bypass the Member States in the implementation of a directive. Consistent with the classical doctrine developed by the CJEU, even if a provision in a directive is clear and sufficiently precise¹²⁸, the Union institutions cannot apply it to impose obligations on individuals (which include credit institutions), because of the prohibition on reverse vertical direct effect¹²⁹.

The Single Rulebook is likely to re-open the discussions regarding this prohibition, in view of the fact that while some of the Level 1 acts are in the form of directives, the majority of Level 2 acts are in the form of directly applicable regulations. This makes the *Viamex* judgement¹³⁰ all the more prominent and in particular the following lines:

¹²⁶ See Section 3.2. above on the concept of pre-emption.

¹²⁷ Case C-602/10 SC Volksbank România [not yet published in the ECR].

¹²⁸ Which is the condition for its direct effect in line with the case law of the CJEU in Case 8/81 Becker [1982] ECR 53, paragraph 25.

¹²⁹ Case 152/84 Marshall, paragraph 48.

¹³⁰ Joined cases C-37 and 58/06 *Viamex*, [2008] ECR I-00069.

*'However, it cannot be precluded, in principle, that the provisions of a directive may be applicable by means of an express reference in a regulation to its provisions, provided that general principles of law and, in particular, the principle of legal certainty, are observed.'*¹³¹

This very broad wording could potentially be applied to virtually all elements of the Single Rulebook that are further implemented by a Level 2 measure. One obvious example is the AIFM Directive, which is implemented by a Commission Delegated Regulation¹³².

¹³¹ Ibid, paragraph 28.

¹³² Commission Delegated Regulation (EU) No 231/2013.

4 Relevance of the Single Rulebook for the SSM

The establishment of the SSM provided one more reason in support of furthering the Single Rulebook. The centralised supervision coordinated by the ECB needs to step on substantive rules which are as consistent as possible in order to achieve consistent supervisory outcomes.

4.1 Basic facts about the SSM and its functioning

The idea of an EU Banking Union

Intended to 'break the link between sovereigns and banks'¹³³, the Banking Union entails more centralised prudential supervision and resolution of EU credit institutions in the participating Member States. One question that arises is why was the Single Rulebook not sufficient in itself to achieve this objective. And why was it necessary to move also to centralised supervision and resolution. As seen above, the de Larosière report explicitly argued for a decentralised integrated network of supervisory authorities. Nevertheless the European Parliament has for some time insisted on such centralisation¹³⁴. Leaving political considerations aside, the concern over convergent application of financial regulation, which was the aim sought with the creation of the Single Rulebook, hardly arises where all decisions are taken by a single authority. Or at least this has been the understanding underpinning the conclusions of the de Larosière report: that the two solutions are mutually exclusive.

The two approaches should rather be viewed as complementary steps of the very same process. As will be discussed later, in the context of the SSM, centralised supervision by the ECB needs the foundation of common rules. To ensure a level playing field the central supervisor needs to be able to treat institutions in the different Member States in the same manner and avoid arbitrage opportunities which in turn lead to competitive distortions and potential fragmentation. Centralised enforcement also fosters convergence of rules by establishing best practices.

The potential challenges for centralised supervision within the SSM are very reminiscent of the challenges encountered in the area of competition policy enforcement. However unlike the ECB in its supervisory tasks, the Commission is also granted rule-making capacity in the application of competition rules. The latter is a pragmatic approach which avoids the need to seek out where rule-making ends and application and interpretation begins. This is however possible because

¹³³ Communication from the Commission to the European Parliament and the Council – A Roadmap towards a Banking Union, COM(2012) 510 final.

¹³⁴ See recital 8 of Council Regulation (EU) No 1024/2013.

competition policy is an exclusive competence of the Union under Article 3(1)(b) TFEU. Such an arrangement cannot be fully transposed in the area of financial services legislation where the Union does not have exclusive competence¹³⁵. The Single Rulebook nevertheless should aim to gradually achieve a similar result via the evolution of the substantive rules.

The SSM is intended to build on the rulebook

From the very beginning the SSM was intended to be closely tied to the Single Rulebook. The initial Commission Communication provided that the creation of the Banking Union must not compromise the unity and integrity of the single market which remains one of the greatest achievements of European integration¹³⁶. Indeed, the Banking Union rests on the completion of the programme of substantive regulatory reform underway for the single market [the 'Single Rulebook']¹³⁷. The European Council thus considered that it was of paramount importance to establish a single rulebook underpinning the centralised supervision¹³⁸.

Because of the progress in the implementation of the de Larosière recommendations and in particular the operationalization of the ESAs, the SSM had to be engineered with the existing framework, without endowing the ECB with a rule-making capacity¹³⁹. Granting such powers to the ECB would in principle be possible and would be compliant with the cited *Meroni* doctrine.

The parallel roles for the ECB and the EBA in the financial services sector may however cause some friction, especially as regard the delineation of their tasks in the regulatory field. From the outset the Commission set out the regulatory competences of the ECB in the field of supervision arguing that any measures adopted by the ECB – for example to spell out further details on how prudential supervision is carried out in the context of the specific supervisory structure created by the single supervisory mechanism – must be in line with the [Single Rulebook] including the technical standards set out by delegated acts adopted by the Commission¹⁴⁰. This was further reinforced in the preamble of the SSM Regulation where it is stated that the ECB should not replace the exercise of the EBA's tasks of developing draft technical standards and guidelines and recommendations, ensuring supervisory convergence and consistency of the supervisory outcomes within the Union¹⁴¹.

¹³⁵ Article 4(2) TFEU.

¹³⁶ See COM(2012) 510 final.

¹³⁷ Ibid.

¹³⁸ See European Council Conclusions, Brussels, 19 October 2012.

¹³⁹ See Article 4(3) of Regulation (EU) No 1024/2013.

¹⁴⁰ COM(2012) 510 final.

¹⁴¹ See recital 32 of the Regulation (EU) No 1024/2013.

4.2 Direct supervision by the ECB and instructions to NSAs

The SSM Regulation provides that the ECB should only exercise direct supervision over significant institutions as well as specific limited tasks vis-à-vis less significant institutions¹⁴². In the original Commission proposal¹⁴³ ECB was in charge of supervising all credit institutions in the Union while NCAs had to assist the ECB on its request with the preparation and implementation of any acts relating to the ECB's tasks. In the final text of the SSM Regulation the ECB is responsible to carry out directly in relation to all credit institutions in the Union only two of its tasks – authorisation (as well as withdrawal of authorisation) and assessment of notifications of acquisitions and disposal of qualifying holdings. Besides the general oversight function¹⁴⁴ as regards less significant institutions¹⁴⁵, the ECB has only limited powers – sometimes only as far as to instruct NCAs to act rather than taking the supervisory decisions itself¹⁴⁶. The ECB does not, in a legal sense, have direct supervisory powers in the mentioned cases for less significant institutions. In the context of its exclusive competences of granting (and in some cases of withdrawing) authorisations, the ECB's decisions are conditional on a proposal from the NCA¹⁴⁷. As regards all other tasks in the case of significant institutions the ECB itself adopts the supervisory decisions prepared by the joint supervisory teams (JSTs)¹⁴⁸.

In view of the above limitations this working paper delineates four very broad types of SSM supervisory decisions adopted in application of the Single Rulebook, depending on the decision-making bodies involved (the ECB and the NCAs) and the procedure followed. Such a categorisation is also useful in determining the most significant legal consequences in the context of the contemporary EU legal doctrine. The four broad categories are:

- (a) ECB direct supervisory decisions (supervision of significant institutions);
- (b) ECB decisions on proposal by the NCA (common procedures);
- (c) NCAs decisions adopted upon instruction from the ECB;
- (d) NCAs supervision of less significant institutions as well for matters outside the ECB's exclusive tasks.

This section only covers the first three categories as they present a novelty compared to the known arrangement of NCAs in charge of supervision¹⁴⁹. In particular these three procedures entail in different measure a Union institution

¹⁴² By argument from Article 6 of Regulation (EU) No 1024/2013.

¹⁴³ COM(2012) 511 final, Article 5(2).

¹⁴⁴ See Article 6(5)(c) of Regulation (EU) No 1024/2013.

¹⁴⁵ These institutions are determined by reference to certain metric thresholds but the ECB may also choose to exercise direct supervision. See in particular Part IV of Regulation (EU) No 468/2014.

¹⁴⁶ See Article 6(5)(a) and Article 7(1) of the Council Regulation (EU) No 1024/2013.

¹⁴⁷ *Ibid*, Article 14.

¹⁴⁸ Article 3 of Regulation (EU) No 468/2014.

¹⁴⁹ For the supervision of less significant credit institutions and for the tasks which are outside of the ECB's exclusive competence Section 3 of this working paper is also relevant.

applying a broad catalogue of rules – both Union rules and national rules vis-à-vis private entities in the participating Member States.

4.3 Substantive law applicable within the SSM and by the ECB

There were various legal constraints in the elaboration of the ECB's supervisory role in the SSM Regulation¹⁵⁰. Besides the more obvious limitation of the Treaty legal basis, the principles of subsidiarity and proportionality also come to mind. It would be conceivable for the ECB to act as a central supervisory authority only in areas where it had already been established that the Union could achieve the stated objectives to a greater extent than individual Member States. ECB supervision is thus permissible only to the extent that conferral of competences on the Union has already taken place. Combining the conditions from the legal basis and the principles of subsidiarity and proportionality, the ECB can only be granted competence in the area of prudential supervision of credit institutions¹⁵¹ and only in subject areas already governed by the Single Rulebook¹⁵².

The mechanism for the application by the ECB of the relevant parts of the Single Rulebook entails the ECB substituting the NCAs¹⁵³ in every instance where Union legislation mentions them in an area within the ECB's field of competence. Article 9(1) of the SSM Regulation provides that for the exclusive purpose of carrying out the tasks conferred on it the ECB is considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law.

The provisions of Articles 4(3) and 9(1) SSM Regulation should be read together to provide a two-legged test: (i) the ECB would only apply elements of the Single Rulebook; and (ii) only in areas where it has been conferred an exclusive task. As a consequence the mere reference to the competent authority in a substantive law does not per se justify reading it as also referring to the ECB¹⁵⁴. It is the subject matter and the scope of each provision that determines whether the ECB can apply it as part of its supervisory tasks. Such an approach is obviously not un-problematic. It may entail that within a single Union legal act conferring specific powers and responsibilities on the competent authority the ECB may only be able to apply some of the provisions. The scope of the ECB's powers therefore does not fully overlap with the Single Rulebook for credit institutions as defined above and as defined by the legislator. From the perspective of a credit institution, the ECB only monitors

¹⁵⁰ Already well documented in the de Larosière report (see footnote 6), paragraphs 167 to 172.

¹⁵¹ Within the limits of its exclusive competences under Article 4(1) of Regulation (EU) No 1024/2013.

¹⁵² This limitation is spelled out in Article 1, sixth subparagraph, and Article 4(3) of Regulation (EU) No 1024/2013.

¹⁵³ As well as in some specific cases national designated authorities.

¹⁵⁴ This is also evidenced by the explicit exclusion from the scope of ECB action of Directive 2014/65/EU (MiFID) and Directive 2005/60/EC (anti-money laundering directive) in recital 28 of Regulation (EU) No 1024/2013.

compliance with a fraction (albeit significant) of all Union rules and national financial services legislation which apply to the activities of this institution.

A clarification should be made regarding the determination of the law to be applied by the ECB. The high level references in Article 4(1) of the SSM Regulation should in any case be interpreted broadly. For example the reference to own funds requirements in letter (d) should be interpreted extensively to cover entirely parts two and three of the CRR. Such a doctrine is likely to develop in the case law of the CJEU in order not to prejudice the proper functioning of the SSM.

The above issue is not purely academic and abstract. It gains relevance in the context of, e.g., national procedural rules and more generally the gold-plating rules which are permissible in areas of minimum harmonisation such as the CRD and the BRRD. In addition the CRR provides for various permissions to be granted by the NCAs, for example in the area of calculation of own funds requirements. In line with the vertical dimension of the Single Rulebook discussed above, it could be possible for Member States to further specify the procedural rules for the granting of such permissions, a level of detail which is absent in the CRR. The question then arises if such procedural rules could be deemed to stem from Union law and thus to be within the remit of the ECB's tasks. A similar question stands as regards supervisory powers granted to NCAs that are in addition to the minimum provided for in Article 104 CRD and, e.g., Articles 27-29 BRRD.

4.3.1 Application of Level 1 legislation

The SSM Regulation determines that the dividing line between the ECB applying Union law and national law lies with the distinction between the different types of acts – directives and regulations¹⁵⁵. The application of regulations is less problematic, although certainly their implementation and the options and discretions in them pose some questions.

Application of Union regulations

The application by the ECB of Level 1 regulations is relatively unproblematic. The ECB simply interprets and applies/ensures compliance with the provisions which create obligations for the credit institutions. To identify what is the substantive law to be applied by the ECB, one should use the set-up described above – under Article 4(3) of the SSM regulation ECB applies relevant Union law, for the purpose of carrying out the tasks conferred on it. Then one should look at the first paragraph of Article 4 of the SSM Regulation – point (d) in particular foresees that the ECB ensures compliance with regulations that impose prudential requirements on credit institutions in the areas of own funds requirements¹⁵⁶, securitisations, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those

¹⁵⁵ See recital 34 and Article 4(3) first subparagraph of Regulation (EU) No 1024/2013.

¹⁵⁶ See for example Decision (EU) 2015/656.

matters. The major part of the Single Rulebook that the ECB works with is then the CRR¹⁵⁷. In addition, the ECB may exercise specific tasks under the SRM Regulation to the extent that these are covered in Article 4(1)(i) of the SSM Regulation. One of the ECB's key tasks is the determination whether an institution is failing or likely to fail, which could eventually lead to its entry into resolution. Conversely for many of the recent regulations, however, application by the ECB has been explicitly excluded because of their subject matter. The examples of EMIR and MiFIR¹⁵⁸ have already been mentioned. Uncertainty only arises in the context of the CSD Regulation and the tasks foreseen there as regards authorisation of CSDs with a banking licence¹⁵⁹.

An interesting area of substantive law is the upcoming regulation on structural measures for banks. The Commission proposal¹⁶⁰ implements the mandate given to the ECB in the SSM Regulation¹⁶¹. In particular for some significant institutions in participating Member States, the ECB will have to review their trading activities and decide whether they need to be separated from deposit taking in order to protect taxpayers¹⁶². In essence these are individual supervisory decisions. As will be discussed later, in the area of other supervisory decisions, the ECB has been given specific supervisory powers in the SSM Regulation. The question that arises is whether any regulation other than the SSM Regulation can grant additional supervisory powers to the ECB. If this question is answered in the negative, does the ECB have the capacity to impose structural measures only having recourse to its supervisory powers under Article 16 of the SSM Regulation? This is an issue that is likely to also arise in other future Single Rulebook acts which are intended to be applied by the ECB and have a substantial procedural element.

Application of Union directives

As already noted, the classical doctrine in the case law of the CJEU prohibits any reverse vertical direct effect of directives¹⁶³. The emergence of the Single Rulebook may necessitate a slight revision of this doctrine¹⁶⁴.

The ECB can only rely vis-à-vis institutions on the national laws implementing a directive but not on the rules of the directive itself¹⁶⁵. This is relatively similar to the pre-SSM set-up of supervision albeit with one major difference. In supervision NCAs should in principle rely on the implementing measures adopted in their Member State. But when given a mandate by the relevant legislator, NCAs could also be the ones to draft and adopt the national rules that implement a directive, or even in some

¹⁵⁷ Regulation (EU) No 575/2013.

¹⁵⁸ Excluded by virtue of recital 28 and Article 1 of Regulation (EU) No 1024/2013

¹⁵⁹ Regulation (EU) No 909/2014, Article 54.

¹⁶⁰ COM(2014) 43 final.

¹⁶¹ See Article 4(1)(i) of Regulation (EU) No 1024/2013.

¹⁶² COM(2014) 43 final, Article 10.

¹⁶³ See Section 3.3. above.

¹⁶⁴ As has been already argued by Craig (see footnote 43).

¹⁶⁵ By argument from Article 4(3) of Regulation (EU) No 1024/2013.

case perform the entire implementation via individual decisions¹⁶⁶. In addition, credit institutions could rely on the actual directive against the same authorities in the case of incorrect implementation¹⁶⁷. This has not been a significant concern in the past as both implementation of a directive and its application lay with the same party – the Member State (whether in the form of the parliament, the executive branch or an agency such as the supervisory authority).

In the SSM set-up, the ECB does not have any influence over the process of implementation of a directive¹⁶⁸. This function cannot be delegated to the ECB by the Member States in the way this is often done for the NCAs. It is moreover conceivable that in some cases the ECB will have to apply the implementing measures adopted by the NCAs¹⁶⁹. The counter-intuitive result of this legal construction is that the ECB bears the full consequences of the standard of implementation of directives by Member States. Thus incorrect or even simply divergent implementation would leave one of two choices to the ECB, either to apply the national rule as it is, or to abstain from taking a supervisory measure based on it altogether.

It will be interesting to see if the case law of the CJEU will be altered so as to accommodate this concern by acknowledging the power of an administration (the ECB) to impose obligations on individuals stemming from a directive, i.e. if the CJEU will uphold the existence of reverse vertical direct effect. This would definitely be reasonable in cases where particular provisions of a directive provide for de facto maximum harmonisation, i.e. Member States only nominally have discretion as to the means to achieve the result. Such a reversal of the doctrine would not per se contradict the rationale of the prohibition of vertical direct effect – that Member States should not be able to benefit from their failure to comply with the Treaty obligation to implement Union law.

National options and discretions and their exercise by the ECB

‘National options and discretions’ is not a new term, but it has gained prominence in the context of the SSM¹⁷⁰. The options and discretions were in place to ensure flexibility in the old CRD¹⁷¹.

The field that national options and discretions occupy since the introduction of the Single Rulebook is more limited. Whereas previously options and discretions could be found in the majority of provisions of Level 1 directives, now these elements are more frequent in Level 1 regulations. Recital 34 of the SSM Regulation is very

¹⁶⁶ See Case C-389/08 *Base and others* [2010] I-09073, paragraph 22-31 and Case C-216/05 *Commission v Ireland* [2006] ECR I-10787, paragraph 26.

¹⁶⁷ Case C-188/89 *Foster*, paragraphs 16-22.

¹⁶⁸ There is no requirement for the ECB to be consulted on national laws whose sole purpose is the implementation of a directive, as is specified in Decision 98/415/EC.

¹⁶⁹ This would be the case for example when the national implementation of a directive has taken the form of ordinances.

¹⁷⁰ As noted above national options and discretions were already monitored and assessed under the Lamfalussy process. See also the CEBS's second advice on options and national discretions.

¹⁷¹ Directives 2006/48/EC and 2006/49/EC.

instructive in providing that the ECB has to apply national laws implementing a directive, and only mentioning options in the context of regulations. Thus some provisions¹⁷² in the recent Level 1 regulations are effectively 'directive-style provisions'. Strictly speaking they are addressed solely to Member States/NCAs and do not confer any rights or obligations on individuals¹⁷³.

In the SSM context options and discretions may pose challenges because of the clear line that the SSM Regulation draws between law-making (implementation of a directive) and the actual application of the rule. The ECB is only permitted to do the latter. But as regard national options and discretions these two elements are intrinsically linked. In accordance with Article 4(3) of the SSM Regulation, where the relevant Union law is composed of regulations and where currently those regulations explicitly grant options for Member States, the ECB must also apply the national legislation exercising those options, thus it cannot exercise options itself.

Conversely the ECB's role regarding options granted only to NCAs is less clear. A very restrictive reading of recital 34 of the SSM Regulation leads to the conclusion that the ECB can never apply national options or discretions as they all may contain an element of NCA autonomy. A broader reading of recital 34 however leads to the conclusion that the ECB can at least apply the national options and discretions which are available to the NCAs only.

Procedural rules – SREP and sanctions

The SREP stands out from other parts of the Single Rulebook. Unlike the clear set of rules in the CRR, the SREP constitutes an ad hoc approach to regulation – an analysis on a case by case basis of the risks of a particular institution and application of individual measures judged to be appropriate by the supervisor¹⁷⁴. It is an area of flexibility in the otherwise rigidly regulated CRD/CRR¹⁷⁵. This area of supervisory review does not allow for any form of further harmonisation beyond a framework clause granting a set of powers to the NCAs¹⁷⁶ and a mandate for the EBA to provide a common methodology¹⁷⁷.

When the Commission first drafted the ECB's new mandate, it seems to have assumed that the ECB would have the supervisory powers of NCAs as contained in

¹⁷² For an indicative list of options and discretions see Commission Implementing Regulation (EU) No 650/2014.

¹⁷³ See for example the provisions on the adjustment of risk weights – Articles 124(2) and 164(4) of Regulation (EU) No 575/2013.

¹⁷⁴ As noted in the ECB Guide to banking supervision, September 2014 (available at www.bankingsupervision.europa.eu), the SREP requires that the supervisors (for significant institutions, the JSTs; for less significant institutions, the NCAs under the ECB's oversight) review the arrangements, strategies, processes and mechanisms implemented by the credit institutions and evaluate the following: (i) the risks to which the institutions are or might be exposed; (ii) the risks that an institution poses to the financial system in general; and (iii) the risks revealed by stress testing, taking into account the nature, scale and complexity of an institution's activities.

¹⁷⁵ This also corresponds to the position of Pillar II requirements under the Basel principles.

¹⁷⁶ See Chapter II, Section III of Directive 2013/36/EU.

¹⁷⁷ See the EBA Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP) (EBA/GL/2014/13).

national laws¹⁷⁸. This may however have been problematic in the context of the abovementioned consideration that the ECB does not have any regulatory powers. It would be difficult to determine whether indeed individual ECB supervisory decisions under the SREP do in fact constitute an implementation of the CRD, which would contradict a narrow interpretation of Article 288 TFEU. The solution to this problem was arguably found in conferring an identical set of supervisory powers directly on the ECB in the SSM Regulation¹⁷⁹. This entails more legal certainty and as such does not contradict the CRD. This solution does however create a system of parallel existence of powers with the potential for parallel enforcement – the ECB is empowered by secondary Union law, but so are the NCAs. To avoid potential collisions in this regard, the SSM Regulation foresees a strict division of powers, which is implemented in the SSM Framework Regulation¹⁸⁰.

Sanctions are another special case in the supervisory framework. The SSM Regulation came up with the somewhat convoluted solution of barring the ECB from applying national law implementing the sanctioning regime in the CRD. Instead Article 18 of the SSM Regulation provides for a specific set of powers which are given to the ECB, but which are not the sanctioning powers that NCAs have for the exact same breaches of Union law. In a sense the legal basis for the ECB to impose sanctions is solely the SSM Regulation, but at the same time it is conditional on the choices of the Member States in the implementation of the CRD. It can therefore hardly be argued that in the area of sanctions the ECB is applying any element of the Single Rulebook. But it is also true that the harmonisation in this area of the Single Rulebook has historically been the weakest. Incidentally this is the only area in the SSM where the ECB and the NCAs apply disparate substantive rules.

4.4 Levels 2 and 3

Commission delegated and implementing acts and technical standards fall within the scope of the law to be applied by the ECB¹⁸¹. The technical standards are one of the key elements of the Single Rulebook from an ECB perspective as they allow the whole SSM structure to be operational even in the absence of clear ECB rule-making powers.

Delegated and implementing acts

The ECB applies all Level 2 legal acts adopted under a delegation from the CRR. One important acts is the Commission delegated act specifying the liquidity coverage

¹⁷⁸ See COM(2012) 511 final, Article 5.

¹⁷⁹ Article 16 of Regulation (EU) No 1024/2013.

¹⁸⁰ See Regulation (EU) No 468/2014.

¹⁸¹ Article 4(3) second subparagraph of Regulation (EU) No 1024/2013.

requirement¹⁸², where the ECB's mandate is derived from Article 4(1)(d) of the SSM Regulation.

Moreover, in line with the *Viamex* judgement¹⁸³, it appears very likely that the ECB may apply some of the provisions of the CRD¹⁸⁴ without needing to have recourse to national implementing measures. This would be the case where a Commission delegated act in the form of a regulation specifies one of the requirements of the CRD¹⁸⁵ or the BRRD.

Technical standards

The ECB's application of technical standards appears unproblematic at first. In the areas of, e.g., reporting requirements¹⁸⁶, calculation of own funds requirements¹⁸⁷ and disclosures¹⁸⁸, the ECB seeks to ensure compliance with the different requirements in these standards, benefiting from the standardised form, and not least of the uniform language, when compared to national implementing measures¹⁸⁹.

The ECB's task of ensuring compliance with technical standards whose legal basis is in a directive is more difficult, as is for example the case in the area of remuneration policies¹⁹⁰. In principle the *Viamex* judgment should also be relevant, and should enable the direct applicability of both these technical standards and the empowering provisions in the directive, in effect avoiding recourse to national law.

Impact of EBA guidelines and recommendations

The case of the ECB applying Level 3 (EBA guidelines and recommendations) is more difficult. Both are non-binding instruments, which while benefiting from the 'comply or explain' mechanism, do not prejudice the autonomy of NCAs to derogate from the general rule. The ECB's position in this context is similar to that described above as regards directives. The ECB cannot take over the decision whether to implement a guideline in a given legal order by means of an act of general application. The SSM Regulation provides for the application of guidelines by the

¹⁸² Commission Delegated Regulation (EU) 2015/61.

¹⁸³ Cited above in Section 3.3.

¹⁸⁴ Directly applicable Commission delegated acts may be adopted in several areas, specified in Article 145 of Directive 2013/36/EU.

¹⁸⁵ Notably Article 145(g) provides a mandate for the Commission to adopt delegated acts regarding the SREP.

¹⁸⁶ Commission Implementing Regulation (EU) No 680/2014.

¹⁸⁷ See for example Commission Delegated Regulation (EU) No 241/2014.

¹⁸⁸ See for example Commission Implementing Regulation (EU) No 1423/2013.

¹⁸⁹ Building on a technical standard the ECB adopted Decision ECB/2014/29 on the provision of supervisory data reported to the national competent authorities by the supervised entities pursuant to Commission Implementing Regulation (EU) No 680/2014.

¹⁹⁰ See Article 94(2) of Directive 2013/36/EU.

ECB vis-à-vis significant institutions¹⁹¹. In particular under Article 4(3) of the SSM Regulation the ECB is subject to Article 16 of the EBA Regulation, which provides the power for the EBA to issue recommendations and guidelines and specifies the obligations of competent authorities in this regard. Following the amendment to the EBA Regulation¹⁹² the ECB arguably has all of the obligations of an NCA vis-à-vis the EBA with regard to the tasks conferred on it by the SSM Regulation, including the obligation to comply or explain with regard to EBA guidelines, since the ECB has been included in the definition of a 'competent authority'¹⁹³. It is however unclear if this exempts the ECB from the requirement to take into consideration divergent national laws based on EBA guidelines.

The medium for the implementation by the ECB of such guidelines and recommendations is not entirely clear. In the absence of a true regulatory capacity, the ECB would probably have to implement them via internal acts, guiding the JSTs' work in preparing draft supervisory decisions¹⁹⁴.

4.4.2 Application of national law

One of the significant innovations of the SSM Regulation is the application by the ECB of national law which is adopted in implementation of directives¹⁹⁵. A starting point is the distinction between implementation and application of Union law, which the creation of the SSM poses for the first time. As noted above Member States have significant discretion in the choice of implementation of a Union provision and this task may consequently fall within the remit of legislative or executive bodies¹⁹⁶. From this perspective, traditionally it was not easy in the Union legal order to make a formal distinction between legislation and implementation of legislation¹⁹⁷.

Since in practice the transposition of directives may take many forms – such as national laws adopted by parliaments, ordinances or individual decisions – it has been considered impractical to decouple transposition of a directive and the application of the rules therein. Yet the set-up of the SSM aims to decouple these two interlinked elements and allocate one to the Member States and the other to the ECB. As noted the ECB cannot have any impact on the implementation of directives in national legislation, but may in some isolated cases manage to avoid applying national implementing measures altogether by applying a directly applicable Level 2 act.

¹⁹¹ This is also the case for the other central body in the Banking Union – the Single Resolution Board – which has to comply with the EBA guidelines. See recital 18 and Article 5(2) of the Regulation (EU) No 806/2014.

¹⁹² Regulation (EU) No 1022/2013.

¹⁹³ See Article 2(2)(f) of Regulation (EU) No 1093/2010, as amended by Regulation (EU) No 1022/2013.

¹⁹⁴ See Regulation (EU) No 468/2014.

¹⁹⁵ Article 4(3) of Regulation (EU) No 1024/2013.

¹⁹⁶ Lenaerts and Van Nuffel (see footnote 95), p. 689.

¹⁹⁷ *Ibid.*, p. 692.

One additional issue to be mentioned is that this is the first occasion that a Union institution is applying national laws. The set-up has been quite different in all other cases of network enforcement in the EU¹⁹⁸. The significance of the ECB being a Union institution is twofold. First it is unclear how an ECB decision, being a Union legal act, could be subordinate to national law even if it is a law adopted in implementation of a directive¹⁹⁹. Second, in the context of national administration, including supervisory authorities being obliged to set aside conflicting national law and ensure consistent interpretation²⁰⁰, it is unclear if the ECB would also have such a role in scrutinising national implementation measures. Both of these issues would likely require an adjustment of the *Simmenthal* formula by the CJEU.

4.5 Review of SSM acts

An interesting aspect of the SSM organisation is that acts by the ECB are subject to review by the CJEU²⁰¹. In this regard it can be recalled that the grounds for annulment under Article 263 TFEU are: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application or misuse of powers²⁰².

In the context of the SSM, the CJEU may have to decide, inter alia, on the appropriate application of the Single Rulebook by the ECB. There is little ambiguity as regards interpreting Union law in the form of regulations and directives, which the CJEU has already done for many years. A novel area would be a judgement on the correct application of national law – an issue that the CJEU has very carefully avoided in many of its preliminary rulings. This could well be the first time that the CJEU effectively applies national law²⁰³. It would be interesting to see how the CJEU would apply the above grounds for annulment in the context of an ECB act, which was itself based on a mandate in national law.

Technique and potential outcome

The new task of reviewing the application of national law poses some difficulties. Consider a case of incorrect implementation of a directive and an ECB decision based on that national law. It is a prerogative of the Commission to actually commence an infringement procedure in accordance with the relevant safeguards in

¹⁹⁸ For example the European Competition Network has two sets of substantive rules – for the Commission these are the directly applicable Treaty provisions. For the national authorities the substantive law consists of the same Treaty provisions, plus their national competition laws.

¹⁹⁹ Case 106/77 *Simmenthal*, paragraph 21.

²⁰⁰ See Section 3.2. above.

²⁰¹ Article 263 TFEU and Article 35.1. of the Statute of the European System of Central Banks and of the European Central Bank.

²⁰² Lenaerts, Maselis and Gutman (see footnote 27), p. 364.

²⁰³ Although Lenaerts argues that the CJEU has already done so in adopting the comparative law method in some judgements. See Lenaerts, 'Interlocking Legal orders in the European union and comparative law', *International and Comparative Law Quarterly*, 52, Issue 04, October 2003., pp. 873-906.

the Treaty²⁰⁴. A pragmatic approach would be that the CJEU, while reviewing a prospective challenge to an ECB legal act, on its own motion scrutinises whether the national law on which the act was based implements properly a directive. Conversely a plea of illegality²⁰⁵ is not an option to challenge the national law implementing the directive, as under that procedure the CJEU only has competence to review Union legislation. Moreover in the presence of the prohibition of reverse vertical direct effect, a finding of contradiction between national law applied by the ECB and a directive also entails that the ECB's decision loses its legal basis. The CJEU thus may have to apply the national law, disregarding any considerations about the Union act which the law implements, except potentially the obligation to ensure consistent interpretation. In a way the space for manoeuvre for the CJEU is thus much narrower than the powers of a national court applying the very same provisions.

For the ECB one of the unfortunate outcomes is that it may lose any incentive to seek convergence in the application of national implementing measures, since a finding that a transposition has been incorrect would make the ECB's supervisory actions void, since as discussed, the ECB's actions cannot be based on the directive itself. The ECB is therefore prone to defending all implementation by the Member States, or conversely abstaining from adopting any decisions based on some national laws.

Another complication is that the CJEU cannot really apply a specific provision of national law in isolation in all cases. Additional provisions and entire legal acts, which do not necessarily transpose a given directive, and may apply *mutatis mutandis*, would also have a bearing on the dispute at hand. Such a link is already well recognised in the context of prudential supervision in the SSM Regulation²⁰⁶. The CJEU's expertise in the national legal systems would therefore have to be developed.

Review in the case of instructions to NSAs

On some occasions the implementation of the Single Rulebook would be carried out by the ECB via instructions. This is possible both in areas where the ECB has been accorded exclusive competence²⁰⁷, and in areas, where the ECB does not have exclusive competence²⁰⁸.

The legal review of supervisory actions by NCAs pursuant to instructions from the ECB, also poses some questions. To the extent that these are actions undertaken by the NCAs the review would be determined in accordance with national rules. Nevertheless, the ECB's instructions²⁰⁹ can be challenged before the CJEU by

²⁰⁴ Articles 258-260 TFEU.

²⁰⁵ Article 277 TFEU.

²⁰⁶ See Article 9(1) third subparagraph.

²⁰⁷ See Article 6(3) of Regulation (EU) No 1024/2013.

²⁰⁸ See Article 9(1) third subparagraph of Regulation (EU) No 1024/2013.

²⁰⁹ See on the concept of a reviewable act Lenaerts, Maselis and Gutman (see footnote 27), p. 257.

parties with standing. To determine if ECB instructions are reviewable, one would need to examine to what extent they are intended to produce effects against a third party. The relevant case law on instructions in general seems to suggest that ECB's instructions are also subject to review²¹⁰.

²¹⁰ Case C-366/88 France v Commission [1990] I-03571, paragraphs 9 and 10.

5 Conclusions

The creation of a Single Rulebook for the financial services sector was a key element of the EU policy makers' response to the financial crisis. The Single Rulebook is not a legal concept but rather a political one. Its elements and their interaction do however pose various legal questions.

The Single Rulebook approach takes the path of positive harmonisation as opposed to past approaches combining minimum harmonisation with mutual recognition. Thus the Single Rulebook aims at ensuring more consistent results from the application of Union rules. To put it simply, the more precise and comprehensive the EU regulation, the more consistent the result from its application. The existing elements of the Single Rulebook function relatively well together and, subject to some minor adjustments, they may well achieve the intended goal.

Nevertheless the application of the Single Rulebook challenges the existing understanding of the delimitation of competences between the Union and its Member States. Additional problems may arise in such a densely-regulated area and clear hierarchy between the Single Rulebook acts will have to be established.

The establishment of more centralised decision-making within the SSM and the SRM has boosted the case for uniform Union rules applicable to financial institutions. The SSM's success in particular is dependent on a broad, coherent and precise Single Rulebook. The Single Rulebook in turn may benefit from the experience gathered in the functioning of the SSM. A good addition might be a limited ECB rule-making power to bridge the gaps where formalism in the approach to implementation of not directly applicable Union acts would prevent the ECB from properly exercising its supervisory tasks.

The CJEU will be called on to clarify many of the existing ambiguities, both as regards the Single Rulebook in general and as regards its application within the SSM and in particular by the ECB. While in some cases it will have to cover completely new ground and fill in gaps, in others it may have to adjust long-standing EU legal doctrine. Ultimately the CJEU will have to develop a unique doctrine on the Single Rulebook, which will not only impact the functioning of the SSM but also the broader evolution of Union law.

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