5

The Single Supervisory Mechanism

5.1 INTRODUCTION

This case study is somewhat specific in terms of the addressees of the Single Supervisory Mechanism (SSM), these being banks and other financial institutions under the supervision of the ECB and national competent authorities (NCAs). Critics might argue that because banks were at the source of the crisis,[1] any attempt at improving their position in the system of legal accountability can hardly be seen as supportive of political equality of citizens. Can one really conceive of a role for the principles of solidarity and equality in banking supervision? Further still, can increasing the responsiveness of decision-makers towards banks contribute to the political equality of citizens? I agree that taking the road to this conclusion may involve some detours. Necessarily, the analysis of the consequences for accountability and the individual striving for political equality will, to a certain extent, appear indirect. In other words, what happens to banks and their ability to challenge the decisions of the ECB and national competent authorities before EU and national courts appears not to have an immediate impact on the ability of individuals to hold decision-makers in the EMU to account.

Why, then, including the SSM? As I hope to make clear in this chapter, the SSM's lack of immediate application to individuals does not make its impact any less important. Its peculiar legal set-up, organisation, and operation, all of which arguably stem from the shock of the financial crisis,[2] illustrates the inherent flexibility of the Treaty framework to adjust to exogenous shocks and exceptional circumstances. Legal experimentalism is thus undoubtedly the

[1] See, for example, Opinion of Advocate General Hogan in Case C-450/17 P *Landeskreditbank Baden-Württemberg* EU:C:2018:982 [1].

[2] D Howarth and L Quaglia, 'Internationalised Banking, Alternative Banks and the Single Supervisory Mechanism' (2016) 39 *West European Politics* 438.

shared common denominator of the SSM and earlier case studies in this book. The three case studies further share economic salience and impact in the Eurozone.[3] Centrally for the purposes of this book, the SSM brought about significant accountability distortions. The way that courts review decisions in this area thus undoubtedly carries consequences for the individual.

The legal experimentalism in the SSM that created accountability distortions may be seen as less haphazard than the solutions in financial assistance mechanisms and unconventional monetary policy programmes of the ECB. Prudential supervision is, under the SSM Regulation, an exclusive task for the ECB.[4] However, due to a lack of unanimous support in the legislative procedure,[5] this exclusive competence is unrestrained only for significant entities. Prudential supervision of less significant entities[6] is a task for national competent authorities.[7] The resulting composite structure of prudential supervision muddled the accountability routes available thus far.[8] Complicating matters further, the ECB has the power to apply national law[9] and EU courts accordingly the power exclusively to review national decisions in certain situations.[10] Three major themes thus arise: first, when the ECB applies national law, does it do so in the common interest of the EU or in the interest of the Member State that enacted that national law? Second, when an ECB decision is reviewed before the EU courts, do they also become competent to

[3] As Schammo reports, significant entities that the SSM Regulation brought under direct supervision of the ECB account for almost 82 per cent of banking assets in the Eurozone. P Schammo, 'Institutional Change in the Banking Union: The Case of the Single Supervisory Mechanism' (2021) 40(1) *Yearbook of European Law* 265, 288, 304.

[4] Article 4(1) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287) 63 (SSM Regulation). This statement is, as will become obvious in the analysis below, simple and straightforward only at first glance.

[5] Schammo (n 3) 282.

[6] Article 6(4) of the SSM Regulation provides criteria for determining what is a less significant institution. The final say on the significant/less significant characterisation lies with the ECB.

[7] Article 6 of the SSM Regulation. It should be mentioned that a reclassification of an entity moves in both directions: from a significant to a less significant one and vice versa. In both cases, the ECB makes the final decision. For more details, see Section 5.2.

[8] A Karagianni and M Scholten, 'Accountability Gaps in the Single Supervisory Mechanism Framework' (2018) 34(2) *Utrecht Journal of International and European Law* 185. For a more optimistic view, see M Goldmann, 'The Case for Intra-Executive Accountability in the Banking Union' in M Dawson (ed), *Towards Substantive Accountability in EU Economic Governance* (Cambridge University Press, forthcoming 2023).

[9] Article 4(3) of the SSM Regulation.

[10] Case C-219/17 *Berlusconi* EU:C:2018:1023 [47]. These concern national preparatory acts within the meaning of Article 4(1)(c) and Article 15 of the SSM Regulation.

interpret and apply the national law that the ECB relied on? Finally, what is left for the national courts to review in the structure of the SSM?

In addition to its composite structure, the SSM Regulation is characterised by a different kind of legal experimentalism due to the changes, often novel and unconventional, of the scope and manner of judicial review. More obviously than in the previous two case studies, the enforcement of the SSM by the ECB and national competent authorities resulted in unconventional judicial solutions and novel relationships between EU and national courts. It may even be said that the SSM framework left open a number of interpretative questions that were left to the courts to deal with for lack of another actor.[11] Thus, this legal regime lends itself remarkably well for testing the accountability framework presented in Chapter 1: this chapter will tackle the wiggle room available to the courts under analysis for rethinking the relationship between the principles of equality and solidarity, in respect of access, remedies, and interpretation of the common interest.

This chapter is structured as follows. In the next section I will present the legal framework of the SSM and the solutions chosen for its organisation and operation. This exercise will both aid our reading of the case law to come and highlight a number of accountability distortions problematic for the political equality of citizens. In Section 5.3, I will focus on judicial review concerning the SSM at the EU level, which will include the jurisprudence of the General Court and the Court of Justice. Section 5.4 will repeat this exercise in respect of the national level. In both sections, I will follow the approach taken in the previous two case studies and look specifically at how courts dealt with questions of access, remedies, and any possible interpretation of the principles of equality and solidarity. The final section of this chapter will then reflect upon the role that judicial interactions play in delivering accountability within the SSM.

5.2 THE LEGAL FRAMEWORK OF THE SSM

The first pillar of the Banking Union,[12] banking supervision, was created by the SSM Regulation that entered into force in 2014. The SSM Regulation

[11] Schammo (n 3) 289, 291.

[12] The second pillar of the Banking Union is the Single Resolution Mechanism (SRM), a system for effective and efficient resolution of non-viable credit institutions. The third pillar of the Banking Union, the European Deposit Insurance Scheme (EDIS), is still in the making. For more information, see <www.consilium.europa.eu/en/policies/banking-union/>.

was based on the competence for harmonising[13] prudential supervision in Article 127(6) TFEU.[14] The principal aim of the SSM is

> ensuring the safety and soundness of credit institutions and the stability of the financial system of the Union as well as of individual participating Member States and the unity and integrity of the internal market, thereby ensuring also the protection of depositors and improving the functioning of the internal market, in accordance with the single rulebook for financial services in the Union.[15]

Further details on the operation of the SSM were set out in the ECB SSM Framework Regulation.[16] The basic organisational principle of the SSM Regulation can be summarised as follows: the ECB supervises significant entities, whereas the supervision of less significant entities is left to national competent authorities.[17] The final decision on the significant character of an entity lies with the ECB,[18] based on the criteria for distinction from Article 6 of the SSM Regulation.[19] Crucially, the ECB has the power to take on the supervision of an entity having hitherto been classified as less significant[20] and vice versa.[21] The SSM Regulation is not explicit on the nature of ECB's powers in the supervisory field: it is inconclusive as to whether the ECB is the exclusive power holder who simply delegates tasks to national competent

[13] The literature underlines that using this legal basis did not resolve the nature of such harmonisation, namely, whether it forms part of the exclusive Union competence in monetary policy (given that Article 127(6) TFEU is positioned in the monetary policy chapter of the TFEU). See B Wolfers and T Voland, 'Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank' (2014) 51(5) *Common Market Law Review* 1463; T Tridimas, 'The Constitutional Dimension of Banking Union' in S Grundmann and H-W Micklitz, *The European Banking Union and Constitution–Beacon for Advanced Integration or Death-Knell for Democracy* (Hart 2019) 36–38.

[14] 'The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.'

[15] Recital 30 of the SSM Regulation. See also Recitals 16, 17, 27, 65, 87, and Article 1(1) of the SSM Regulation.

[16] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (ECB/2014/17) (OJ 2014 L 141) 1 (SSM Framework Regulation).

[17] Article 6(4) of the SSM Regulation.

[18] Recitals 39–41 of the SSM Regulation.

[19] Detailed further in Part IV of the SSM Framework Regulation.

[20] See Article 6(4), subparagraphs (3)–(7) of the SSM Regulation.

[21] Article 6(4), subparagraphs (1) and (2) of the SSM Regulation.

authorities, or they share tasks along the dividing line of significance. The Court of Justice confirmed the former in *Landeskreditbank*: supervisory powers of the ECB are exclusive and national competent authorities are assisting the ECB in respect of less significant credit institutions.[22]

Supervisory tasks conferred upon the ECB are detailed in Article 4 of the SSM Regulation. These are shared with national competent authorities according to the significant/less significant division, save for the ECB's exclusive powers concerning the authorisation of credit institutions and its withdrawal[23] and the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions (except in the case of a bank resolution).[24] A further exception to the significant/less significant division of tasks can be found in Article 6(5) of the SSM Regulation, under which certain powers remain with the ECB, such as, for example, issuing guidelines, regulations, or general instructions to national competent authorities so as to ensure the consistency of supervisory outcomes.

In carrying out their respective tasks under the SSM Regulation, the relationship between the ECB and national competent authorities is one of cooperation in good faith and continuous exchange of relevant information.[25] The relationship of cooperation between the ECB and national competent authorities is designed in an especially interesting way[26] under the SSM

[22] Case C-450/17 P *Landeskreditbank* EU:C:2019:372 [38]–[41]. I will come back to this decision in more detail in Section 5.3.2.

[23] Defined in Article 14 and reserved to the ECB under Article 6(4) of the SSM Regulation.

[24] Defined in Article 15 and reserved to the ECB under Article 6(4) of the SSM Regulation. See also Article 6(6) of the SSM Regulation.

[25] Article 6(2) of the SSM Regulation.

[26] To be clear, I am merely a fish in the vast sea of legal commentators writing about this novel solution. For a few examples, see A Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?' (2014) 21 *Maastricht Journal of European and Comparative Law* 89; L Boucon and D Jaros, 'The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism: A New Mode of European Integration?' (2018) 10 *European Journal of Legal Studies* 155; F Coman-Kund and F Amtenbrink, 'On the Scope and Limits of the Application of National Law by the European Central Bank within the Single Supervisory Mechanism' (2018) 33 *Banking & Finance Law Review* 133; E Gagliardi and L Wissink, 'Ensuring Effective Judicial Protection in Case of ECB Decisions Based on National Law' (2020) 13 *Review of European Administrative Law* 13; A Biondi and A Spano, 'The ECB and the Application of National Law in the SSM: New Yet Old . . .' (2020) 31 *European Business Law Review* 1023; F Hernández Fernández, 'The Application of National Law and Composite Procedures in the Single Supervisory Mechanism: Did the Court of Justice of the EU Find a New Van Gend en Loos?' (2021) 14(3) *Review of European Administrative Law* 5. By contrast, the novel character of this composite construct was downplayed in the Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17 *Berlusconi* EU:C:2018:502 [58]–[59].

Regulation: it is not only that these institutions share and divide supervisory and other tasks under the SSM Regulation. They also share the applicable law. This means that national competent authorities apply EU and national law, as does the ECB. Under Article 4(3) of the SSM Regulation, the ECB applies all the relevant Union law. However, given that all the relevant Union law also consists of national law implementing directives and exercising options granted by regulations, the ECB also applies that national law. Under Article 9(1), third subparagraph of the SSM Regulation, when necessary for the exercise of its supervisory tasks, the ECB will issue instructions to competent national authorities to make use of relevant powers under national law.

The ECB's need to apply and take into account national law is particularly manifest in areas where it is exclusively competent to exercise supervisory tasks regardless of the significant/less significant division. The first such situation is issuing and withdrawing authorisations to credit institutions:[27] here the ECB depends entirely on national law regulating the procedure and requirements for granting and withdrawing authorisations. The competent national authority draws up the draft decision proposing to the ECB to grant the authorisation (in the event of a negative assessment, the national authority merely submits its appraisal to the ECB). The ECB is equally dependent on national law when it comes to the assessment of qualifying holdings under Article 15 of the SSM Regulation.

This enmeshment of EU and national law within banking supervision brought about further innovations in judicial review. In the standard division of tasks between EU and national courts, the former are competent to interpret (and possibly invalidate) EU law and the same powers pertain to the latter in respect of national law. Yet, what happens when the ECB makes a decision based on the preparatory national act of the competent national authority? To complicate matters further, what if that national preparatory act is in parallel subject to judicial review at the national level, or further still, survived judicial review at the national level and the matter is considered *res judicata*? A simple conclusion answers all these questions simultaneously: the national preparatory act forms part of the final ECB decision and the consequences of this are not difficult to fathom: EU courts are exclusively competent to interpret and possibly invalidate such acts, while national courts are prevented from doing so.[28]

[27] Article 14 of the SSM Regulation.
[28] Case C-219/17 *Berlusconi* (n 10) [43]–[44], [47]–[51].

It is no wonder that legal accountability in the SSM framework deserves a case study of the EU and national judicial review given this rollercoaster of regulatory solutions. In the coming section, I will analyse decisions of the General Court and the Court of Justice, following their approach to access, remedies, and the interpretation of the principles of solidarity and equality.

5.3 JUDICIAL REVIEW AT THE EU LEVEL

5.3.1 *Access and Remedies*

The preliminary reference procedure, the foremost method of access to EU courts (or more precisely, the Court of Justice) in the area of monetary policy and financial assistance, does not dominate prudential supervision, where instead direct actions take centre stage.[29] This is, of course, resulting from the set-up of prudential supervision as described in the previous section: the ECB is centrally responsible for the supervision of significant entities and maintains the exclusive power to characterise an entity as such. These decisions necessarily then address the credit institution itself and the decision of the ECB is a challengeable act under Article 263(1) TFEU. Challenging these decisions, therefore, usually takes place before the General Court, possibly followed by an appeal before the Court of Justice.

Normally, ECB's decisions in the area of prudential supervision concern a specific entity. For example, the ECB may decide on the characterisation of an entity as significant or less significant (as in *Landeskreditbank*);[30] it may grant or revoke an authorisation to a credit institution (as in *Trasta Komercbanka*);[31] or it may approve or block the acquisition of a qualifying holding in a credit institution (as in *Berlusconi*).[32] Seeking annulment of such decisions under Article 263(4) TFEU[33] is fairly straightforward: the entity in

[29] At the time of writing, the SSM Regulation was the central subject matter of nine judgments before the Court of Justice (in others, the SSM Regulation was merely mentioned in other relevant provisions). Four of those were the result of preliminary references. In addition, the General Court dealt with twenty-six SSM cases. Of those, twenty-three deal with SSM proper (nine are currently under appeal), and three with access to documents in prudential supervision (one is currently under appeal).

[30] Case C-450/17 P *Landeskreditbank* (n 22).

[31] Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* EU:C:2019:923.

[32] Case C-219/17 *Berlusconi* (n 10).

[33] For an overview of the case law on direct and individual concern and its appraisal in the context of the SSM, see M Lamandini, D Ramos and J Solana, 'The European Central Bank (ECB) Powers as a Catalyst for Change in EU Law. Part 2: SSM, SRM and Fundamental Rights' (2017) 23 *Columbia Journal of European Law* 199, 248–250.

question is most certainly directly and individually concerned and will have no difficulty in triggering judicial review against such decisions of the ECB before the EU courts.[34]

The situation of less significant institutions is somewhat more complicated: while supervised by the national competent authority, as we have seen in the preceding section, some supervisory powers remain with the ECB. Either of these institutions, in addition, may be deciding on the basis of EU or national law (depending on the specific situation under the SSM Regulation). It is also often possible that such decisions are based on instructions or preparatory acts of the institution not making the final decision. A final twist comes also from the possibility that the decision of either of the institutions involves different degrees of discretion in enacting preparatory acts or instructions for the other institution. Depending on the combination of each of these factors, less significant institutions may find themselves before the national or EU courts.

Access to EU courts becomes progressively more difficult the more the powers of the ECB and national competent authorities intertwine.[35] Such are, for example, situations in which Member States implement directives or use the options offered by regulations.[36] Using options may involve supervisory or instruction powers for the ECB, which may issue such instructions to competent national authorities. It is also possible that under national law the national competent authorities retain some discretion in making decisions that

[34] Türk and Xanthoulis call these the 'straightforward cases' in terms of achieving legal accountability in the SSM. They also provide a list of further administrative decisions of the ECB that pertain to this category. See A H Türk and N Xanthoulis, 'Legal Accountability of European Central Bank in Bank Supervision: A Case Study in Conceptualizing the Legal Effects of Union Acts' (2019) 26(1) *Maastricht Journal of European and Comparative Law* 151, 156.

[35] What Türk and Xanthoulis label as 'hard cases'. See Türk and Xanthoulis (n 34) 159–164.

[36] The regulatory framework in the area of banking regulation is the Single Rulebook, the aim of which is to 'strengthen the resilience of the banking sector across the European Union (EU) so it would be better placed to absorb economic shocks while ensuring that banks continue to finance economic activity and growth. The European Banking Authority (EBA) plays a key role in the implementation of the new Basel 3 regulatory framework in the European Union'. In respect of prudential supervision, the relevant rules are set out in the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176) 1 and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176) 338. These are accompanied by a number of implementing acts. See also <www.eba.europa.eu/regulation-and-policy/implementing-basel-iii-europe>.

influence rights or obligations of credit institutions.[37] In this scenario, the threshold of Article 263(4) TFEU would not be met: the entity in question would need to turn to the national court instead. Whether the Court of Justice would assume jurisdiction to decide on the preliminary reference to review an ECB instruction or preparatory act has not yet been explicitly addressed.[38] However, it is possible to assume the answer would be yes. Let us then have a look at *Berlusconi* and *Balgarska Narodna Banka*.[39]

In *Berlusconi*, the central issue was the status of national preparatory acts that served as the basis for the ECB to block the acquisition of a qualifying holding under Article 15 of the SSM Regulation. The power of the ECB under this provision is exclusive regardless of the significance of a credit institution. Yet, the decision to oppose or not an acquisition of a qualifying holding is not possible without the use of national law following Article 4(3) of the SSM Regulation. More specifically, the requirements attached to such acquisitions are set out in national law and any such acquisition should be notified to the national competent authority.[40] The national competent authority then forwards the notification to the ECB and prepares a proposal for a decision to oppose the acquisition or not. It also assists the ECB in this process in any other way necessary.

Based on the proposal of the Italian competent authority (the Bank of Italy), the ECB decided to oppose the acquisition of a qualifying holding in a credit institution by Silvio Berlusconi. He was, prior to this acquisition attempt, found guilty of tax fraud and thus did not meet the reputation requirement required under the Italian law for acquiring qualifying holdings. In turn, this cast serious doubts with regard to the sound and prudential management of the credit institution in the future and formed the basis for the proposal of the Bank of Italy and the resulting decision of the ECB. Berlusconi challenged the national and ECB's decisions before all conceivable avenues. First, the decision of the Bank of Italy was challenged for breach of non-retroactivity, given that the requirement of good reputation entered into force after the criminal conviction and, according to Berlusconi, it should not have been taken into account. This action was successful in the second instance before the Italian Council of State.[41] Second, Berlusconi also challenged the ECB's

[37] See also Lamandini, Ramos and Solana (n 33) 250.
[38] This would also arguably depend on the interpretation of the option in question.
[39] Case C-501/18 *Balgarska Narodna Banka* EU:C:2021:249. These findings were confirmed by the Court subsequently in Case C-911/19 *Fédération bancaire française* EU:C:2021:599 [56].
[40] See Articles 85–87 of the SSM Framework Regulation for more detail.
[41] This circumstance further complicated matters for the preliminary reference procedure submitted by the Council of State, as we will see.

decision before the General Court.[42] Third, Berlusconi initiated an action for annulment of the Bank of Italy's decision before a regional administrative court. Finally, again before the Council of State, Berlusconi initiated an *azione di ottemperanza*,[43] demanding the Bank of Italy to comply with the abovementioned judgment concerning the breach of non-retroactivity.

Complexity reached its peak in this fourth procedure. At its centre were two issues: first, the relationship between decisions and procedures before the Bank of Italy and the ECB, and second, the role the Council of State's earlier judgment concerning the breach of non-retroactivity by the Bank of Italy. The matter reached the Court of Justice by way of a preliminary reference. First, the Council of State asked whether Article 263 TFEU may be used to challenge procedures, preparatory acts, and non-binding proposals of the national competent authorities in the area of prudential supervision. Next, if such jurisdiction is established, what role, if any, does the previous final judgment of a national court play?

The Advocate General, relying on the Court's previous decisions in *Borelli*[44] and *Sweden v Commission*,[45] found that the relevant criterion for determining jurisdiction to review national preparatory acts corresponds to the location of the final decision-making power. In other words, what is relevant is whether the national preparatory act is binding on the EU authority making the final decision. Given that the approval of acquisition of qualifying holdings belongs finally and exclusively to the ECB, the Advocate General concluded that the jurisdiction for review of such decisions accordingly 'must lie with the General Court and the Court of Justice'.[46] This, according to the Advocate General, includes the power to review both the decision of the ECB and the national preparatory act.[47] The proper place for this review is thus the annulment action against the ECB's decision (pending on appeal before the Court of Justice).[48] This finding then directly answers the second question of

[42] The action was rejected in Case T-913/16 *Fininvest and Berlusconi v ECB* EU:T:2022:279. That decision has been appealed and is currently pending before the Court of Justice in Case C-512/22 P *Fininvest v ECB*.

[43] A procedure in Italian law seeking to oblige an administrative authority to comply with previous final judgments.

[44] Case C-97/91 *Borelli* EU:C:1992:491. In that case, the EU institution had no discretion and was bound by the national preparatory act.

[45] Case C-64/05 P *Sweden v Commission* EU:C:2007:802. By contrast, in that case the final decision-making power was with the EU institution (the Commission).

[46] Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17 *Berlusconi* (n 26) [105].

[47] ibid [107].

[48] See n 42.

the Council of State: a national remedy cannot have any bearing on the exclusive jurisdiction of EU courts to review national preparatory acts and the ECB decision concerning the acquisition of qualifying holdings in credit institutions.[49]

The Court followed the Advocate General *en grandes lignes* when it comes to the *Borelli/Sweden v Commission* division of jurisdiction in composite procedures. Yet, establishing exclusive jurisdiction of EU courts was grounded in the exclusive power of the ECB to make a decision on the acquisition of qualifying holdings, thereby ensuring effective judicial protection of the persons concerned.[50] As a consequence, Article 263 TFEU, read in light of the principle of sincere cooperation in Article 4(3) TEU, prevents the national courts from conducting judicial review of the final decision of the ECB, but also of national preparatory acts.[51] This renders the cooperation mechanism between the EU and national authorities effective, preventing the risk of divergent assessments by the EU and national courts.[52] The necessary consequence of this finding is then also the inability of the national court to entertain the *azione di ottemporanza*.[53]

The clear division of jurisdiction between EU and national courts in this area and the explicit prohibition for the national courts to review national preparatory acts where the final word pertains to an EU institution is a major novelty in the case law of the Court.[54] The Court placed great emphasis on the specific cooperation mechanism that underlies the SSM as a manifestation of sincere cooperation from Article 4(3) TEU. From the perspective of evaluating access to legal accountability in the SSM, clarifying the division of jurisdiction (or to be precise, expanding it)[55] in complex institutional and legal situations contributes to legal certainty and legitimate expectations of individuals. Certainly, that comes at the expense of the jurisdiction of the national courts reviewing the acts of *national* institutions applying *national*

[49] Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17 *Berlusconi* (n 26) [116]–[119].

[50] Case C-219/17 *Berlusconi* (n 10) [44].

[51] ibid [47].

[52] ibid [49]–[50]. For a criticism of divergences in interpretation as a justification of the Court to assume exclusive jurisdiction in situations of overlapping competences, see Opinion of Advocate General Ćapeta in Case C-721/20 *DB Station & Service* EU:C:2022:288 [64]–[73].

[53] Case C-219/17 *Berlusconi* (n 10) [57]–[59]. As a consequence, a national rule concerning *res judicata* was to be disapplied by the referring court.

[54] F Brito Bastos, 'Judicial Review of Composite Administrative Procedures in the Single Supervisory Mechanism: *Berlusconi*' (2019) 56 *Common Market Law Review* 1355, 1372.

[55] Opinion of Advocate General Campos Sánchez-Bordona in Case C-219/17 *Berlusconi* (n 26) [114].

law.[56] However, following up on the finding in *Landeskreditbank* that the power of the ECB in prudential supervision is exclusive in nature,[57] the decision of the Court is in no way surprising. A more sober reading of this decision would be to confine its effects only to those situations under the SSM where the ECB has full discretion to make the final decision (such as was the one in *Berlusconi*, and when it comes to the authorisation of credit institutions).

One question concerning the legal accountability of the ECB in a *Berlusconi* situation remains unanswered: what happens if the national preparatory act under review by EU courts is illegal as a matter of national law? This problem has, after the *Borelli* judgment, been termed as 'derivative illegality' in the literature: can the illegal national preparatory act contaminate the legality of an EU act? In a *Borelli* situation, where the EU decision-maker *does not* have discretion and is bound by the national preparatory act, the persons concerned are to seek redress before national courts.[58] This is so because first, EU courts do not have the competence to review national law, and second, because national acts cannot influence the legality of EU acts, as this would infringe the autonomy of EU law.[59]

However, if the ECB based its final decision on such an act, while having discretion, the EU courts would be able to review the exercise of this discretion as a matter of EU law. But of what use then is the power of EU courts to review the preparatory acts themselves? And against what standards would they be reviewed? It would appear that effective judicial protection (to have the national preparatory act reviewed against the standards of national law) is here sacrificed for the benefit of sincere cooperation in the 'specific cooperation mechanism' in prudential supervision. Still, the obligation of the ECB to apply national law under the SSM Regulation, coupled with the general obligation of cooperation and assistance with the national competent authorities, allows the EU courts to review the duty of care applied by the ECB in exercising its discretion. So ultimately, it may be said that the ECB's decision

[56] This more generally puts into question the strict dividing lines between the jurisdiction of EU and national courts. Brito Bastos (n 54) 1376.

[57] See also P Dermine and M Eliantonio, 'Case Note: CJEU (Grand Chamber), Judgment of 19 December 2018, C-219/17, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)' (2019) 12(2) *Review of European Administrative Law* 237, 244.

[58] See also Case C-785/18 *Jeanningross* EU:C:2020:46 [25]–[27].

[59] On the discussion of these points, see Brito Bastos (n 54) 1370–1372; Dermine and Eliantonio (n 57) 245.

would be controlled for mistakes in the national preparatory acts.[60] Accountability of national authorities in that process, however, seems to remain without redress. We have seen in Chapter 2 that preparatory acts are in principle not subject to a direct action before the EU courts (unlike in a preliminary reference procedure).[61] In theory, however, it is possible to imagine that national courts may subsequently entertain actions seeking responsibility of the national authority under national law, and it is by extension also possible to expect preliminary references in this area.

Thus we have learned about the organisation of judicial review for situations when the ECB makes a final decision based on a non-binding national preparatory act in accordance with national law. What about the reverse situation: a national competent authority makes a final decision based on non-binding guidance or instruction of the ECB? The Court has not, to my knowledge, addressed this point specifically in respect of the ECB. However, it has done so in the broader context of prudential supervision, concerning the guidelines issued by the European Banking Authority (EBA), which were then taken up by the competent national authority and influenced the rights and obligations of credit institutions. In *Balgarska Narodna Banka*, the Court took an approach that at first glance comes across as counter-intuitive:[62] non-binding acts of EU institutions cannot be subject to direct action under Article 263 TFEU, but the question of their validity may be submitted to the Court by way of a preliminary reference from a national court.[63] What is more, standing in such situations is covered by national procedural autonomy and does not depend on the standing threshold from Article 263 TFEU.[64]

This outcome makes perfect sense, specifically considering the challenges left from *Berlusconi* and the exclusive jurisdiction of the EU courts to review the national preparatory acts that were not binding upon the ECB. First, if we take up the traditional division of tasks between EU and national courts complemented by *Berlusconi*, we may conclude that the final decision based on a non-binding act of another institution should be reviewed by the court of the institution making the final decision. Simply put, EU courts will review

[60] A further twist in this scenario is when the national law itself arguably wrongly implements EU law.

[61] Chapter 2, Section 2.2.3.

[62] This was certainly the view of Advocate General Bobek. See Opinion of Advocate General Bobek in Case C-911/19 *Fédération bancaire française* EU:C:2021:294 [141]–[142], [144], [149]–[155].

[63] Case C-501/18 *Balgarska Narodna Banka* (n 39) [82]. On this point, see also Chapter 2, Section 2.2.3.

[64] Case C-911/19 *Fédération bancaire française* (n 39) [62]–[65].

the final decisions of the ECB; national courts will review the final decisions of national competent authorities.

This division of tasks then translates into the relationship between Article 263 TFEU and Article 267 TFEU. As regards the former, the Court of Justice explained in *Fédération bancaire française* that non-binding acts cannot be subject to direct actions under Article 263 TFEU as they do not produce binding legal effects.[65] Indeed, in the language of *Berlusconi*, there is no decision of an EU institution that is binding as a matter of EU law. Subsequently, then, if a national competent authority follows the non-binding act, the content of such an act produces effects between private parties not merely by the authority of national law, but also as a matter of EU law. Hence, a preliminary reference on the interpretation or validity of such a non-binding act should be allowed to help the national court resolve the dispute before it. If we compare this situation to a Member State taking up an option provided by a directive, once it uses such an option, it will operate in the national legal system also as a matter of EU law.

Effective judicial protection here demands that a change in the legal position of an individual, which finds its source in EU law, be reviewed by a court.[66] This could not be the national court, as it would go against the *Foto-Frost* doctrine, which prohibits national courts to review the validity of EU law, as well as against Article 19(1) TEU, according to which it is the exclusive jurisdiction of the Court of Justice to interpret EU law. Still, the national court, to review comprehensively the national act based on the non-binding EU act, must know whether the latter is valid as a matter of EU law. In respecting the autonomy of EU law, then, it can achieve this result only through the preliminary reference procedure.

A final note concerning non-binding acts by EU institutions is due. Such acts are, as a general rule (repeated in *Balgarska Narodna Banka* and *Fédération bancaire française*), not subject to direct actions under Article 263 TFEU.[67] However, we now know from *Poggiolini* that preparatory acts of EU institutions are not entirely outside the scope of the Court's jurisdiction in direct actions. When preparatory acts do create an immediate change in the legal position of the person concerned (what the Court termed 'independent legal effects'), those acts are susceptible to judicial review under Article 263

[65] ibid [37].

[66] Opinion of Advocate General Bobek in Case C-911/19 *Fédération bancaire française* (n 62) [140].

[67] This was recently confirmed by the General Court in Case T-709/21 *WhatsApp Ireland Ltd* EU:T:2022:783 [42], [45], in a case concerning the protection of personal data.

TFEU.[68] The Court's justification lies in effective judicial protection, which would be jeopardised if a direct action against a final decision would not be able to remedy the immediate (independent legal) effects of a preparatory act. For the purposes of prudential supervision, this means that we can expect the Court to entertain an assessment of independent legal effects of a preparatory act.

We have up to now dealt with situations in which the parties to the case did not struggle with meeting the standing threshold, either at the national level that triggered the preliminary reference procedure, or by way of a direct action. Yet, the threshold for direct and individual concern has been a hurdle for applicants beyond those individually named by the decision in question. Are shareholders also subjects that can meet the threshold of direct and individual concern when national law makes them the only actors effectively able to initiate judicial review? This question was raised before the Court of Justice in respect of an ECB decision withdrawing the authorisation to Trasta Komercbanka under Article 4(1)(a) and Article 14(5) of the SSM Regulation.[69] The context behind this action can also be neatly connected to the above discussion on the division of tasks between national and EU courts and in particular whether access to judicial review in prudential supervision is a matter of EU or national law. As we will see, *Trasta Komercbanka* depicts very well the clashes that can occur when national law is applied to the consequences of a final ECB decision in prudential supervision. Here, national law created a de facto limit to the legal accountability of the ECB in respect of its authorisation withdrawal.

Specifically, Latvian law determined that upon the withdrawal of an authorisation, the bank in question goes into automatic liquidation. For this purpose, a liquidator is appointed by the competent national authority that recommended the withdrawal to the ECB. In that case, the legal representative of the bank submitted an action before the General Court to challenge the ECB's decision concerning the withdrawal of the authorisation. However, because the liquidator withdrew the power of attorney to the legal representative, the General Court found this action inadmissible for lack of legal representation.[70] Instead, given that shareholders also challenged the ECB decision, claiming that their economic interests have been significantly

[68] Case C-408/20 P *Poggiolini* EU:C:2021:806 [39]–[42].
[69] Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 31).
[70] Order T-247/16 *Fursin and Others v ECB* EU:T:2017:623 [49].

affected by the authorisation withdrawal, the General Court found they were directly and individually concerned and allowed their appeal.[71]

On appeal, both Advocate General Kokott and the Court of Justice endorsed the opposite finding. The Advocate General Opinion is particularly instructive when it comes to the consequences that national law may have on the right to an effective judicial remedy against EU acts. Specifically, the Opinion analyses the effect that the appointment of the liquidator under Latvian law had on the ability of Trasta Komercbanka to challenge the withdrawal decision of the ECB before the EU courts. The withdrawal decision was based on the recommendation of the Latvian competent authority, as was the appointment of the liquidator. The Latvian authority also had the power to discharge the liquidator of his or her function in case of loss of confidence. While formally it was at the disposal of the liquidator to initiate legal proceedings before the General Court, in fact, the liquidator would be in a conflict of interest and judicial protection would as a consequence not be effective.[72] This would mean, according to the Advocate General, that effective legal protection against an EU act would depend on national law, which cannot be upheld.[73]

The Court of Justice took up this point further: the withdrawal decision of the ECB resulted, under Latvian law, in mandatory liquidation. The Court considered it clear that the interests of the competent authority and the liquidator coincide,[74] making the conflict of interest, as the Advocate General put it, 'obvious'.[75] Both the Advocate General and the Court therefore agreed that the General Court should have disregarded the liquidator's decision to withdraw the power of attorney to the legal representative of the bank. Instead, for the purposes of effective legal protection, continuity of the previous legal representation should have been recognised by the General Court.[76] The mistake of the General Court was then to accept the rules of national law on representation to the detriment of effective judicial protection. This approach of the Court of Justice is both novel and extremely traditional.

[71] ibid [63], [69].

[72] Opinion of Advocate General Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* EU:C:2019:323 [79].

[73] ibid [56].

[74] Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 31) [73]–[78].

[75] Opinion of Advocate General Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 75) [75].

[76] Opinion of Advocate General Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 75) [100], [128]; Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 31) [78].

It is novel because it asks of EU courts to disapply rules of representation in national law and depart from the general approach according to which the concept of a 'lawyer' for the purposes of representation is a matter of national law.[77] It is extremely traditional because the Court of Justice uses the route of effective judicial protection as a wild card whenever no other option seems available. In other words, without exploring further the specific enmeshment of EU and national law under the SSM and its obviously new consequences, the Court of Justice chose the well-travelled road of effective judicial protection.

Against this background, the Advocate General and the Court also agreed that the General Court erred in establishing direct and individual concern of the shareholders who challenged the decision of the ECB.[78] Both agreed that while there certainly exists an effect on the economic position of shareholders as a consequence of the withdrawal of the authorisation and the mandatory liquidation,[79] neither of these meet the standard of direct concern under EU law. In essence, then, had the General Court correctly treated the question of legal representation and disregarded the dismissal by the liquidator, effective judicial protection would have been safeguarded without distorting the concepts of direct and individual concern under Article 263(4) TFEU.

Is this a satisfactory solution? Discerning the actual representation and legal continuity in a case such as *Trasta Komercbanka* involves a certain degree of flexibility by the EU courts, including looking further into national law and its consequences for the purposes of effective judicial protection.[80] EU courts should in my view be able to surpass the rigidity of formal legal representation, which is ultimately a matter of national law.[81] This is so because national

[77] See also Article 44 of the Rules of Procedure of the Court of Justice and Article 39 of the Rules of Procedure of the General Court. Further on the treatment of this type of national law reference before EU courts, see M Prek and S Lefèvre, 'The EU Courts as "National Courts": National Law in the EU Judicial Process' (2017) 54 *Common Market Law Review* 369, 382.

[78] Opinion of Advocate General Kokott in Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 75) [114]–[122]; Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 31) [107]–[115].

[79] The Court underlined that this consequence is in any event stemming from national law, which thus represents an 'intermediate rule', precluding the existence of direct concern by an EU act. Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 31) [114].

[80] The concern for effective judicial protection was, according to Simoncini, selective, given that it broadened the approach to legal representation while at the same time narrowing direct and individual concern for shareholders. M Simoncini, 'Different Shades of Legal Standing and the Right to Judicial Protection of Private Parties in the Banking Union: *Trasta Komercbanka*' (2020) 57 *Common Market Law Review* 1867, 1878.

[81] Joined Cases C-663/17 P, C-665/17 P and C-669/17 P *Trasta Komercbanka* (n 31) [58]–[59].

procedural autonomy yields before the right to an effective remedy[82] and it is for EU courts to move beyond a formal reading of national rules and ensure that this right is effectively safeguarded. This is particularly pressing in the context of *Berlusconi*: national courts are prevented from any judicial review in areas where the ECB has exclusive powers under the SSM Regulation, such as the authorisation withdrawal, as was the case in *Trasta Komercbanka*. We know that this also includes national preparatory acts. National acts dealing with the aftermath of such decisions should accordingly also not stand in the way of legal accountability of the ECB. It is certainly possible that the finding of EU courts concerning the legality of the ECB decision has an influence on subsequent legal developments at the national level.

The area of prudential supervision is, ultimately, not one where we were able to witness any creativity on behalf of EU courts when it comes to remedies themselves.[83] However, given the extensive changes that took place in terms of the division of jurisdiction between EU and national courts as well as the interpretation of access to judicial review, EU courts have indeed shown a degree of flexibility[84] to ensure legal accountability of decisions in prudential supervision. Procedurally, thus, a wide enough understanding of access can ensure that remedies are used to enforce legal accountability in prudential supervision. Next, I will turn to the substantive side of ensuring legal accountability.

5.3.2 *Solidarity and Equality*

The principal aim of the SSM more generally is to ensure the safety and soundness of credit institutions and the stability of the financial system of the Union and individual Member States. The system as a whole, and also its component parts, therefore, tell us something about the common interest as the guiding principle in the SSM. The criterion of significance of an entity is, as we have seen, at the centre of division of supervisory tasks between the ECB and national competent authorities. Article 6(4) of the SSM Regulation lays down what significance means more specifically. Without getting into listing

[82] Case C-243/15 *Lesoochranáske zoskupenie* EU:C:2016:838 [65].

[83] In Chapter 4, Section 4.3.1, we have seen that the Court of Justice, based on the special nature of the European System of Central Banks, for the first time annulled a national measure in Joined Cases C-202/18 and C-238/18 *Rimšēvičs* EU:2019:139.

[84] G Marafioti, 'The *Trasta Komercbanka* Cases: Withdrawals of Banking Licences and *locus standi*' in C Zilioli and K-P Wojcik (eds), *Judicial Review in the European Banking Union* (Edward Elgar 2021) 528.

the individual criteria, what brings them together is the possibility that should such entities not be run in a prudential manner, consequences would be felt on a systemic level, or at least beyond a single Member State. In addition, the ECB supervises, for example, the three largest entities in each Member State, as well as those for which ESM or EFSF funding has been granted or requested. Ultimately, the ECB also has discretion in defining any entity as significant, should it consider that its cross-border assets and activities so warrant.

The nature of ECB's powers was clarified by the Court of Justice when Landeskreditbank disputed the decision of the ECB by which it refused to classify it as less significant (and by consequence place it under the supervision of the German competent authority). The General Court dismissed the action, and the Court of Justice dismissed the appeal against that judgment. Both courts found that the ECB gained by the SSM Regulation the exclusive competence to determine what are 'particular circumstances'[85] for characterising an entity as (less) significant. Are there any limits to ECB action here, such as the principle of proportionality? The Court found that the principle is embedded in the legislative framework and the ECB is not required to demonstrate how it is being met on a case-by-case basis.[86] In addition, the Court established that the SSM Regulation conferred an exclusive competence to the ECB to supervise all credit institutions, whereas given its decentralised implementation, the national authorities carry out and are responsible for less significant institutions.[87]

Landeskreditbank also argued that the General Court distorted the decision of the ECB, as it incorrectly represented it and added its own reasoning. This is of relevance for the type of judicial review that courts should perform in the EMU as proposed in Chapter 2: the duty to state reasons should be extensive and sufficient to allow for a meaningful review. Yet, the Court of Justice referred to its well-known discretion case law: the ECB has broad discretion in matters of supervision.[88] In addition, the Administrative Board of Review (ABoR) also carried out an internal administrative review of the ECB's decision, and the reasoning in that decision, according to the Court, also forms

[85] Case T-122/15 *Landeskreditbank* EU:T:2017:337 [54], [63], [72]; Case C-450/17 P *Landeskreditbank* (n 22) [49].

[86] Case C-450/17 P *Landeskreditbank* (n 22) [58]–[59].

[87] ibid [38]–[41], [49]. For a presentation of diverging views in the literature on how this division of tasks is to operate in practice, see F Annunziata, 'European Banking Supervision in the Age of the ECB: Landeskreditbank Baden-Württemberg-Förderbank v ECB' (2020) 21 *European Business Organization Law Review* 545, 555–556.

[88] Case C-450/17 P *Landeskreditbank* (n 22) [86].

part of the statement of reasons.[89] This could, in principle, be justified by the fact that credit institutions have the option to seek an internal review of ECB decisions by ABoR,[90] and once they have done so, cannot be unaware of the reasoning provided in that procedure. It should not go unmentioned, however, that the decision of ABoR is not subject to judicial review, but only the decision of the ECB.[91] It is thus not only desirable, but necessary, for full judicial protection, that the reasoning of ABoR also be subject to judicial review indirectly: when the original ECB decision is under review.

The division of tasks endorsed by the Court of Justice in *Landeskreditbank* opened a number of new questions. What is the role of systemic risk in terms of safeguarding the common interest? What interests are represented and considered by the ECB in making the decision concerning the significance of an entity? In controlling the ECB in its activities, how do EU courts interpret the ECB's assessment of significance in relation to the principles of equality and/or solidarity? Finally, does the SSM Regulation impose any conditions on the national law regulating the functioning of credit institutions? In other words, the ECB is to grant or withdraw an authorisation based on the entity meeting or failing to meet the requirements set out in national law – but is that very national law in some way restrained by the SSM Regulation in turn?

Supervisory powers of the ECB and national competent authorities are designed to overcome individual interests of Member States, for the greater good of safeguarding the stability of the system as a whole. The decision in *Landeskreditbank* illustrates this vividly: regardless of the historical or financial relevance of individual large credit institutions for the Member State concerned, their supervision is transferred exclusively to the ECB. This then tells us something about safeguarding the common interest: controlling the systemic risk that significant credit institutions may bring about is prioritised over a formal demand for equality of Member States in safeguarding their financial interests.

Member States and the EU have, for better or worse, been put in a position to bail-in a number of large credit institutions to assuage the consequences of the crisis.[92] While the events in *Kotnik* took place just as the SSM was entering into force, the findings of the Court in the area of state aid and bail-ins are helpful in understanding the approach to the common interest in

[89] ibid [92].
[90] Article 24(5) of the SSM Regulation.
[91] Annunziata (n 87) 563.
[92] See Opinion of Advocate General Wahl in Case C-526/14 *Kotnik* EU:C:2016:102 [2].

respect of bearing the burdens of the financial crisis. Specifically, bailing-in banks to preserve the stability of the system as a whole is a perfect example of increased solidarity demands. The Court in *Kotnik* addressed the issue of whether additional conditions of burden-sharing by shareholders and subordinated creditors may be attached to a bail-in measure intended to maintain the viability of banks.[93] Bail-ins of banks were in that case state aid that was notified to and approved by the Commission. In its Banking Communication,[94] that guided the design of national bail-in measures,[95] the Commission stated: 'State support can create moral hazard and undermine market discipline. To reduce moral hazard, aid should only be granted on terms which involve adequate burden-sharing by existing investors.'[96] Advocate General Wahl explained the tensions that brought about the need for burden-sharing:

> [F]inancial services play a very distinct role in modern economic systems. Banks and other credit institutions are a vital source of finance for (most) undertakings active on any given market. Furthermore, banks are often closely interconnected and many of them operate at an international level. That is why the crisis of one or more banks risks quickly spreading to other banks (both in the home State and in other Member States) and that, in turn, risks producing negative spill-over effects in other sectors of the economy (often referred to as the 'real economy'). This effect of contagion is liable, ultimately, to severely affect the lives of private individuals.[97]

Bailing-in banks thus carries significant benefits and risks. To balance these out, the Advocate General found nothing problematic in attaching the demands of burden-sharing to state support.[98] The Court agreed:

> [. . .] the burden-sharing measures involving both shareholders and subordinated creditors constitute, when they are imposed by the national authorities, exceptional measures. They can be adopted only in the context of there

[93] Case C-526/14 *Kotnik* EU:C:2016:570.

[94] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ 2013 C 216) 1. Its aim was to provide guidance on the criteria for the compatibility of State aid with the internal market pursuant to Article 107(3)(b) TFEU for the financial sector during that crisis.

[95] It should be stated that the Court found that the Communication was not binding on Member States, but rather only on the Commission when assessing notified State aid. Case C-526/14 *Kotnik* (n 93) [44]–[45].

[96] Section 3.1.2, point 40 of the Banking Communication (n 94).

[97] Opinion of Advocate General Wahl in Case C-526/14 *Kotnik* (n 92) [59].

[98] ibid [59]–[63].

> being a serious disturbance of the economy of a Member State and with the objective of preventing a systemic risk and ensuring the stability of the financial system.[99]

The stability of the entire financial system of the Union may easily be translated to the common interest: banks that are too big to fail risk, causing further disturbances to the entire system and thus may be subject to exceptional selective measures. The Court confirmed, agreeing with the Advocate General, that burden-sharing in this scenario represents an overriding public interest.[100] Property rights of the shareholders and subordinate creditors can on this basis be restricted by the requirement of burden-sharing.[101] We therefore move to the area of prudential supervision already knowing that the stability of the system as a whole may involve exceptional and asymmetrical measures.

Although neither the Advocate General nor the Court mentioned the principle of solidarity specifically, the findings in *Kotnik* align with the theoretical understanding of solidarity presented in Chapter 1. Preventing systemic risk from materialising, or turned around, the preservation of the financial stability of the entire system, is the guiding justification of differentiated measures. In addition, it also guides the division of tasks between the ECB and the national competent authorities: Member States have, for this common interest, given up their own supervisory powers of significant credit institutions.

5.4 JUDICIAL REVIEW AT THE NATIONAL LEVEL

5.4.1 *Access and Remedies*

The regulatory choice of mixing national and EU law obligations in prudential management complicated the respective tasks of national and EU courts, as did the separation of different preparatory and final decision-making powers between the ECB and national supervisory authorities. The 'usual' division of tasks according to which each court applies its own law is becoming increasingly difficult to sustain. In addition to this, the nature of supervisory powers granted to the ECB and national authorities remains contested, or at the very least, disagreements about it persist between national and EU courts. Before

[99] Case C-526/14 *Kotnik* (n 93) [88]. See also Case C-686/18 *OC and Others v Banca d'Italia and Others* EU:C:2020:567 [92].
[100] Case C-526/14 *Kotnik* (n 93) [69].
[101] ibid [80].

delving into more detail on access and remedies under the SSM Regulation, I will first turn to the judicial review of its implementation at the national level, challenged in Germany before the Bundesverfassungsgericht.

Mirroring the subject matter of the *Landeskreditbank* decision of the Court of Justice, the Bundesverfassungsgericht decided in 2019 that the SSM Regulation is compliant with the German Basic Law. Unlike the Court of Justice, the German court did not wholeheartedly subscribe to the idea that the ECB gained exclusive competence in banking supervision. The judgment is interesting in two ways: the first relates to access; the second to submitting a preliminary reference to the Court of Justice. In terms of access, the threshold for initiating a constitutional complaint in Germany against an act implementing EU legislation is wide. Individuals have the right to challenge such acts if they have sufficiently asserted and substantiated a possible violation of their right to democratic self-determination and demonstrated that they are individually, presently, and directly affected.[102] Forming part of the national procedural autonomy, wide standing rules are always welcome to counterbalance the narrow rules on access before the Court of Justice.

The second aspect relates to the Bundesverfassungsgericht deciding not to submit a preliminary reference to the Court of Justice on the interpretation of Article 127(6) TFEU. According to the Bundesverfassungsgericht, the interpretation of Article 127(6) TFEU is not necessary because 'it cannot be assumed that the CJEU might interpret Art. 127(6) TFEU, which governs the allocation of competences in this case, more narrowly than the Federal Constitutional Court'.[103] The German court appears to misunderstand entirely the purpose of the preliminary reference procedure: it treats it as a procedural device of use only to justify a possible *ultra vires* finding. In the eyes of the Bundesverfassungsgericht, it seems irrelevant that its own interpretation, albeit permissive, might not be the same as that of the Court of Justice.[104] In fact, we will see in the next section that this is exactly what

[102] On this point, see Chapter 4, Section 4.4.1, as well as Epilogue, section 'Judicial Review at the National Level'.

[103] Cases 2 BvR 1685/14 and 2 BvR 2631/14 *Banking Union* Judgment of the Second Senate of 30 July 2019 [317]. See Epilogue, section 'Judicial Review at the National Level', where the Bundesverfassungsgericht used the same justification for not submitting a reference on the interpretation of Articles 122 and 311(2) TFEU when reviewing the ratification of the Own Resources Decision.

[104] See also P Faraguna and D Messineo, 'Light and Shadows in the Bundesverfassungsgericht's Decision Upholding the European Banking Union' (2020) 57 *Common Market Law Review* 1629, 1636.

happened: the nature of ECB's competence in banking supervision was interpreted differently by the two courts. A sincere use of the preliminary reference procedure would mean genuinely seeking the interpretation of an EU norm, instead of instrumentalising the procedure for the narrow purpose of a possible *ultra vires* finding.

This development also goes against the approach taken in respect of other courts in Germany: under the case law of the Bundesverfassungsgericht, the submission of a preliminary reference to the Court of Justice forms part of the right to a lawful judge under Article 101(1) of the Basic Law.[105] It does so when the national court commits a fundamental disregard of the obligation to make a reference; when there is a deliberate deviation without a willingness to make a submission; and if there are other possibilities of interpretation of a certain provision without it being *acte eclairé* under the case law of the Court of Justice.[106] The German court was open about the fact that it was its own interpretation that sufficed for the purposes of the constitutional complaint, regardless of possible differences that might have arisen had the reference been submitted. Such a reasoning makes it possible that at least some of the situations entailing a breach of the right to a lawful judge is engaged. Broad access to a national court should include all the benefits that entails, the preliminary reference procedure being one of them. Maintaining this review process in-house deprives not only the Court of Justice of providing an interpretation with Union-wide relevance, but also preventively shields the Bundesverfassungsgericht from any possible external input that might interfere with a purely national interpretation of the norm in question. As we will see in the next section, a Germany-oriented approach is widely present also when it comes to the substantive interpretation of Article 127(6) TFEU and the SSM Regulation.

Apart from this *ex ante* review, judicial review at the national level will more prominently develop in the actual application of supervisory functions by the national authorities and the ECB. National law should provide access to judicial review and appropriate remedies when the national supervisory authority makes a final decision in which the ECB is not subsequently involved. This is, for example, the first stage of the process of granting an authorisation to a credit institution.[107] National supervisory authorities are

[105] For example, in Cases 2 BvR 615/09 and 2 BvR 535/09 Judgment of the Second Senate of 21 November 2011.

[106] Further on this, see R Valutytė, 'Legal Consequences for the Infringement of the Obligation to Make a Reference for a Preliminary Ruling under Constitutional Law' (2012) 19(3) *Jurisprudencija/Jurisprudence* 1171, 1175.

[107] Article 4(1)(a) of the SSM Regulation.

included in the process at different stages: at the outset they have the power to reject the application for an authorisation if it does not meet the substantive requirements in national law.[108] Here, the rejection is only forwarded to the ECB, who has no power to act further. Under the second sentence of Article 19(1) TEU, sufficient remedies should be provided to ensure effective legal protection, as this is a field regulated by EU law.[109] The concrete modalities of access and remedies in this context are of course subject to choices that remain within national procedural autonomy.[110]

Another role for national courts is the authorisation of on-site inspections, when such authorisation is required by national law.[111] In such cases national courts control the authenticity of the ECB's decision, the arbitrariness or excessiveness of coercive measures, and may demand from the ECB detailed explanations relating to the on-site inspection. National courts are prevented, however, from reviewing the necessity for the inspection and from demanding to see the ECB's case file. Finally, the lawfulness of the ECB's decision may only be reviewed by the Court of Justice. This provision causes some confusion as to who does what: if national courts are prevented from examining the necessity of the inspection, it is unclear what exactly they would examine when it comes to the excessiveness of that same measure. This becomes clear when it comes to remedies, because if a national court can block a measure due to its excessiveness, the ECB's defence of the measure will intuitively be focused on the necessity of the measure.

Arguably, national courts would be able to submit a preliminary reference to the Court of Justice to interpret this provision of the SSM Regulation,[112] but it seems to me that the Court would not be able to provide all the answers. The SSM Regulation refers specifically to the national law requiring a judicial authorisation, and it would be logical to assume that if a national law requires it, it also regulates what is to be assessed in this process. A legal accountability perspective of this matter would require a solution where national courts broadly use their power to demand of the ECB extensive explanations to

[108] Article 75 of the SSM Framework Regulation.

[109] See also Article 47(1) of the Charter.

[110] Limited by the principles of effectiveness and equivalence, national rules for enforcing EU law rights: '... must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible'. See, for example, Case C-397/21 *HUMDA* EU:C:2022:790 [33].

[111] Article 13 of the SSM Regulation.

[112] D Segoin, 'The Investigation Powers, Including On-Site Inspections, of the ECB, and Their Judicial Control' in Zilioli and Wojcik (n 84) 293.

ensure that on-site inspections respect fundamental rights of all those subject to or affected by such a measure.

5.4.2 *Solidarity and Equality*

As in the previous section, here I will also first focus on the decision of the Bundesverfassungsgericht reviewing the SSM Regulation, after which I will turn to how judicial review at the national level can contribute to legal accountability in respect of achieving the common interest. In the ESM, we have seen that achieving the common interest, and by extension the political equality of all EU citizens, faced the tension between the interest of different socioeconomic groups across the EU and nationally oriented aims that creditors and debtor states, respectively, were trying to protect. In monetary policy, the focus was on how the ECB balances different interests that hinge upon the common interest when making decisions with high redistributive effects. In the SSM, the emphasis is on how national courts balance national interests behind banking supervision with what the EU-wide common interest demands.

First, then, to the review of the SSM Regulation against the German Basic Law. There are two takeaways relevant for our thinking about legal accountability and achieving the common interest. First, the Bundesverfassungsgericht repeatedly emphasised that the ECB must be subject to different mechanisms of accountability, which is the only way to ensure it complies with its mandate in supervision. Second, as a consequence of that nature of the ECB's mandate in supervision, the German court provided an interpretation of the SSM Regulation at odds with that of the Court of Justice in *Landeskreditbank*, by taking a highly Germany-oriented approach. From the common interest perspective, the first point can be read as positive, and the second negative.

A holistic approach to accountability was at the centre of finding that the supervisory mandate given to the ECB does not exceed the transfer of competences to the EU level under Article 127(6) TFEU. The ECB holds considerable discretion and independence in its supervisory activities,[113] and the analysis of the Bundesverfassungsgericht focused on the multitude of legal and political accountability mechanisms designed to keep the ECB in check.[114] This included references to both EU and national judicial review,

[113] K Alexander, 'The European Central Bank and Banking Supervision: The Regulatory Limits of the Single Supervisory Mechanism' (2016) 13 *European Company and Financial Law Review* 467.

[114] Cases 2 BvR 1685/14 and 2 BvR 2631/14 *Banking Union* (n 103) [209]–[218].

as well as parliamentary oversight. A similar holistic analysis of accountability in the SSM has shown that numerous accountability mechanisms in store are individually superficial, thus resulting in an overall weak accountability of the ECB.[115] This is not to suggest that the Bundesverfassungsgericht should have annulled the German implementation of the SSM Regulation but rather that a genuine analysis of accountability needs to go further than a formal box-ticking exercise. The positive impression nevertheless remains in terms of promoting a message that the ECB should be held under strict scrutiny in conducting its supervisory activities.

The problematic part of the decision, in my view, is the Bundesverfassungsgericht's purely national interpretation of the SSM. It insisted on a reading according to which the ECB's powers are strictly limited to 'specific tasks', while all other tasks remain for national supervisors.[116] Although the finding of significance of a credit institution is for the ECB to decide, the German court made it seem as if this is an objectively discernible fact.[117] Yet, Article 6(4), third sentence, gives the ECB considerable discretion in determining the concept of significance.[118] The same was confirmed by the Court of Justice in *Landeskreditbank*.[119] The Bundesverfassungsgericht also underlined that the activities of the Federal Financial Supervisory Authority and the Bundesbank are subject to judicial review at the national level, stating that such review is 'generally comprehensive and addresses factual and legal aspects'.[120] This approach, however, disregards the diminished role for national courts under the SSM Regulation, in particular when the final decision lies with the ECB. By focusing only on what the German Basic Law would allow,[121] and

[115] M Dawson, A Maricut-Akbik and A Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' (2019) 25(1) *European Law Journal* 75; A-L Högenauer, 'Paper 7: The ECB as a Banking Supervisor: Transparent Compared to What?' (2023) 45(1) *Journal of European Integration* 121. For a positive assessment of the responsiveness of the ECB as an accountability mechanism in the SSM, see P Nicolaides, 'Accountability of the ECB's Supervisory Activities (SSM): Evolving and Responsive' (2019) 26(1) *Maastricht Journal of European and Comparative Law* 136.

[116] Cases 2 BvR 1685/14 and 2 BvR 2631/14 *Banking Union* (n 103) [160], [167], [171]–[172].

[117] '. . . it depends on the significance of the credit institution whether the ECB of a national supervisory authority is competent.' ibid [174]. See also [176].

[118] 'The ECB may also, on its own initiative, consider an institution to be of significant relevance where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities subject to the conditions laid down in the methodology.'

[119] Case C-450/17 P *Landeskreditbank* (n 22) [56].

[120] Cases 2 BvR 1685/14 and 2 BvR 2631/14 *Banking Union* (n 103) [229].

[121] Faraguna and Messineo (n 104) 1641.

ignoring the interpretation of the Court of Justice,[122] it made it more difficult for national courts to focus on the common interest.

Options for judicial review in the actual operation of the SSM also display a tendency for a more pronounced safeguarding of national over the common interest.[123] This, however, is the result of banking regulation, which remains outside the SSM. The basics are contained in the Basel III Framework, a set of internationally agreed rules developed by the Basel Committee on Banking Supervision in response to the financial crisis.[124] To harmonise compliance with these standards in the EU, the European Banking Authority issues standards, guidelines, recommendations, and the like under the Single Rulebook. The Basel III Framework rules are also reflected in the Capital Requirements Directive[125] and the Capital Requirements Regulation.[126] As instruments striving for exhaustive regulation, they leave predetermined options and discretions for national legislation. Arguably due to a shift towards maximum harmonisation in these instruments, options and discretions at the national level are increasing fragmentation[127] and are a method for national authorities to protect their policy choices.[128] Banking regulation thus forms an important part of the SSM context, given that prudential management of credit institutions assumes a continuing compliance with capital requirements and its other elements. These are mostly found in national law, and although they are implementing EU law, considerable leeway remains for national supervisors and courts alike.

Within the SSM Regulation, these national particularities may come to the fore, for example, when it comes to granting authorisations to credit institutions. As already mentioned, under Article 4(3) of the SSM Regulation, even when decision-making power lies with the ECB, it may happen that it applies the relevant national law. Still, national courts are not the ones who review those decisions: review of ECB decisions is the task of EU courts. Given that EU jurisprudence tackling this conundrum is barely nascent, one can only speculate about the methods of interpretation and sources that will

[122] See also A L Riso, 'A Prime for the SSM before the Court: The *L-Bank* Case' in Zilioli and Wojcik (n 84) 497.
[123] See also Boucon and Jaros (n 26) 159.
[124] For more information, see <www.bis.org/bcbs/basel3.htm?m=2572>.
[125] See n 36.
[126] ibid.
[127] Z Kudrna and S Puntscher Riekmann, 'Harmonizing National Options and Discretions in the EU Banking Regulation' (2018) 21(2) *Journal of Economic Policy Reform* 144.
[128] Boucon and Jaros (n 26) 186.

be considered when deciding how the ECB interpreted and applied national law.

It is also important to consider how the ECB will in fact apply this national law. Arguably, when applying national law that implements options and discretions, the ECB is by extension necessarily promoting the national interests behind them, rather than pursuing the common interest of the entire system.[129] This opposes the traditional wisdom according to which the task of EU institutions and legislation is to safeguard the common interest.[130] A mitigating factor comes from research on systemic risk: here it was established that by preserving the diversity of national banking systems, chances of systemic risks are decreased, thereby resulting in benefits for the sustainability of the system as a whole.[131] By taking into account national peculiarities in the banking system, the ECB can indeed thus also safeguard the common interest.[132]

In the judicial review at the EU level, to ensure that national banking regulation of highly diverse systems[133] is not taken out of context but is properly applied, it would in my view be necessary to include in the procedure at least the national supervisory authority. Of course, the shortcoming is that the national authority would likely share the interest of the ECB and thus merely echo the latter's position on how to interpret the relevant national law. Still, it seems problematic that EU courts should be left to their own devices when interpreting national law,[134] for which they do not have jurisdiction (under Article 19 TEU), nor the requisite knowledge. In opposition to this view, Advocate General Mengozzi was more optimistic and argued, in the context of public contracts where national law may also be of relevance, that it sometimes cannot be avoided that national law forms part of the relevant legal

[129] ibid.

[130] For example, see Case C-128/89 *Commission v Italy* EU:C:1990:311 [14] and Case C-282/90 *Vreugdenhil v Commission* EU:C:1992:124 [24].

[131] O Butzbach, 'Systemic Risk, Macro-Prudential Regulation and Organizational Diversity in Banking' (2016) 35 *Policy and Society* 239, 247–248. See also in the UK context, J Michie, 'Promoting Corporate Diversity in the Financial Services Sector' (2011) 32(4) *Policy Studies* 309.

[132] In *Landeskreditbank* analysed above, the bank argued that due to its specificity, it would be more efficient had supervision been left to the national authorities. The Court of Justice, however, dismissed this argument (albeit without much explanation). It is to be expected, nevertheless, that the ECB, operating through the aid of Joint Supervisory Teams, would conduct its supervision considering institutional and regulatory particularities of credit institutions. See Case C-450/17 P *Landeskreditbank* (n 22) [112].

[133] T Beck, O De Jonghe and G Schepens, 'Bank Competition and Stability: Cross-country Heterogeneity' (2013) 22(2) *Journal of Financial Intermediation* 218.

[134] On this problem more generally, see Prek and Lefèvre (n 77).

framework before the EU courts, which should be approached 'with all due caution'.[135]

This problem arose in *Corneli v ECB*,[136] decided by the General Court and currently under appeal before the Court of Justice.[137] Here, Ms Corneli, a minority shareholder of Banca Carige, challenged the decision of the ECB to put the bank under temporary administration.[138] Banca Carige is considered a significant institution and is thus subject to direct supervision by the ECB. The ECB here had to apply the national law that implemented the Resolution Directive,[139] which provides that before putting a bank under temporary administration, the competent authority can remove senior management or the management body of the bank. The Italian law, however, only provided for the temporary administration decision. In a situation of a bank deteriorating at great speed, the ECB conducted what might be termed a conform interpretation of the national law and opted for the temporary administration measure. The General Court disagreed that the conform interpretation of national law was possible in that situation because it would amount to a *contra legem* interpretation.[140] It thus annulled the ECB's decision.[141] The Court of

[135] Opinion of Advocate General Mengozzi in Case C-401/09 P *Evropaïki Dynamiki v ECB* EU:C:2011:31 [71].

[136] Case T-502/19 *Corneli v ECB* EU:T:2022:627.

[137] Case C-777/22 P *ECB v Corneli* and Case C-789/22 P *Commission v Corneli*.

[138] In terms of standing, it would appear, following the findings in *Trasta Komercbanka*, that Ms Corneli as a shareholder would not have standing to challenge the decision of the ECB. However, the General Court used that judgment to distinguish it from the situation of Ms Corneli: because *Trasta Komercbanka* concerned the withdrawal of an authorisation of a credit institution and its subsequent liquidation, the ceasing of its operation concerned directly not the shareholders but the credit institution itself. That decision on liquidation was, however, not a decision of the ECB. Here, on the contrary, Banca Carige was put under temporary administration by a decision of the ECB and is different from the situation in *Trasta Komercbanka*. Case T-502/19 *Corneli v ECB* (n 136) [47]–[53]. Whether the Court of Justice will agree with this distinction remains to be seen.

[139] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173) 190.

[140] Case T-502/19 *Corneli v ECB* (n 136) [106]–[108].

[141] For a criticism directed to the General Court concerning its misunderstanding of the case law on the effects of directives in national law, see D Sarmiento, 'Setting the Limits of Implementation of National Law by EU Institutions: The *Corneli v ECB* Case (T-502/19)' *EU Law Live* October 2022. Available at <https://eulawlive.com/op-ed-setting-the-limits-of-implementation-of-national-law-by-eu-institutions-the-corneli-v-ecb-case-t-502-19-by-daniel-sarmiento/>.

Justice is thus faced with an appeal on how properly to interpret national law in relation to a directive. In another recent case, the Court of Justice did indeed refer to the national case law when interpreting a provision of national law.[142]

Could there be a role in such and similar cases for national courts? Given that actions against the ECB will be direct, there is no possibility for national courts to participate in the procedure (and which national court would this be in the first place?). Yet, it would be incumbent on EU courts to ensure that all relevant case law from the national level is considered when making a decision. In the context of public procurement, the General Court stated that while EU courts have no power to interpret national law, the institutions are, 'in accordance with the principles of sound administration and solidarity', to ensure that national law is complied with.[143] Whether the EU courts will take up this duty of care remains to be seen in the litigation to come.

5.5 ON JUDICIAL INTERACTIONS

The judicial review in the SSM raised novel and unique challenges for judicial interactions, and by extension, for legal accountability. There are two essential characteristics of this area relevant for judicial interactions. The first concerns the division of competences between EU and national courts resulting from the composite nature of the SSM, and the second the dominance of direct actions. Each of these produce important consequences for the legal accountability of decision-makers in the SSM, and by extension, the achievement of the common interest.

The question of who does what and on the basis on which law is a pressing one. We have seen in Section 5.2 that the SSM is organised as a composite structure: supervision of financial institutions is shared between the ECB and national supervisory authorities. In Section 5.3, it was further established that for those competences where the final decision lies with the ECB,[144] national courts are prevented, under *Berlusconi*, from reviewing the national preparatory acts. Finally, for those supervisory competences that remain with the national authorities, judicial review is conducted at the national level in line

[142] Joined Cases C-152/18 P and C-153/18 P *Crédit Mutuel Arkéa* EU:C:2019:810 [99]–[109].
[143] Case T-139/99 *AICS v Parliament* EU:T:2000:182 [41].
[144] See also L Wissink, T Duijkersloot and R Widdershoven, 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and Their Consequences for Judicial Protection' (2014) 10(5) *Utrecht Law Review* 92, 96–100.

with national procedural rules on access and remedies. What about non-binding preparatory acts or guidelines of the ECB when the national supervisory authority issues the final decision?[145] This should arguably be the competence of national courts,[146] although EU courts have not yet expressed their position on this point. To resolve these uncertainties, I consider it crucial that national courts remain as active as possible in prudential supervision and use the preliminary reference procedure extensively (unlike the approach of the Bundesverfassungsgericht in the *Banking Union* decision). These judicial interactions ought to promote clarity and refinement of the case law of EU courts and provide broader access to legal accountability for individuals.

The second characteristic of the SSM is the dominance of direct actions over preliminary rulings at the EU level. This is the result of the powers of the ECB as a supervisor in respect of significant credit institutions as well as of its exclusive powers in select tasks concerning all credit institutions. While it is intuitive that the EU courts should be the ones reviewing the ECB's final decisions under the SSM Regulation, after *Berlusconi*, they now also have the power to review national preparatory acts leading to the ECB's final decision. National courts are left to review only the final national acts. This is problematic as it removes the central role that national courts have as interlocutors of the Court of Justice, the role in which they can keep the Court of Justice in check by either challenging its decisions when important countervailing constitutional concerns arise, or simply when it is necessary to point out inconsistencies in its case law.

Another weakness of direct actions pervading the SSM is the relationship between the General Court and the Court of Justice. In this context, legal accountability does not benefit from the broad input that national courts can provide but instead remains in-house. In preliminary references, national courts are the ones ultimately deciding the case. While the Court of Justice emphasises the binding nature of its rulings,[147] there is little it can do to ensure that the national courts abide by its rulings. For its judgments to be accepted by the national courts, the Court of Justice needs to work on its

[145] See Article 9(1) of the SSM Regulation, on instructions of the ECB to national authorities to use the powers they have available under national law, and Article 18(5) of the SSM Regulation, on the ECB requiring the national authorities to initiate proceedings under national law which may result in administrative penalties.

[146] C Brescia Morra, 'The Interplay between the ECB and NCAs in the "Common Procedures" under the SSM Regulation: Are There Gaps in Legal Protection?' (2018) 84 *Quaderni di Ricerca Giuridica della Consulenza Legale* 81, 84.

[147] Case C-62/14 *Gauweiler* EU:C:2015:400 [16].

judgments being persuasive, coherent, consistent, and mindful of possible consequences that might arise in the national context. None of these constraints exist when it is deciding on appeals against the decisions of the General Court.

What is more, the General Court cannot challenge the Court of Justice in the same way that national courts can: the latter has appellate jurisdiction and is undoubtedly in a superior position, which prevents a more significant influence of the General Court. Several examples illustrate the inherent subordination of the General Court when it comes to pushing legal accountability forward. In *Trasta Komercbanka*, the General Court attempted to expand access to judicial review by also including shareholders of a bank that underwent mandatory liquidation – the Court of Justice disagreed. In *Corneli v ECB*, the General Court persisted in finding another way of justifying standing for the shareholders. It remains to be seen how the appeal will be decided, but there is no incentive for the Court of Justice to change course.[148] In *Crédit lyonnais v ECB*,[149] the General Court conducted an intense judicial review of ECB's discretion. Currently pending on appeal, Advocate General Emiliou suggested to the Court to annul the decision of the General Court for too intrusive a review of ECB's discretion.[150]

The SSM thus displays a worrying lack of judicial interactions and little hope that this might change. The General Court cannot be left alone to bear the burden of keeping the Court of Justice in check, something it is procedurally not equipped to do in the first place. It is precisely the other way around: as the appellate jurisdiction, it is the task of the Court of Justice to control the General Court and keep it in check. National courts should maintain their presence in the SSM as important actors in legal accountability, something that might require a departure from the prohibition of review of national preparatory acts. Using the preliminary reference procedure as a platform, they too can contribute to the political equality of citizens in achieving the common interest.

[148] Another example was mentioned in Chapter 3 concerning the accountability of the Euro Group. The General Court attempted to find a way to make the Euro Group accountable in Case T-680/13 *Chrysostomides* EU:T:2018:486, but the Court of Justice refused to follow this innovation in Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides* EU:C:2020:1028. See further, Chapter 3, Section 3.4.1.

[149] Case T-504/19 *Crédit lyonnais v ECB* EU:T:2021:185. Pending on appeal in Case C-389/21 P *ECB v Crédit lyonnais*.

[150] Opinion of Advocate General Emiliou in Case C-389/21 P *ECB v Crédit lyonnais* EU:C:2022:844.