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THE ENFORCEMENT OF ECB SANCTIONS IN LIGHT OF THE PROPORTIONALITY PRINCIPLE: IS THERE A NEED FOR A GUIDE TO DEFINE A SOLID LEGAL FRAMEWORK?

SILVIA ALLEGREZZA* AND GIULIA LASAGNI**

Abstract

This article first provides an overview of the various dimensions of the principle of proportionality and its evolution in the multi-layered European legal framework in light of the increasing expansion of punitive powers of executive bodies. Second, and more specifically, it outlines the limits of the principle of proportionality in the sanctioning procedure of the Single Supervisory Mechanism (SSM) within the ECB, comparing it with other relevant EU bodies and national supervisors. Finally, a new and, hopefully, productive step forwards is proposed that could be implemented to ensure a more coherent application of the principle of proportionality within the SSM, aimed at achieving a fairer and more efficient sanctioning procedure.

1. Introduction: Proportionality as an evolving intersystemic concept

Proportionality is a protean principle that plays a prominent role in coordinating expectations in different fields – from politics to governance to law – and limiting punishment in several legal areas. It evokes "an ideal of harmony, natural (quasi-geometric) order or coherence founded on reason and issuing in fairness, social justice, and limits on power".[1] A concept of relationship, proportionality defines the borders of punitive powers according to the specific setting in which these powers are exercised. As such, its coordinates vary according to the relevant regulatory landscape, the agent(s) in charge, the interests at stake, and the controls in place.

* University of Luxembourg.

** University of Bologna. The article is a joint reflection of the authors who have contributed as follows: Allegrezza – sections 1, 2 and 3; Lasagni – sections 4, 5, and 6. The article is the result of research conducted by the authors following the scholarship awarded by the European Central Bank Legal Research Programme 2022.

1. Lacey, "The metaphor of proportionality", 43 *Journal of Law and Society* (2016), 27–44, 31.

The pivotal role of proportionality as a flexible yardstick for organizing modern legal constructs reaches a pinnacle in the case of the European Union (EU). A pervasive principle, it navigates across the different spaces involved in this context: from national to regional to the Union level, transcending traditional divisions between common law and civil law, and covering all fields of law, from constitutional to administrative to criminal law.[2]

This article analyses the role of the proportionality principle, with a focus on European punitive powers. In the past decade, the EU has conducted an unprecedented centralization of executive powers, conferring direct regulatory and sanctioning prerogatives to executive bodies far beyond the traditional field of competition law. The powers awarded to the European Central Bank (ECB) within the Single Supervisory Mechanism (SSM)[3] as a pillar of the European Banking Union (EBU) represent the most emblematic case of this new paradigm. The ECB, both in its capacity as a central bank and as banking supervisor, relies on sanctions – and their effective enforcement – as a tool to achieve prudentially sound conduct within credit institutions.[4] Article 18 of the SSM Regulation (SSMR) provides for direct and indirect powers to impose sanctions on credit institutions for breaching prudential regulation, introducing a multilevel sanctioning regime in which the ECB/SSM and national competent authorities (NCAs) cooperate to achieve

2. Ibid., at 36 with a specific reference to Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986).

3. Council Regulation (EU) 1024/2013 of 15 Oct. 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. 2013, L 287/63 (SSMR); Regulation (EU) 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 (SSM Framework Regulation) (ECB/2014/17), O.J. 2014, L 141/1 (SSMFR); Council Regulation (EU) 2015/159 of 27 Jan. 2015 amending Council Regulation (EC) 2532/98 concerning the powers of the European Central Bank to impose sanctions, O.J. 2015, L 27/1.

4. Within the SSM, established almost ten years ago, administrative penalties represent an enforcement tool. Busch and Ferrarini (Eds.), *European Banking Union*, 2nd ed. (OUP, 2020); Gortsos, *The Single Supervisory Mechanism (SSM): Legal Aspects of the First Pillar of the European Banking Union* (Nomiki Bibliothiki SA, 2015); Wymeersch, "The Single Supervisory Mechanism or 'SSM', part one of the Banking Union", *European Corporate Governance Institute (ECGI)* (2014), available at <www.ecgi.global/sites/default/files/working_papers/documents/SSRN-id2397800.pdf> (all websites last visited 1 March 2024); Wolfers and Voland, "Level the playing field: The new supervision of credit institutions by the European Central Bank", 51 CML Rev. (2014), 1463; Lamandini, Ramos and Solana, "The European Central Bank (ECB) powers as a catalyst for change in EU law, Part 2, SSM, SRM, and fundamental rights", 23 CJEL (2017), 200–265; Lamandini and Ramos Muñoz, "Law and practice of financial appeal bodies (ESAS' Board of appeal, SRB appeal panel): A view from the inside", 57 CML Rev. (2020), 119–160.

better enforcement.[5] Proportionality has different degrees of application at three different steps in the SSM sanctioning dynamic: the decision to sanction or not to sanction; the amount or type of sanction; and, finally, the decision to publish the sanction with or without anonymization (sections 3 and 4 below).

The SSM centralization of executive powers is a blueprint that was then followed to reform sanctioning powers conferred to the European Securities and Markets Authority (ESMA).[6] It will soon be followed by the Agency on Anti-Money Laundering and Terrorism Financing (AMLA) – a new milestone in the European integration process providing direct sanctioning powers conferred to the future AMLA for non-compliance behaviours committed by selected obliged entities.[7]

This long-term strategy of the Union to regulate and sanction non-compliant behaviours via the centralization of executive powers conferred to autonomous organs evokes a renewed notion of rationally limited and appropriately exercised powers in line with the rule of law. This is mostly due to the specificities of these sanctioning powers. They rely on a composite legal basis, a combination of EU secondary law coupled with national rules.[8] Their application requires a multilevel, shared enforcement system, where

5. For a detailed analysis, see section 3.1 *infra*.

6. A blueprint then followed reforming sanctioning powers conferred to the European Securities and Markets Authority (ESMA). Starting with the wide Commission reform proposal back in 2017, progressively implemented from 2020. Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 Dec. 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, O.J. 2017, L 347.

7. COM(2021)421 final, Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) 1093/2010, (EU) 1094/2010, and (EU) 1095/2010. See also Allegrezza, "The proposed Anti-Money Laundering Authority, FIU cooperation, powers and exchanges of information. A critical assessment", Study, *European Parliament (ECON Committee)* (2022), 57, available at <www.europarl.europa.eu/RegData/etudes/STUD/2022/733968/IPOL_STU(2022)733968_EN.pdf>; Allegrezza, "European strategies against money laundering: A critical overview of current and future enforcement" in Crijns, Haentjens and Haentjens (Eds.), *The Enforcement of EU Financial Law* (Hart 2022), pp. 197–221; Allegrezza and Bruzzese, "EU's anti-money-laundering and countering the financing of terrorism (AML-CFT rules): An overview of the future EU strategy for supervision and enforcement" in Annunziata (Ed.), *EU Banking and Financial Law. Open Issues of Vertical Interplay with National Law*, forthcoming.

8. The SSM is an unprecedented design in terms of interaction between the EU and the national legal systems, see Allegrezza and Voordeckers, "Investigative and sanctioning powers of the ECB in the framework of the Single Supervisory Mechanism", 4 EUCRIM (2015), 151–161; Wymeersch, "The implementation and enforcement of European financial regulation" in Crijns, Haentjens and Haentjens, ibid., pp. 17–52; Boucon and 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?", 10 *European Journal of Legal Studies* (2018), 155–187.

European bodies and national competent authorities are both essential components. Their legality and appropriateness are submitted to a fragmented system of judicial control where internal administrative bodies of review, national courts, and the Court of Justice (CJEU) may be involved. Lastly, their hybrid nature due to the amalgamation of criminal and administrative law taken up by the European Court of Human Rights (ECtHR) and the CJEU[9] has brought proportionality to the very centre of the debate on how to define the scope of sanctioning powers, including those of the ECB.[10]

In this scenario, administrative penalties imposed within the SSM represent a perfect case study for observing the emerging role of proportionality in the European discourse on punitive powers directly enforced by European agents.

Within such a realm, this article aims to define the concept of European punitive proportionality as an evolving intersystemic concept and to establish how it can contribute to containing executive discretionary powers of autonomous EU organs by establishing a matrix of criteria of appropriateness for its exercise.

Section 2 returns to the origins of the principle by addressing the many notions of proportionality used over time as a crucial tool of the EU integration process. It will highlight how the normative value of the principle depends on the different roles it has been called to perform within the EU legal order. Despite the extensive body of literature that exists on proportionality, a cursory overview is still necessary to observe how inadequate the notions of proportionality are when used in different contexts and to advocate in favour of developing sectorial concepts, in particular an autonomous European concept of proportionality applicable to the emerging field of EU "punitive sanctions". The focus in section 3 shifts to the impact of the punitive nature of the sanction in shaping an autonomous concept of "punitive proportionality", filtering out which traditional components of criminal proportionality should be transposed to administrative punitive penalties. Crossing references between traditional criminal law and more recent administrative law theories

9. Cf., in particular, ECtHR, *Grande Stevens and Others* v. *Italy*, Appl. Nos. 18640/10, 186 47/10, 18663/10, 18668/10 and 18698/10, judgment of 4 March 2014; ECtHR, *Dubus S.A.* v. *France*, Appl. No. 5242/04, judgment of 11 June 2009; Case C-524/15, *Menci*, EU:C:2018:1 97; Case C-537/16, *Garlsson Real Estate and Others*, EU:C:2018:193; Joined Cases C-596 & 597/16, *Di Puma*, EU:C:2018:192; Case C-481/19, *DB* v. *Commissione Nazionale per le Società e la Borsa (Consob)*, EU:C:2021:84.

10. D'Ambrosio, "Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings", *Banca d'Italia* (2013), available at <www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2013-0074/Quaderno-74.pdf?language_id=1>; Luchtman, Ligeti and Vervaele (Eds.), *EU Enforcement Authorities* (Hart, 2023); de Moor-van-Vugt, "Administrative sanctions in EU law", 5 REALaw (2012), 5–41; Lasagni, *Banking Supervision and Criminal Investigation. Comparing the EU and US Experiences* (Springer/Giappichelli, 2019), p. 227 et seq.

on punitive sanctions, this section advocates in favour of an evolving principle of proportionality of an intersystemic nature. Identifying those common characters, in particular the need for a cardinal and ordinal approach to punitive sanctions, section 4 observes, also through a comparative perspective, how the principle of proportionality finds application today in the peculiar institutional design of the SSM sanctioning procedure. Section 5 wraps up the analysis, by formulating some proposals on how to strengthen the efficiency and fairness of the SSM sanction enforcement, introducing the need to establish a taxonomy of relevant breaches and increasing the foreseeability of the SSM sanctioning powers. A conclusion to the article is presented in section 6.

2. Proportionality as an autonomous but plural European concept

The principle of proportionality is the most often invoked and, in terms of its role in constitutional adjudication, the most influential principle of EU law.[11] Many are the reasons for this timeless success: its protean, polyhedric, malleable, flexible nature makes proportionality a key instrument of judicial methodology.

Representing the essence of the *Rechtsstaat* and an antidote to authoritarianism,[12] proportionality is a three-part test to assess the exercise of

11. Tridimas, *The General Principles of EU Law*, 2nd ed. (OUP 2006); de Búrca, "The principle of proportionality and its application in EC law", 13 YEL (1993), 105–150; Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, 1996).

12. Mostly elaborated by Prussian administrative literature in the 19th century and elaborated by the *Bundesverfassungsgericht* (BVerfG). The German Constitutional Court has also shifted the focus of the proportionality analysis from its first two subtests (suitability and necessity), which deal with the logical and empirical links between means and ends, to the third subtest (proportionality in the strict sense); see Cohen-Eliya and Porat, "American balancing and German proportionality: The historical origins", (2010) *International Journal of Constitutional Law*, 263–286; Baer, "Equality: The jurisprudence of the German Constitutional Court", 5 CJEL (1999), 249–279; Loughlin, *Foundations of Public Law* (OUP, 2010), Ch. 14; see Galetta, "The EU law principle of proportionality and judicial review: Its origin, development, dissemination and the lessons to be learnt from the Court of Justice of the EU" in ECB (Eds.), *Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow. ECB Legal Conference 2021* (Publications Office of the European Union, 2022), pp. 55–76. It constitutes an unwritten constitutional principle of general importance recognized by the Federal Constitutional Court (BVerfG). See BVerfG (*Entscheidung des Bundesverjassungsgerichts*) 7, 377). See also Teitgen, "Le principe de proportionnalité en droit français" in Kutscher, Ress and Teitgen (Eds.), *Der Grundsatz der Verhältnismäßigkeit in europäischen Rechtsordnungen* (Müller, 1985), pp. 53–65; Ziller, "Le principe de proportionnalité", (1996) *Actualité Juridique Droit Administratif*, 185–188; Grimm, "Proportionality in German constitutional law" in *ECB Legal Conference 2021*, ibid., pp. 48–54.

discretionary power.[13] Providing that the aim of the measure pursues a legitimate interest, the measure has to be "suitable" to achieve the proposed aim, necessary (no less intrusive alternative can achieve that goal), and respond to the "balancing *stricto sensu*" (i.e. there is an adequate balance between the interest pursued and the restricted rights).[14]

Suitability, necessity and strict proportionality[15] rapidly became the holy trinity of a powerful tool for judicial review of the State administrative action. However, different notions of this principle can be recognized. As Craig observed, "three broad types of case where challenges are made on grounds of proportionality can be distinguished: cases involving discretionary policy choices, rights, and penalties".[16] Or, focusing on the interest they serve, Kosta identifies three essential forms of proportionality applicable to any type of Union action: rights proportionality, subsidiarity proportionality, and burdens proportionality.[17] The intensity of review differs in these types of case as proportionality does "not come with any *a priori* or in-built level of intensity".[18]

Throughout the history of the EU integration process, the principle of proportionality has been used in different contexts, serving different goals, and has entailed a different level of intensity of judicial review when scrutinized by the CJEU. As such, it has been subject to in-depth scrutiny by scholars, mostly highlighting its foundational value within "the constitutional fabric of the Union".[19]

Here, on the contrary, the intention is to briefly dissect the various interpretations of the principle and to show that an autonomous approach to the proportionality of punitive penalties is much needed. A first approach sees the principle of proportionality as a standard to determine the compatibility with EU law of national measures that restrict European fundamental

13. Lubbe-Wolff, "The principle of proportionality in the case law of the German Federal Constitutional Court", 34 HRLJ (2014), 12–17; Barak, *Constitutional Rights and Their Limits* (Cambridge University Press, 2012); Jackson and Tushnet (Eds.), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017); Alexy, *A Theory of Constitutional Rights* (OUP, 2002); Grimm, "Proportionality in Canadian and German constitutional jurisprudence", (2007) *University of Toronto Law Journal*, 383–397; Stone Sweet and Mathews, "Proportionality balancing and global constitutionalism", 47 CJTL (2008), 68–149.

14. Grimm, op. cit. *supra* note 12, p. 52.

15. von Hirsch, *Censure and Sanctions* (OUP, 1996), pp. 88–102.

16. Craig, "Proportionality and constitutional review", (2020) *University of Oxford Human Rights Hub Journal*, 87–95.

17. Kosta, "The principle of proportionality in EU law: An interest-based taxonomy" in Mendes (Ed.), *EU Executive Discretion and the Limits of Law* (OUP, 2019).

18. Craig, op. cit. *supra* note 16.

19. Ibid., Lenaerts, "Proportionality as a matrix principle promoting the effectiveness of EU law and the legitimacy of EU action" in ECB (Eds.), op. cit. *supra* note 12, pp. 27–42, at p. 27.

freedoms. In this light, proportionality has supplemented the principle of subsidiarity in shaping the borders of the EU competence and indirectly protecting the market integration mechanism.[20] National interests have been strongly restrained to foster the common European interest and emancipate EU fundamental liberties. Accordingly, the CJEU exercised a thorough judicial review, including the necessity test and the "less restrictive alternative test" as developed by the German *Bundesverfassungsgericht* (BVerfG).

Second, proportionality emerged as a free-standing principle of judicial review in relation to fundamental rights. Starting from the Lisbon treaty, the CJEU has increasingly been asked to check the "functional" proportionality[21] of limitations to fundamental rights. The plethora of decisions mainly highlighted a conflict between a private interest to see the full recognition of a fundamental right and a public tendency to limit the former to pursue a specific policy. However, the rich case law does not enable the identification of a common standard in the way the CJEU made use of the principle of proportionality nor an assessment of the intensity of review.

Lastly, proportionality served as a ground for review of the measures adopted by the Community, and later the Union. In this dimension, the principle of proportionality acted as a premise of governance, to limit the scope and intensity of EU action. Today, it is encapsuled in the conceptual matrix of Article 5 TEU and in the competence-focused proportionality test of its fourth paragraph.[22] Consequently, the intensity of judicial review has progressively been reduced in order to protect the discretion of the legislature and favour the process of European integration.[23]

This is particularly visible when the CJEU is confronted with EU policies aimed at upholding financial stability as a primary goal, as in the case of the ECB. The pressure imposed by the need to protect financial stability leads to a limited exercise of judicial scrutiny resulting in a restrictive definition of

20. Lenaerts, ibid., pp. 28–29.

21. This is a functional proportionality, very much closer to the traditional, German concept of proportionality as elaborated by the BVerfG.

22. See the Consolidated version of the Treaty on the Functioning of the European Union–Protocol (No 2) on the application of the principles of subsidiarity and proportionality, O.J. 2008, C 115/206. See also de Búrca, op. cit. *supra* note 11; Harbo, "The function of the proportionality principle in EU law", 16 ELJ (2010), 158–185; Portuese, "Principle of proportionality as principle of economic efficiency", 19 ELJ (2013), 612–635; Sauter, "Proportionality in EU law: A balancing act?", (2013) CYELS, 439–466; Harbo, *The Function of Proportionality Analysis in European Law* (Brill Nijhoff, 2015). Additional need of specific analysis of this competence-based proportionality test has been highlighted by Petersen and Chatziathanasiou, "Balancing competences? Proportionality as an instrument to regulate the exercise of competences after the PSPP judgment of the Bundesverfassungsgericht", 17 EuConst. (2021), 314–334.

23. Tridimas, op. cit. *supra* note 11, p. 127.

proportionality as a ground for judicial control. It goes beyond the scope of this article to disentangle the intricate field of proportionality as applied to monetary policies.[24] However, it is worth noticing how the CJEU has at least in three cases (*Short-selling*,[25] *Pringle*[26] and *Gauweiler*[27]) adopted – not surprisingly[28] – a very limited approach to proportionality, not grappling with the profound components of the test, and going from the "silence" on short-selling to the "more a 'yes-or-no' vote on the ECB's arguments based on a shallow balancing exercise".[29] The years of pragmatism, to say the least, are not yet over. And the principle of proportionality risks becoming a battlefield between courageous EU measures and national scepticism.[30]

The CJEU is somehow ill-equipped to closely scrutinize policy choices based on the discretion of executive organs, nourished by technical assessments, and adopted when the Union is facing challenging crises. A plea based on the breach of proportionality "only rarely succeeds in the courts", as judicial censorship will only exclude manifestly inappropriate measures.[31] This has led some scholars to advocate in favour of a more balanced normative setting of executive powers, attributing more responsibility to decision-makers, rather than confiding in how courts may review an exercise of discretion.[32] As Tridimas observed, by placing an emphasis on the objectives rather than the effects of the programme and linking Outright

24. See e.g. Zilioli and Ioannidis, "Climate change and the mandate of the ECB: Potential and limits of monetary contributions to the European green policies", 59 CML Rev. (2022), 363–394, at 388–389; Chiti, Macchia and Magliari, "The principle of proportionality and the European Central Bank", 26 EPL (2020), 643–678, at 675 et seq.

25. Case C-270/12, *United Kingdom* v. *Parliament and Council*, EU:C:2014:18.

26. Case C-370/12, *Thomas Pringle* v. *Government of Ireland and Others*, EU:C:2012:756, paras. 54, 56 and 57.

27. Case C-62/14, *Peter Gauweiler and Others* v. *Deutscher Bundestag*, EU:C:2015:400, paras. 50, 55 and 62. For a detailed analysis, see Tuominen, "Proportionality review in economic governance: A manifestation of the formal rationality of modern law" in ECB (Eds.), op. cit. *supra* note 12, pp. 83–86.

28. Lenaerts, op. cit. *supra* note 19, pp. 32–33.

29. Lamandini, Ramos and Solana, op. cit. *supra* note 4, 215; Craig and Markaris, "Gauweiler and the legality of Outright Monetary Transactions", 41 EL Rev. (2016), 4–24.

30. This is the case of the notorious decision of the German Constitutional Court in the PSPP (*Bundesverfassungsgericht* (BVerfG, Federal Constitutional Court), 2 BvR 859/15, May 5, 2020, translation available at <bit.ly/3qMoBcj> (hereinafter PSPP). Never before has a national constitutional court exercised substantive review of the ECB's monetary policy and the pivotal element of the FCC's review is the principle of proportionality, see Egidy, "Proportionality and procedure of monetary policy-making", 19 *International Journal of Constitutional Law* (2021), 285–308.

31. Nehl, "Judicial review of complex socio-economic, technical and scientific assessments in the European Union" in Mendes (Ed.), op. cit. *supra* note 17, p. 189.

32. Mendes, "Bounded discretion in EU law: A limited judicial paradigm in a changing EU", (2017) *Modern Law Review*, 443–472.

Monetary Transactions (OMT) power to conditionality, *Gauweiler* provided "normative legitimization to the austerity model whilst granting the ECB a distinct role not only in monetary policy but also in shaping the general economic policy of the Union".[33] In the CJEU view, the sphere of core discretion implying strategic policy choices among legitimate measures should remain out of the judicial scrutiny based on proportionality.

Despite its omnipresence, proportionality applied by European and national courts in the review of measures related to the financial crisis is often a "loose proportionality".[34] A notion departing "from the juridical roots of the referring concept, which lie in a 'culture of justification' as alternative to a 'culture of authority' in the exercise of public power".[35] This loose proportionality should not become a general standard. A sectorial, specialized proportionality prone to accept the pressure of financial stability, the boundaries of which, already questionable in the specific field, should not be osmotic to avoid expansion to rights-related cases.

The polyhedric concept of proportionality – a matrix principle, indeed[36] – and the variety of ways in which it supported the European integration process is reflected in the current EU legal framework. Hence, the role of proportionality as described in the many provisions differs. Proportionality representing a pillar of the entire EU structure, Article 5(1)(4) TEU refers to proportionality as a policy gauge to determine the legitimacy of the EU action, contributing to affirming the EU competence and its inner limits.[37] It differs from Article 52(1) of the Charter of Fundamental Rights (CFR), where proportionality acts as a protective shield against improper restrictions on fundamental rights.[38]

However, none of these provisions defines proportionality in relation to penalties. The main reference for our purposes is Article 49(3) CFR, corresponding to Article 7 ECHR, according to which "the severity of penalties must not be disproportionate to the criminal offence".[39] It defines the European dimension of a common constitutional principle, restricting the State's authority to punish, and limiting the use of severe sanctions. According to the Explanations of the Charter, Article 49(3) "states the general principle

33. Tridimas and Xanthoulis, "A legal analysis of the Gauweiler case: Between monetary policy and constitutional conflict", 23 MJ (2016), 17–39.

34. Vosa, "'Loose' proportionality review in the European Monetary Union's 'law of the crisis': A sign of decline of the 'culture of justification'?", 26 EPL (2020), 769–794.

35. Ibid.

36. Lenaerts, op. cit. *supra* note 19, p. 27.

37. Art. 5(1) TEU.

38. Art. 52(1) CFR.

39. Mitsilegas and Billis, "Article 49 – Principles of legality and proportionality of criminal offences and penalties" in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights – A Commentary*, 2nd ed. (OUP, 2021), pp. 1473–1508.

of proportionality between penalties and criminal offences which is enshrined in the common constitutional traditions of the Member States and in the case-law of the Court of Justice of the Communities".[40]

Proportionality is indeed an explicit condition in every national legislation dealing with criminal penalties, receiving additional strength as a European constitutional principle according to which "the severity of a penalty must thus correspond to the seriousness of the offence concerned".[41]

Though historically rooted in centuries of philosophy of law, proportionality is still an evolving concept and is very sensitive to political choices and historical background. It is crucial that a European autonomous concept of proportionality is developed which reflects the intrinsic difference of the Union compared with traditional States and mirrors the dynamics of the EU integration process.

Actually, this autonomous concept should not be a unique concept. Instead, it should be a multitude of different concepts of proportionality in order to better serve the purposes of specific EU policies. This brings us to the question of what kind of proportionality should apply to the ECB sanctioning proceedings. Should these punitive powers be governed by the same omnicomprehensive proportionality principle governing executive powers in general and monetary policy more specifically? Or would it be better to identify a tailor-made and autonomous concept of proportionality? This seems to be the preferable option. As will be explained later, this tailor-made proportionality should be rights-oriented and not policy-oriented.

3. Defining punitive proportionality in a multi-layered enforcement system

In order to advance in our analysis, it is necessary to clarify the nature of the punitive powers conferred to the ECB in its supervisory function within the SSM framework.

It remains a fact that the banking regulation does not provide for any harmonization of criminal offences. In the post-Lisbon context, punitive sanctioning law of the EU is divided between criminal and non-criminal sanctions. Administrative penalties have been defined as functional criminalization, whereas traditional criminal offences are the consequence of

40. See the Explanations relating to the Charter of Fundamental Rights, O.J. 2006, C 303/17, and specifically the Explanations on Art. 49 (C 303/30).

41. Case C-537/16, *Garlsson Real Estate and Others*, para 56.

securitized criminalization.[42] There are many reasons for this. The EU Treaties have not conferred a general competence to the EU to impose criminal sanctions. Article 83 TFEU limits the possibility for the Union to "establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime",[43] a list that has to be considered exhaustive, in line with the enumeration principle.[44] A second potential approximation of criminal law can intervene if proved "essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures".[45] This provision, "infelicitously worded"[46] but potentially applicable to our case, has scarcely been used.[47] Despite the intense harmonization, and partial unification, of prudential regulation and enforcement accomplished by the reform package on the Banking Union, the Commission felt no need to harmonize the criminal offences related to banking activities.[48] Criminalization of certain misconducts remains entirely

42. Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016) 54–62.

43. Such as "terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime", Art. 83(1) TFEU. A *ius incriminandi* without a *ius puniendi*, see Sotis, "Criminaliser sans punir. Réflexions sur le pouvoir d'incrimination (directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne", (2010) *Revue de science criminelle et de droit pénal comparé*, 773–785, at 773. The Council has recently established that the violation of restrictive measures shall be an area of crime within the meaning of Art. 83(1), second subparagraph, TFEU; see Council Decision (EU) 2022/2332 of 28 Nov. 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union. See Van Ballegooij, "Ending impunity for the violation of sanctions through criminal law", (2022) *EUCRIM*, 146–151 and Bernardini, "Criminalising the violation of EU restrictive measures: Towards (dis)proportionate punishments vis-à-vis natural persons ?", (forthcoming in *European Criminal Law Review*).

44. Kotzur, "Article 83" in Geiger and Kotzur (Eds.), *European Union Treaties. A Commentary* (Beck, 2005), p. 449.

45. Art. 83(2) TFEU.

46. Kotzur, op. cit. *supra* note 44, p. 450.

47. Few exceptions are Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), O.J. 2014, L 173/179 (MAD II) and Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, O.J. 2017, L 198/29 (PIF Directive).

48. See Art. 65 CRD. It would have been possible, though, as the EU is progressively increasing its role as a primary policy actor in criminal law beyond cross-borderness, especially when internal market issues are concerned. In this regard, see Wieczorek, "The emerging role of the EU as a primary normative actor in the EU area of criminal justice", 27 ELJ (2021), 378–407.

within the realm of the discretion of the Member States, as an alternative to, or together with, administrative sanctions.[49]

Punitive EU centralized powers are thus limited to administrative sanctions, and the SSM system makes no exception.[50] From a functional perspective, this option may only be of ancillary importance: "as long as sanctioning levels and procedures are in line with key desiderata, the practical outcomes will accord with the social optimum and the legal classification of the pertinent regime will remain largely irrelevant in this respect".[51]

As the ECtHR[52] and shortly after the CJEU have retained a broad, substantive understanding of the notion of "criminal offence",[53] previous rigid boundaries between administrative sanctions and criminal penalties have been blurred.[54] A new hybrid category of administrative penalties with a punitive nature – quasi-criminal or *à coloration pénale* – has emerged. Their proximity with criminal sanctions calls into question the reduced level of guarantees foreseen by administrative procedures leading to the imposition of punitive penalties.

49. Allegrezza, "The Single Supervisory Mechanism: Institutional design, punitive powers and the interplay with criminal law" in Allegrezza (Ed), *The Enforcement Dimension of the Single Supervisory Mechanism* (Kluwer Cedam, 2020), pp. 1–48.

50. Riso, "The power of the ECB to impose sanctions in the context of the SSM", *SSRN* (20 14), available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=2526380>; Felisatti, "Sanctioning powers of the European Central Bank and the ne bis in idem principle within the Single Supervisory Mechanism", 8 *European Criminal Law Review* (2018), 378–403.

51. Götz and Tröger, "Fines for misconduct in the banking sector. What is the situation in the EU?", *ECON* (2017), 7, available at <safe-frankfurt.de/fileadmin/user_upload/editor_common/Policy_Center/SAFE_White_Paper_47.pdf>.

52. ECtHR, *Engel and Others* v. *The Netherlands*, Appl. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, judgment of 8 June 1976; Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*, EU:C:2013:105, where the ECJ specified that the criminal nature of the infringement is to be assessed by national judge. See also ECtHR, *Sergei Zolotukhin* v. *Russia*, Appl. No. 14939/03, judgment of 10 Feb. 2009; ECtHR, *A. and B.* v. *Norway*, Appl. Nos. 24130/11 and 29758/11, judgment of 15 Nov. 2016; ECtHR, Appl. No. 43509/08, *Menarini Diagnostics S.r.l.* v. *Italy*. See Kärner, "Interplay between European Union criminal law and administrative sanctions: Constituent elements of transposing punitive administrative sanctions into national law", 13 NJECL (2022), 42–68.

53. Opinion of A.G. Bobek in Case C-384/17, *Link Logistik N&N*, EU:C:2018:494, para. 39 referring to Case C-489/10, *Bonda*, EU:C:2012:319, Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson* and Case C-537/16, *Garlsson Real Estate and Others*. See Lasagni, op. cit. *supra* note 10, p. 227 et seq.; Ansems and Loeve, "Targeted financial sanctions: Criminal in nature? An analysis of the case law of the ECtHR and the CJEU on the nature of targeted financial sanctions", 6 *European Criminal Law Review* (2016), 60–81; Bahçeci, "Redefining the concept of penalty in the case-law of the European Court of Human Rights", 26 EPL (202 0), 867–888; Callewaert, "The European Convention on Human Rights and European Union law: A long way to harmony", 6 EHRLR (2009), 760–783.

54. Weyembergh and Joncheray, "Punitive administrative sanctions and procedural safeguards. A blurred picture that needs to be addressed", 7 NJECL (2016), 190–211.

However, the alignment of the CJEU with the ECtHR standards on defining the autonomous concept of "punitive sanctions" does not offer a clear division line. This article agrees with former Advocate General Bobek in saying that in the current scenario "what is 'criminal' and what 'administrative' is far from clear-cut".[55] Nor are the consequences of extending the criminal law framework to administrative punitive fines. The question concerns a wide array of aspects, from the applicability of *ne bis in idem*, to the publicity of the hearing; from the privilege against self-incrimination for banking institutions to the impartiality of the decision-making body, to mention but a few.[56] Uncertainty still dominates "the theoretical underpinning of this phenomenon and regarding the relationship between the criminal and quasi-criminal fields of normativity and enforcement".[57]

Against this uncertainty, issues arise as to which role proportionality could play in this field, which notion of the principle should actually be enforced and whether the same notion of proportionality should apply to both fields. Indeed, even if Article 49(3) CFR refers to criminal offences, once the criteria defined by the ECtHR and taken up by the CJEU are met, a formally administrative offence can also be classified as criminal and, thus, be subject to Article 49(3) of the Charter.

Despite the persistent lack of clarity on the very notion of "punitive" sanctions and its procedural corollaries, when dealing with competition law the CJEU clearly stated that proportionality is mandatory even when punitiveness is not openly recognized. The Commission is still obliged to set the fine proportionately to the factors taken into account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way that is consistent and objectively justified.[58]

The full applicability of the principle of proportionality to administrative fines has been confirmed even more outside the field of competition law, where the CJEU has openly recognized the punitive nature of administrative

55. Opinion in Case C-384/17, *Link Logistik N&N*, para 39.

56. See Lasagni, op. cit. *supra* note 10, p. 227 et seq; Weyembergh and Joncheray, op. cit. *supra* note 54, 190; Kärner, "Procedural rights in the outskirts of criminal law: European Union administrative fines", 22 HRLR (2022), 1–24.

57. Harding, "Quasi-criminal enforcement in criminal law and penal theory: What would Herbert Packer say?" in

Harding and Franssen, *Criminal and Quasi-criminal Enforcement Mechanisms in Europe* (Hart, 2022), pp. 117–136.

58. Case T-265/12, *Shenker Ltd* v. *European Commission*, EU:T:2016:111, para 245: "the principle of proportionality and the principle that the punishment must fit the offence, those principles require that fines must not be disproportionate to the objectives pursued, that is to say, to compliance with the European Union competition rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters should be proportionate to the infringement, seen as a whole, having regard, in particular, to its gravity".

sanctions.[59] Following this path, the absence at the EU level of a set of harmonized banking crimes does not indeed exclude the applicability of the European legal framework on criminal proportionality to the administrative penalties foreseen by the SSM Regulation.

3.1. *The punitive nature of the SSM sanctions*

As for administrative penalties foreseen by Article 18 SSMR, no one doubts their punitive nature.[60] However, Article 18 SSMR makes a distinction between direct and indirect sanctioning powers related to fines and periodic penalty payments, administrative pecuniary penalties, and penalties for "other breaches". A closer look at Article 18 SSMR, however, is necessary to understand the articulation of proportionality within the SSM. In fact, the direct or indirect nature of the ECB's power to sanction for breaching prudential requirements and the choice between a measure or a pecuniary penalty contribute to shaping the very concept of proportionality in this field.

Article 18(1) SSMR provides the ECB with a direct sanctioning power to impose specific pecuniary penalties if a significant credit institution under its supervision, intentionally or negligently, breaches a directly applicable act of Union law, in relation to which, according to relevant Union law, administrative pecuniary penalties shall be made available (in implementing national law) to NCAs. Mirroring the amended sanctioning regime of Council Regulation 2532/98, the pecuniary penalties that the ECB can impose under Article 18(1) SSMR amount to twice the amount of the profits gained or losses avoided because of the breach where these can be determined, or ten percent of the total annual turnover of a legal person in the preceding business year, or other pecuniary penalties provided for in relevant Union law.

Pursuant to Article 18(7) SSMR, in cases of a breach of regulations or decisions of the ECB itself, by natural or legal persons, the ECB may impose sanctions in accordance with Council Regulation 2532/98. The latter establishes that both fines and periodic penalty payments fall under the notion of "sanctions". While fines are defined as "a single amount of money which an undertaking is obliged to pay as a sanction",[61] periodic penalty payments are "amounts of money which, in the case of a continued infringement, an undertaking is obliged to pay either as a punishment, or with a view to forcing

59. Such as in case of fiscal penalties, see Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*.

60. Allegrezza and Voordeckers, op. cit. *supra* note 8, 151–161; D'Ambrosio, op. cit. *supra* note 10; Allegrezza and Rodopoulos, "Enforcing prudential banking regulations in the Eurozone: A reading from the viewpoint of criminal law" in Ligeti and Franssen (Eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (Hart, 2017), p. 233 et seq.

61. Art. 120 SSMFR.

the persons concerned to comply with the ECB supervisory regulations and decisions".[62] It is worth stressing that this second part of the provision seems to allow the ECB to apply periodic penalty payments as a mere measure, excluding the regime that is usually applicable to penalties.

In cases not covered by Article 18(1) SSMR, the ECB maintains an indirect sanctioning power against significant banks as well as against natural persons. Article 18(5) SSMR entrusts the ECB with the power to "require the NCAs to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed". If the ECB decides to request the NCAs to open penalty proceedings, the NCAs maintain their discretion to decide on the existence and, *a fortiori*, the type and level of the sanction. Since it is up to the NCAs to decide on the type and level of the sanction, these questions will be assessed at the national level and depend on the powers that NCAs enjoy under European as well as national legislation. If upon completion of a penalty procedure, an NCA decides to sanction, Article 18(5) SSMR requires the penalty to be effective, proportionate and dissuasive.

Later, the article will address how the multilevel interaction between the European and national sanctioning powers should impact on the way proportionality works.[63] For the time being, it can be provisionally affirmed that the punitive nature of most of the SSM sanctioning powers brings them closer to criminal offences and consequently allows for extending the concept of criminal proportionality to this type of administrative sanctions.

However, the arsenal offered by the banking regulation in order to deter and punish credit institutions that do not comply with the rules does not end with pecuniary penalties. Administrative law traditionally foresees in the power for the administration to adopt a large range of measures – procedures, instructions, sanctions, removal of confidentiality rules, and techniques – intended to force the entity to comply with the rules.[64] This is also the case within the SSM, where the ECB as the supervisory authority has the power to impose "supervisory measures" as a response to unlawful behaviour of credit institutions or their management and limit administrative penalties to the most serious ones, as a way to enforce proportionality in practice.[65]

According to the CJEU, the difference between "penalties" and "measures" pertains to their function, the former being aimed at punishing, the latter rather

62. Art. 1(6) Council Regulation 2532/98.

63. See section 4 *infra*.

64. For a general overview on how to classify banking measures, penalties and sanctions according to the *Engel* criteria, see D'Ambrosio, op. cit. *supra* note 10, 9 et seq; de Moor-van Vugt, "Administrative sanctions in EU law", 5 REALaw (2012), 5–41; Lasagni, op. cit. *supra* note 10, p. 184 et seq.

65. Arts. 14 and 16 SSMR.

to restore the interest protected by the law.[66] However, focusing on the impact on the legal entity or on the natural persons involved, there can be little doubt concerning the punitive nature of some of those measures. Even though the criterion adopted by the CJEU refers specifically to instruments having a pecuniary nature (like both administrative measures and penalties under the regulation above), "it could easily be extended to the non-pecuniary ones".[67] Consider the withdrawal of the authorization to exercise banking activities or the removal of members of the management. Despite the refusal of the CJEU to openly consider them as sanctions related to criminal law,[68] "where the instrument adopted by the competent authority goes further than the mere aim of restoring the interest protected by the law, it may be considered as having a punitive aim and therefore as a penalty".[69] Do they entail a different concept of proportionality? Or should they follow proportionality as a general principle that is mandatory for all punitive measures?

As a matter of fact, the canon of proportionality should inform any decision adopting a supervisory measure, its legitimacy relying on it being "effective and proportionate". The CJEU clearly stated that:

> "in accordance with the principle of proportionality, which is one of the general principles of EU law, the acts adopted by EU institutions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".[70]

Among the rich arsenal available for supervisory purposes, there are measures that are very different in nature. It can hardly be denied that the withdrawal of the authorization to operate as a bank[71] has the hardest possible negative effect on the legal entity caught in breach of banking regulations. Hence, the tailor-made autonomous concept of proportionality should apply to punitive

66. See the case law on Regulation 2988/95: Case C-210/00, *Käserei Champignon Hofmeister*, EU:C:2002:440, para 46; Case C-489/10, *Bonda*, para 40. See also Poscia, "The VTB case: Administrative penalties and administrative measures" in Poscia, Zilioli and Wojcik (Eds.), *Judicial Review in the European Banking Union* (EE, 2021), pp. 571–578.

67. D'Ambrosio, op. cit. *supra* note 10, 18.

68. Case C-358/16, *UBS Europe SE and Alain Hondequin and Others* v. *DV and Others*, EU:C:2018:715, para 46. See also section 4 *infra*.

69. D'Ambrosio, op. cit. *supra* note 10, 18.

70. See Case C-152/18 P, *Crédit mutuel Arkéa* v. *ECB*, EU:C:2019:810, para 201, and Case T-203/18, *VQ*, EU:T:2020:313, para 61. See also Case C-547/14, *Philip Morris Brands SARL and Others*, EU:C:2016:325, para 165, and the case law cited therein.

71. Case T-698/16, *Versobank*, EU:T:2022:737.

administrative measures accordingly. Measures with a punitive character[72] should, however, follow the same rules and principles applicable to punitive sanctions.

3.2. *Disentangling punitive proportionality: Cardinal and ordinal proportionality*

How close is this "punitive" proportionality to the traditional concept recognized and applied in criminal law? At first sight, once the punitive nature of the sanctions at stake is established, the same paradigm of proportionality traditionally applied to criminal sanctions should be extended. Nevertheless, a more insightful analysis shows many discrepancies in the rationales supporting proportionality in the two fields.

A vast section of literature focuses on the function of the criminal punishment. From Beccaria and traditional retributivism to Bentham utilitarianism, from the Kantian opposition to inhuman practices approach,[73] to the more contemporary views on just deserts[74] or moral duty,[75] criminal scholars are still debating the foundations of criminal punishment.[76] As for administrative penalties within the SSM, the functional approach to penalties intended as an enforcement tool aimed at special and general prevention seems to be predominant.[77] The absolute discretion in deciding whether to sanction conferred to the ECB as banking supervisor, together with the

72. On the punitive nature of the measures, see the first case law of ECJ on Art. 16 SSMR, stressing that: "… Powers it derives from Article 16(2) of Regulation No 1024/2013, are irrelevant to the present complaint, since they cannot constitute appropriate measures within the meaning of the case-law cited in paragraph 61 above. Indeed, the purpose for which those powers were conferred on the ECB is to enable it to ensure compliance with prudential requirements by credit institutions and not to punish those institutions" (Case T-203/18, *VQ*, para 66). The case at stake, however, did not concern specifically the most controversial measures, such as the removal of members of the management body (Art. 16(2)(m) SSMR) or withdrawal of banking licence (Art. 14 SSMR).

73. Murphy, *Kant: The Philosophy of Right* (Mercer University Press, 1970); in relation to proportionality in criminal law, see Rodopoulos, "The dialectical function of the principle of proportionality: A European perspective" in KritV, Vol. 100, No. 3 (2017), pp. 201–216, 205–206.

74. Singer, *Just Deserts: Sentencing Based on Equality and Desert* (Ballinger, 1979).

75. Tadros, *The Ends of Harm* (OUP, 2011).

76. Pavarini, "Pena", *Enciclopedia delle Scienze Sociali Treccani* (1996), available at <www.treccani.it/enciclopedia/pena_%28Enciclopedia-delle-scienze-sociali%29/>.

77. For a discussion on how retributive and consequentialist criminal proportionality influences national cartel enforcement, Huizing, "Proportionality of fines in the context of global cartel enforcement", 43 World Comp. (2020), 61–86, 65. On deterrence in competition cases, Steenberger, "Proportionality in competition law and policy", 35 LIEI (2008), 259–268, 263.

exclusive focus on legal entities and the publication of the penalty as a crucial component, seem to foster the idea of a sanction as a mean of deterrence.[78]

In line with a liberal concept of retributivism, the principle of proportionality requires, first, that the penalty imposed corresponds to the seriousness of the offence and, second, that the individual circumstances of the specific case are taken into account in determining the penalty and fixing the amount of the fine.

Even in the restricted field of criminal law, there is no unanimity in the way proportionality should be interpreted, nor its primary goal. There are at least two approaches to proportionality which are both interesting for our purposes.

A first approach promotes proportionality as part of a theory of legal argumentation, focusing on balancing opposite rights. In other words, proportionality is an argumentative tool to establish a limit to the limits imposed by criminal law to fundamental rights (*Verhältnismäßigkeit*, *Schranken-Schranke*). This approach has a direct impact on policy choices on criminalization,[79] including those relevant to banking regulation provided for by Article 65 of the Capital Requirements Directive (CRD). As we have seen, this internal proportionality among breaches is currently left to the Member States to decide whether breaches of prudential regulation should qualify as criminal offences or merely administrative ones.

The second approach proceeds from the first and complements it. Once the legislature posited the breach as a crime, according to the so-called *Schuldausgleich*, proportionality is primarily meant to reflect the seriousness of the criminal offence in the sanction. This is the literal interpretation of Article 49(3) CFR, criticized by scholars as it reduces this provision to a subliminal innovation with no real impact on the construction of a common concept.[80]

The seriousness of the offence is also regarded as pivotal in determining the amount of the administrative penalty. The CJEU clearly stated that "the principle of proportionality requires, first, that the penalty imposed corresponds to the seriousness of the offence and, second, that the individual

78. For deterrence as an "enforcement imperative" in the field of competition law, with specific reference to leniency programmes, see Harding, "Enforcement inconsistency in EU competition cases as a rule of law problem", 46 LIEI (2019), 363–386, 363; and Wils, "The increased level of EU antitrust fines, judicial review and the ECHR", 33 World Comp. (2010), 5–29.

79. For an overview of the German theories of punishment that had so much influence on the continental debate, see, recently, Hörnle, "A framework theory of punishment", (2021) Max Planck Institute for the Study of Crime, Security and Law, Working Paper No. 2021/01, 1–29.

80. Sicurella, "Article 49" in Mastroianni, Pollicino, Allegrezza, Pappalardo and Razzolini (Eds.), *Carta dei diritti fondamentali dell'Unione Europea* (Giuffrè, 2017), p. 349. It applies to Art. 49(3) CFR, Art. 18(1)(7) SSMR, Arts. 66 and 67 CRD.

circumstances of the particular case are taken into account in determining the penalty and fixing the amount of the fine".[81] It is the EU Constitutional framework, specifically Article 52(1) of the Charter and the principle of proportionality of penalties in Article 49(3) of the Charter, which imposes that the severity of a penalty must thus correspond to the seriousness of the offence concerned.[82] Traditional criminal penalties require retrospective proportionality,[83] focused on internal components, the seriousness of the offence being independent from the impact of the conduct on others than the direct victim. Conversely, the financial capacity of the offender, whether a natural or a legal person, does not play a role in determining the amount of the sanction. A basic principle of equality excludes different penalties for equal criminal behaviour.

Administrative penalties differ in their approach to quantitative proportionality in both the factors that are considered in determining the penalty and the way the latter is calculated. External factors, such as the impact on the stability of the financial system and the potential side effects on the banking system as a whole, are extremely relevant.

An additional divergence concerns the absence in administrative penalties of the so-called cardinal and ordinal proportionality as defined in criminal law.[84] The understanding of these concepts is pivotal in observing the regulatory role played by proportionality as a tool of internal and external coherence of criminal enforcement.

Cardinal proportionality "sets absolute measures for punishment that is proportional to a given crime",[85] establishing what penalty is suitable. It implies an intrinsic assessment of the blameworthiness. Cardinal proportionality states that "there should be limits on the severity of sanction with which a given amount of disapproval may be expressed, and these constitute the limits of cardinal, or nonrelative, proportionality".[86] However, cardinal proportionality alone does not exhaust the regulatory function of proportionality.

81. Case C-384/17, *Link Logistic N&N*, EU:C:2018:810.

82. Ibid., para 41, in line with Case C-537/16, *Garlsson Real Estate and Others*, para 56.

83. Matikkala, "Criminal law and competition infringements", 54 *Scandinavian Studies in Law* (2009), 269, 279.

84. Refers to ordinal and cardinal proportionality discussing the possible criminalization of competition infringements, Matikkala, op. cit. *supra* note 83; with reference to national fines against cartels, Huizing, op. cit. *supra* note 77, 65.

85. Walen, "Retributive justice", (2020) *Stanford Encyclopedia of Philosophy*, available at <plato.stanford.edu/entries/justice-retributive/challenges.html#:~:text=2.-,Punishment%20proportional%20to%20a%20crime,severely%20than%20less%20serious%20crimes>.

86. von Hirsch, "Proportionality in the philosophy of punishment", (1992) *Crime and Justice*, 55–98.

Ordinal proportionality as an intrasystemic principle requires that more serious crimes are punished more severely than less serious crimes. It answers the question of how punishments are to be gauged between a minimum and a maximum and in relation to each other. Ordinal proportionality is a relative, comparative exercise that goes beyond identifying mere limits. It fixes the sanction along a penalty scale that considers the specific conduct in relation to the others. Consequently, it is infringed "when equally reprehensible conduct is punished unequally".[87] Indirectly, it establishes a ranking among criminal offences, traditionally based, on continental Europe, on the relevance of the *Rechtsgut* affected, and in the common law systems on the harm caused by the offence.

To maintain ordinal proportionality, comparative severities of punishment would need to be decided according to the relative gravity of the criminal conduct involved.[88] As Lacey observed, ordinal proportionality may be much harder to motivate beyond "standard" offences, and hence across the wide terrain of so-called "regulatory" offences or areas such as corporate crime.[89]

In his seminal work, von Hirsch highlights how this ordinal/cardinal distinction anchors proportionality to an internal and external scale based on gravity of the conduct as the decisive element and the equality of treatment as the external limit.[90] The existence of these rankings aims to foster internal coherence of a legal system, granting that a more severe penalty corresponds to the more serious offence as a way to legitimize the sacrifice inflicted to the individual concerned.

In a similar vein, some recent EU initiatives aiming at harmonizing criminal law have been criticized for this lack of ordinal and cardinal proportionality. The EU intends to promote a common level playing field in providing a minimum and a maximum penalty via directives to be implemented at national level.[91] The political choice to abandon the "minimum triad" of "effective, proportionate and dissuasive" as elaborated in the *Greek Maize* case in favour of a more rigid system of minimum-maximum, based on numeric values which are identical for all the Member States, has triggered conflicting reactions among scholars. On the one hand, it fosters equality of treatment

87. Ibid., 76.
88. Ibid., 78.
89. Lacey, op. cit. *supra* note 1, 40, ft. 34.
90. von Hirsch, op. cit. *supra* note 86, 77.
91. Arts. 3, 4 and 5 of Directive 2011/93/EU of the European Parliament and of the Council of 13 Dec. 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, O.J. 2011, L 335/1. Cf. Council of the EU, "Council Conclusions on model provisions, guiding the Council's criminal law deliberations", *Council of the EU* (2009), available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/111543.pdf>.

across the EU; on the other hand, it might have detrimental effects on the internal coherence of national systems. According to some scholars, "their use generally leads to an increase in punitivity, tends to destroy the coherence of national systems and affects the proportionality of national penal concepts".[92]

Despite the criticism, the establishment of ordinal and cardinal axes might foster a European dimension of proportionality, especially when it comes to direct sanctioning powers, as is the case for banking sanctions within the SSM. As we will see later, the lack of any cardinal or ordinal ranking among administrative penalties, together with the ample discretionary powers conferred to the ECB and the leniency of judicial review contribute to a certain scepticism on the coherence of the system as a fully-fledged integrated "mechanism".

In the last decade, indeed, the establishment of sanctioning and enforcing models such as the SSM has led to a transformation of the normative function of proportionality. In particular, the SSM represents an unprecedented model of shared enforcement in the field of banking supervision, where traditional differences among national supervisors had led in the past to notorious gaps of effective prudential supervision. With the involvement of both EU and national enforcement authorities, the SSM designs a multidimensional system in which the European and the national level are somehow integrated. Built around the basic distinction between significant and less significant credit institutions, this multi-layered enforcement system finds its strongest affirmation in the sanctioning powers foreseen by Article 18 SSMR described above.

The combination of direct enforceable sanctioning powers with the indirect powers to influence national supervisors when their action is intertwined, creates a multi-layered system in which proportionality ceases to be a static, mono-dimensional concept.

The SSM shared enforcement system requires combining a horizontal proportionality, implied when the ECB exercises its direct sanctioning powers according to Article 18(1) SSMR, with a vertical and a diagonal proportionality. Vertical proportionality connects the EU level with the national level when national supervisors are required to act according to Article 18(5) SSMR. Even considering the national discretion in setting

92. Satzger, "The harmonisation of criminal sanctions in the European Union. A new approach", (2019) *EUCRIM*, 115–120. Cf. e.g. the attempt to introduce minimum penalties ("minimum sanctions") in Art. 8 of the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012)363 final, which was largely resisted in the Council (see Council document 9836/13, 28 May 2013, 2, as well as Council document 10729/13, 10 June 2013) as well as the Parliament (see amendment No. 27 of the legislative resolution from 29 April 2014, P7_TA-PROV(2014)0427). Finally, the Commission's attempt was therefore abandoned.

administrative penalties – effective, dissuasive and proportionate – an integrated system of banking supervision should foster internal coherence. Finally, diagonal proportionality implies the unavoidable interaction with criminal law when certain breaches of banking regulations are also considered as criminal offences.[93] It is perhaps premature to imagine a system integrating the two tiers of enforcement in a coherent architectural structure at the EU level. But it would be a mistake not to start sketching the potential evolution of an intersystemic concept of proportionality.

4. The principle of proportionality in the SSM sanctioning procedure

This section moves forward with an investigation of the role of the principle of proportionality, examining how the latter is currently applied within the SSM sanctioning procedures that may result in the imposition of punitive penalties.

The inquiry analyses the way in which the principle is mirrored in the current legal framework, composed of the SSMR, the SSMFR, Council Regulation 2532/98 and, notably a soft law instrument, i.e. the "Guide to the method of setting administrative pecuniary penalties pursuant to Article 18(1) and (7) of Council Regulation (EU) No 1024/2013" (hereinafter referred to as the Guide).[94] The examination is completed by a comparative perspective, looking at other relevant models – both at the EU level (section 4.2.1) and at the national level (section 4.2.2) – that can provide significant insights into the investigated matter.

The adequacy of the SSM procedure is addressed against the need to ensure a fair and coherent approach to sanctioning enforcement, especially in light of the higher levels of protection required for fundamental rights in punitive matters. In this analysis, the scope of the duty to state reasons, the accessibility of the sanctioning decisions, and the structure of mechanisms of judicial review emerge as particularly relevant due to their role in making the identification of potential violations possible, as well as in defining the scale of potential remedies available to the sanctioned subjects.

The investigation takes its lead from the two main functions generally recognized in the proportionality principle within sanctioning proceedings that aim to ensure coherence in the casual link between the breach and the

93. Allegrezza and Rodopoulos, op. cit. *supra* note 60, pp. 233–264; Allegrezza, op. cit. *supra* note 49, pp. 33–36; Chiti and Vesperini (Eds.), *The Administrative Architecture of Financial Integration Institutional Design, Legal Issues, Perspectives* (Il Mulino, 2015), pp. 1–296.

94. Published by the ECB in March 2021, available at <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.guidetothemethodofsettingadministrativepecuniarypenalties_202103~400cbafa55.en.pdf>.

penalty.[95] The first way in which the principle operates is *ex ante*: in this sense, proportionality represents a limit to the intrusiveness of the powers of public authorities. The second perspective, on the other side, is *ex post*: here, the function of the principle requires providing grounds for a subsequent (judicial) review of the adopted decision. Indeed, especially in punitive matters, the discretion of the authority cannot exclude the recognition of the right to a full judicial review to parties that have been sanctioned. It goes beyond the scope of this article to enter the broad debate that has long developed on the theme of judicial review since the very creation of the SSM.[96] Still, dealing with the proportionality principle in this domain requires us to touch at least on a few crucial aspects which will be illustrated further below (section 5.2).

Naturally, both *ex ante* and *ex post* functions are closely correlated, as the scope of the proportionality in the first instance shapes the potential for the subsequent review to affect the merit of the decision.[97]

By translating these functions in the sanctioning dynamics, three main phases can be identified in the SSM proceedings, in which the principle finds different degrees of application and that correspond to different decisions adopted by the ECB. Namely: a) *an*: the decision to sanction or not to sanction (section 4.1); b) *quantum*: the decision on the amount and type of sanction (section 4.2); and finally, c) the decision to publish the sanction with or without anonymization (section 4.3).

As the following analysis will show, the SSM framework currently addresses the level of protection requested by the substantial matter at stake only to a partial extent. Though significant progress has been achieved with the publication of the Guide, other important profiles still require some strengthening both in terms of fairness of the proceedings and ensuring efficient enforcement of sanctions.

95. Naturally, the potential of the principle of proportionality also emerges in other phases of the sanctioning proceedings that cannot be addressed here given the limited remit of this contribution. The reference goes especially to the investigation phase, where the principle must relate strictly to compliance with procedural safeguards as well. Significant profiles could include e.g. deciding whether to perform on-site inspections or rather to ask the credit institution to provide information, or determining the scope of the right of access to file or to be heard.

96. See, for all, D'Ambrosio, op. cit. *supra* note 10; Nehl, op. cit. *supra* note 31, p. 157 et seq.

97. Montaldo, "EU sanctioning power and the principle of proportionality" in Montaldo, Costamagna and Miglio (Eds.), *EU Law Enforcement. The Evolution of Sanctioning Power* (Routledge/Giappichelli, 2020), pp. 115–138; Lenaerts, op. cit. *supra* note 19, pp. 27–42.

4.1. *The decision to sanction or not to sanction*

The power to impose sanctions is the moment which expresses, perhaps more clearly and explicitly than any other, the discretion of an authority in carrying out its institutional tasks.[98]

At this juncture, proportionality often plays a role as a guiding criterion in shaping the action of the decision-maker, and the ECB, entrusted with supervisory tasks in the application of the TFEU, is no exception. One only needs to look at Article 2(2) of Council Regulation 2532/98, according to which "in determining whether to impose a sanction and in determining the appropriate sanction, the ECB shall be guided by the principle of proportionality".[99]

Against similar broad statements, it is clear how the *ex post* function of the principle assumes a crucial relevance in this phase.[100] In particular, the issue arises of whether and, if so, to what extent the authority can be held accountable for not having acted according to proportionality.

Generally, being a direct manifestation of policy choices, the decision to sanction is subject to a limited scrutiny by external reviewers, including judicial authorities.[101] This interpretation has been repeatedly expressed in the case law of the CJEU, which, although not in direct relation to the SSM (for instance, in competition law), usually refers to the criterion of "manifest disproportion" in areas "giving rise to complex economic assessments". According to the CJEU, the choice of the authority to impose a sanction cannot be challenged unless it shows some gross (manifest) misrepresentation of the facts or the legal framework.[102] In principle, therefore, proportionality

98. Cf., *ex multis*, Matterella, "Law and discretion: A public law perspective in the EU" in Mendes (Ed.), op. cit. *supra* note 17, p. 21 et seq.; Mendes, op. cit. *supra* note 32, 443; Black, *Rules and Regulators* (Clarendon, 1997), p. 21 et seq.

99. Council Regulation (EU) 2015/159 cited *supra* note 3.

100. See also Case T-576/18, *Crédit Agricole SA* v. *European Central Bank*, EU:T:2020:304, para 133: "It follows that the ECB has wide discretion to determine the amount of the pecuniary penalty. In such circumstances, it is settled case-law that respect for the rights guaranteed by the EU legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the right of the person concerned to have the decision at issue reasoned to the requisite legal standard. Only in this way can the Court of Justice and the General Court verify whether the factual and legal elements upon which the exercise of the discretionary power depends were present".

101. Cf. section 2 *supra*.

102. Case T-26/89, *Henri de Compte* v. *European Parliament*, EU:T:1991:54, para 220; Case C-326/91 P, *Henri de Compte* v. *European Parliament*, EU:C:1994:218, para 115; Case C-386/10 P, *Chalkor* v. *Commission*, EU:C:2011:815, para 54; Case C-272/09, *KME and Others* v. *Commission*, EU:C:2011:816, para 94; Case C-199/11, *Europese Gemeenschap* v. *Otis NV and Others*, EU:C:2012:684, para 59; Case C-295/12 P, *Telefónica SA and Telefónica de España SAU* v. *European Commission*, EU:C:2014:2062, para 39. See Ligeti and Robinson,

remains a guide to the sanctioning authority. However, *ex post*, it offers only a limited margin of review to the affected subjects.

A relatively recent decision of the Court of Justice, this time directly addressing the SSM, seems however to have set a partially different standard for review that might increase the possibility to question the proportionality of the decision to impose a sanction. In the 2020 case *VQ* v. *European Central Bank*, the ECJ indeed affirmed that for the discretion of the SSM to be compliant with the principle of proportionality, the scope of the obligations that are assumed to be violated by the supervised entity must be clear and unambiguous for the latter.[103]

In the situation at stake, such clarity was ensured not only by the wording of the relevant legal bases, but also by the fact that the credit institution was warned by the ECB about the breaching nature of its behaviour in a phase preceding the opening of the sanctioning procedure. Specifically, the supervised entity had been informed by the Joint Supervisory Team that its conduct constituted a breach during a communications exchange of ordinary supervisory activities. According to the Court, this warning allowed the ECB to proportionally conclude that the breach had, as from that date, been committed no longer negligently, but intentionally.[104]

The decision is relevant as it seems to introduce a further and more demanding parameter for the Court to dispute the choices of the authority, even in this very discretional phase of the sanctioning proceedings. And although *VQ* alone far from establishes a clear standard for review, it does raise interesting questions about the magnitude of the proposed solution. For instance, one might wonder what effects are eventually attached to the warning of the supervisor.

On one side, the Court seems to suggest a communication to the credit institution be strongly recommended where the wording of the legal basis is not crystal-clear. This perspective would, undoubtedly, require adding a further procedural step to the (already rather structured) SSM sanctioning proceedings. On the other side, however, one could also consider the technicality and complexity of the subject matter, and the difficulty in

"Transversal report on judicial protection" in Luchtman and Vervaele (Eds.), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework Through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)* (Utrecht University, 2017), p. 232, available at <dspace.library.uu.nl/handle/1874/352061>. On the development of the doctrine of manifest error, see, *ex multis*, Nehl, op. cit. *supra* note 31, p. 164. On the national level, Kalflèche, "Le contrôle de proportionnalité exercé par les juridictions administratives", 46 *Les Petites Affiches* (2009), 46–53; Long, Well, Delvolvé, Genevois and Braibant, *Les grands arrêts de la jurisprudence administrative*, 21st ed. (Dalloz, 2017), para 27.8.

103. Case T-203/18, *VQ*, para 61 et seq., and in particular, para 64.

104. Ibid., paras. 11 and 65.

distinguishing purely supervisory activities from the early stages of the sanctioning proceedings.[105] Taking these factors into account, an even broader interpretation could seem reasonable, according to which warning the credit institution could be ordinarily seen as a necessary step to comply with the proportionality principle.

For all these reasons, the inclusion of a similar precaution in the Guide could be seen as an appropriate amendment for the ECB to carry out. In principle, this operation might be implemented with a corrective feature to reduce its impact on the daily activities of the SSM, for instance by limiting this obligation to the most severe cases, where the risk is higher for credit institutions. However, as will be illustrated below (section 4.2), such a distinction is far from straightforward in the current framework and would pre-emptively require the implementation of some sort of taxonomy in the SSM sanctioning system.

4.2. *The decision on the amount and type of the sanction*

Contrary to the choice to sanction or not to sanction, challenging decisions about the amount of the penalty (or about its type[106]) in light of the proportionality principle is much less controversial. The consideration also embraces the SSM framework where, in 2021, a major step forwards was achieved with the approval of the Guide.[107] The document specifically aimed at making the calculation of ECB sanctions foreseeable to credit institutions, to comply with the proportionality requirement expressed in Article 18(3) SSMR which states that "penalties applied shall be effective, proportionate and dissuasive".

As the outcome of a challenging process, the approval of the Guide seems in particular to have marked the decision to abandon the argument previously sustained by the ECB with regard to the transparency of the sanctioning methodology. According to it, disclosing how sanctions are calculated, and thus making their application more foreseeable by the parties was to be

105. Cf. Lasagni, "Investigatory, supervisory and sanctioning powers within the SSM" in Allegrezza (Ed.), op. cit. *supra* note 49, p. 49 et seq.

106. Considering in the number of punitive outcomes of the sanctioning proceedings not only what is defined as "sanction" in the SSM legal framework, but also the much more controversial "measures", on which see section 2 *supra*.

107. On the criticism over the opaqueness of the ECB discretion in its first period of activity as banking supervisor, see e.g. Singh, "The centralisation of European financial regulation and supervision: Is there a need for a single enforcement handbook?", 16 EBOR (2015), 439–465, at 460.

rejected, as it would have encouraged strategic behaviours among credit institutions and reduced the deterrent effect of penalties themselves.[108]

Already in 2020, this logic was blankly rejected in the case *Crédit Agricole SA* v. *ECB*, where the Court highlighted the importance of ensuring transparency in the proceedings to determine the calculation of sanctions, by looking at the problem from an *ex post* perspective. Specifically, the CJEU recalled that:

> "the statement of reasons required must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review . . . Only in this way can the Court of Justice and the General Court verify whether the factual and legal elements upon which the exercise of the discretionary power depends were present. Therefore, in view of both the wide discretion conferred on the ECB by Article 18(1) of Regulation No 1024/2013 and the very substantial amounts of the administrative pecuniary penalties incurred, the obligation to state reasons for decisions imposing such a penalty is of particular importance".[109]

Making the decision on the amount of sanctions clearly understandable, therefore, became a necessity first of all by calling into question the duty to state reasons. This rationale possibly reduced the convenience for the ECB not to be transparent in the calculation method since the very beginning, facilitating the drafting and publication of the Guide.

Additionally, the argumentation of the Court appears even more to the point considering the likely punitive nature of several of the SSM pecuniary penalties,[110] including Article 18(1) SSMR, which leaves a wide margin of discretion to the ECB in its setting.

Though the argument was not dealt with by the Court in the case at stake, the substantial nature of the sanctions in this field imposes an adequate reading of

108. Case T-576/18, *Crédit Agricole SA* v. *ECB*, para 128: "At the hearing, the ECB also argued that the absence, in the contested decision, of an explanation of the methodology allowing the precise amount of the penalty to be determined was intended to preserve the deterrent effect of that penalty. Credit institutions should not be able to anticipate the amount of the penalties which may be imposed, which could reduce the incentive to comply with prudential regulations. It also acknowledged that the fact that the total amount of the applicant's assets under management was taken into account was not included in the contested decision, but it took the view that that did not constitute a failure to adequately state reasons, since it was a purely objective matter".

109. Ibid., para 121 et seq.

110. Section 3.1 *supra*.

proportionality. As argued above,[111] in criminal matters this requires looking at the principle with a specific focus on procedural fairness. This also has an impact on the notion of efficiency: indeed, to be efficient *and* proportionate, punitive sanctions need not just be a deterrent, but also be respectful of fundamental rights as interpreted in the criminal or punitive matter, which implies a particularly safeguarding reading of defence rights.

Foreseeability of how fines are going to be calculated, however, does not per se suffice in ensuring proportionate decisions of the supervisory authority. Indeed, proportionality and legality principles first of all require foreseeability of the illicit conducts and then of their gravity. In other words, a taxonomy of infringements is necessary, to allow the subjects who may be sanctioned to understand in advance which kind of conduct is considered an infringement and what conduct is more likely to be sanctioned heavily.[112]

Though the Guide has brought undeniable improvements, a fair distance can be found between a similar model and the current SSM sanctioning system. This gap is particularly evident in Article 18(1) SSMR, in that it only refers to the amount of applicable penalties in their maximum ("up to twice the amount of the profits gained or losses or up to 10% of the total annual turnover"), and, above all, does not specifically identify what conduct is considered illicit (mentioning instead in a more general way: "breach a requirement under relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent authorities under the relevant Union law").[113]

Such a legal archetype, however, is no inescapable feature of banking supervision, nor of independent administrative authorities' sanctioning systems.

Both at the EU and at the national level, comparable models are in place which do embrace a taxonomy-based perspective, though with different approaches. As will emerge from the following brief analysis, such examples could also be relevant for the ECB.

4.2.1. *Relevant EU models: Competition law and ESMA*

A first model that, for its tradition and significance, emerges as relevant for a comparative analysis is the methodology developed in the field of competition law. Indeed, comparing the Commission Guidelines on the method of setting

111. Section 3.2 *supra*.

112. As reminded also by the same ECJ, even outside the criminal matter, see Case 117/83, *Karl Könecke GmbH & Co. KG, Fleischwarenfabrik,* v. *Bundesanstalt für landwirtschaftliche Marktordnung*, EU:C:1984:288, para 11. See section 3.2 *supra.*

113. Highlighting the lack of clear identification of the conducts, Allegrezza, op. cit. *supra* note 49, p. 29.

fines in competition law[114] with the ECB Guide, several elements emerge which enable establishing common ground regardless of the different subject matter at stake.

First of all, both systems envisage a wide discretion of authority, which includes even the possibility to depart from the guidelines if needed, as well as the power to impose symbolic fines if adequately motivated.[115] Second, both systems provide for similar ways in calculating the amount of fines. Seeking to obtain a general and special deterrence effect, the documents provide for a two-step calculation method, identifying what the basic fine is and then adjusting it according to the concrete situation of the case. To this end, both guidelines present some mitigating and aggravating circumstances, though, again in light of the authority's discretion, without getting to the point of having established a closed list of such factors.[116] Lastly, both the SSM and the Commission legal bases define penalties with reference only to their maximum amounts.[117]

Against these commonalities, some crucial differences can be observed which show a somewhat different approach to sanctioning. On the one hand, the ECB Guide is much more detailed than the Commission Guidelines on the fine calculation procedure and on how different factors may be combined to that end.[118] This attention in making the calculation method accessible to the parties also transpires from the summary decisions published on the ECB website after the entry into force of the Guide.[119] On the other hand, and most

114. European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, O.J. 2006, C 210/2, 2–5.

115. Cf. the Guidelines, ibid., respectively paras. 36–37, with the SSM Guide cited *supra* note 94, respectively paras. 34–35.

116. Cf. the Guidelines ibid., para 19 et seq., with the SSM Guide cited *supra* note 94, 19 et seq.

117. Cf. Art. 23 of the Council Regulation (EC) 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003, L 1/1, with Art. 18(1) and (7) SSMR and Art. 4a Council Regulation 2532/98.

118. Cf. SSM Guide cited *supra* note 94, para 21 et seq., on which see also De Bellis, "Proportionality as a guiding principle for administrative sanctions: Quantitative criteria, qualitative assessments and discretion in the EBU and in the ESFS" in Siri and Annunziata (Eds.), *EU Banking and Capital Markets Regulation. Open Issues of Vertical Interplay with National Law* (EBI - Springer, forthcoming 2024), at section 3.2.

119. Although decisions are not publicly available in full text on the website, the criteria applied by the ECB are clearly stated in the summaries, see <www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html>, after the entrance into force of the SSM Guide in 2021. Previously, decisions since Oct. 2019 started to have a generic reference to some circumstances taken into account ("Among other circumstances, the amount of the penalty takes into account the duration of the breach and the degree of responsibility of [the supervised entity]"); no mention at all can be found in the previous decisions. What still remains difficult to assess, for parties not involved in the proceedings (thus without access to the full text decisions), is the concrete application of the criteria to the specific situation concerning the obliged entity.

significantly, unlike the ECB Guide, the Commission Guidelines include a taxonomy of the breaches, based on the identification of which infringements are considered most severe.[120] According to the Guidelines:

> "Horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale".[121]

Although rather general in its wording, the provision allows undertakings to have an idea of which breaches are going to be sanctioned more severely. This plays a relevant role in ensuring compliance with the proportionality principle.

A second, different, model relates to the European Securities and Markets Authority (ESMA), and in particular to sanctions grounded on the Credit Rating Agency (CRA) and on the Market Infrastructure (EMIR) Regulations. In both cases, a rather structured taxonomy is established. CRA and EMIR Regulations firstly define the breaches, which are listed in specific Annexes (Annex III for CRA, Annex I and III for EMIR), by describing the illicit conducts and which obligations they refer to. Infringements are then classified into several groups, by direct relation to the lists included in the Annexes. Finally, for each of these groups, sanctions are determined by both a minimum and a maximum penalty.[122]

Moreover, ESMA has developed a methodology to set the calculation of fees that is publicly accessible "for clarification purposes only".[123] The document illustrates the two-phase procedure followed by the supervisor, consisting of: 1) setting a basic amount for the fine; and 2) the adjustment, if necessary, of that basic amount. Aggravating and mitigating circumstances are listed in detail in the document, in a table which also specifically clarifies the coefficient to be applied to each of them.[124]

120. Cf. section 3.2. *supra*.

121. See the Guidelines cited *supra* note 114, para 23.

122. Cf. Art. 36a, Regulation (EC) 1060/2009 of the European Parliament and of the Council of 16 Sept. 2009 on credit rating agencies, O.J. 2009, L 302/1, with Arts. 65 and 25j, Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, O.J. 2012, L 201/1 (consolidated version of 12/08/2022).

123. ESMA, "Information on the methodology to set fines", *ESMA*, 1, available at <www.esma.europa.eu/sites/default/files/esma_-_information_regarding_methodology_to_set_fines.pdf>.

124. Ibid., 2.

Compared to competition law or the SSM model, the framework concerning ESMA sanctions is thus more detailed in several aspects (definition of the conduct, definition of the penalties, definition of the calculation method). Looking at the national level, however, structured taxonomy paradigms may also be found in the matter of banking supervision.

4.2.2. *National supervisory banking authorities: A glance at France, Germany, Italy, Spain*

In the investigation on the scope and role of the proportionality principle in banking supervision, national legislation and practices can provide very useful insights as they contribute to the vertical dimension of proportionality in a shared enforcement system (section 3.2). Naturally, the limited nature of this article does not allow for an in-depth examination of all banking systems of the Eurozone. Leaving more detailed analyses to other contributions,[125] an overview of the solutions adopted at the domestic level can be useful in providing the ECB with some reference models to look at. To this end, the French, German, Italian and Spanish frameworks will be taken into account here. All these systems present a taxonomy that is more defined than the SSM one, though with various degrees of detail.

In France, the taxonomy of infringements follows a mixed model, built on two different sets of sanctions: disciplinary and pecuniary. On the one side, illicit conducts are identified in rather broad terms when it comes to defining the scope of disciplinary sanctions: similar to the SSM framework, the legislative technique used in these cases makes reference to only the non-compliance with relevant legislation (e.g. "une disposition européenne, législative ou réglementaire") or orders issued by the supervisor.[126] However, the French regulation provides for a clear ranking of imposable sanctions, listing them according to their impact (from warning and reprimand to compulsory resignation of managers, and total withdrawal of the banking authorization).[127]

The model is then partially different for pecuniary penalties. In this case, while the latter are defined only in their maximum (up to EUR 100 million or 10% of annual net turnover), the underlying breaches are punctually identified in the law, by explicit mentioning the relevant legal provisions.[128]

125. See, for all, the national law analyses carried out in Allegrezza (Ed.), op. cit. *supra* note 49.

126. More specifically, cf. Art. L. 612-39 *Code monétaire et financier.*

127. Ibid.

128. At least to a large extent, cf. ibid.: "les manquements aux articles L. 113-5, L. 132-5, L. 132-8, L. 132-9-2 et L. 132-9-3 du code des assurances, aux articles L. 223-10, L. 223-10-1, L. 223-10-2 et L. 223-19-1 du code de la mutualité, aux chapitres Ier et II du titre VI du livre V

Against this framework, proportionality does play a significant role in the sanctioning procedure. As emerges in the decisions issued by the *Autorité de Contrôle Prudentiel et de Résolution* (ACPR), the principle guides the concrete application of penalties. For instance, in assessing the seriousness of the alleged breaches, the ACPR shall examine the nature of the obligations involved; the number and duration of the breaches; the harm they may have caused to customers or third parties; the undue savings or profits the undue savings or benefits that may have resulted for the person sanctioned; and the timing and extent of the corrective measures eventually implemented. Proportionality is also taken into account to ensure that the envisaged penalty is not excessive with regard to the financial capabilities of the sanctioned subject. In doing so, for example, penalties equal to the legal maximum, combined with a temporary ban, shall be used only to punish exceptionally serious breaches in the light of the factors illustrated above.[129]

In Germany, the taxonomy shows a higher level of regulation, similar to the ESMA model discussed above. Sanctions imposable by the supervisor (*Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin)) are clustered in five categories. For each group, a series of breaches is punctually identified and a different and decreasing maximum amount is established (up to EUR 5 million; up to EUR 700,000; up to EUR 500,000; up to EUR 200,000; and up to EUR 100,000).[130]

In line with its traditionally preponderant role, in the German legal system the proportionality principle also has direct and explicit application in banking supervision. This is reflected first of all in an understanding of penalties as a last resort instrument, to be applied only where other measures (e.g. supervisory powers) are not successful.[131] Second, the principle has an extensive role in the method of setting fines. BaFin discretion on the matter is directly influenced by proportionality. Accordingly, a three-phase method has been developed: first, the basic amount of the penalty is identified; then, the latter is adjusted in light of the specific circumstances of the case; finally, the economic conditions of the supervised subject may be considered.[132] Contrary to other fields of law falling under BaFin competence, however, no guideline has yet been published in banking supervision that allows external

du présent code et aux dispositions européennes portant sur les obligations liées à la lutte contre le blanchiment et le financement du terrorisme ainsi que sur les mesures restrictives".

129. ACPR, **"**Décision de la Commission des sanctions n° 2014-01 du 19 décembre 2014 à l'égard de la société ALLIANZ VIE (Organisme d'assurance, Contrats d'assurance sur la vie non réglés)**"**, *ACPR* (2014), available at <acpr.banque-france.fr/contenu-de-tableau/decision-de-la-commission-des-sanctions-ndeg-2014-01-du-19-decembre-2014-legard-de-la-societe>.

130. Cf. Section 56, paras. 6–8, *Gesetz über das Kreditwesen* (*Kreditwesengesetz* – KWG).

131. Cf. Albrecht, "Germany" in Allegrezza (Ed.) op. cit. *supra* note 49, p. 293.

132. Ibid., p. 297.

access to the specific criteria applied by the authority in its sanctioning procedures.[133]

In Italy, a taxonomy does exist, although it allows for a greater discretion of the supervisor when it comes to the decision on the amount of the sanction. On the one hand, statutory limits are rather wide, and differentiated only with regard to the type of sanctioned subject: for legal persons, fines may range from EUR 30,000 to 10 percent of the total annual turnover; for natural persons, from EUR 5,000 to EUR 5 million. On the other hand, the infringing conducts are clearly and punctually identified in the system, which exhaustively lists the legal provisions whose violation may be sanctioned.[134]

Against this framework, a rule grounded on the proportionality principle can be found in relation to breaches characterized by a low offensive nature. According to Article 144(2) *Testo unico bancario* (TUB), such breaches – punctually identified in the law – may be punished with a cease-and-desist order instead of pecuniary penalties.[135] The principle of proportionality is then explicitly included among the general principles that should guide the discretion of the supervisor.

In documents issued by *Banca d'Italia* to illustrate the sanctioning procedures to the interested parties, the link between proportionality and duty to state reasons is particularly emphasized, as well as the circumstances to be taken into account to assess the amount of the sanction.[136] In particular, the following factors are listed as relevant: the type of supervised subject (natural or physical person); the duration of the infringement; the financial capacity of the subject; previous sanctions imposed in the past for banking or financial violations; the harm suffered by third parties and by the financial system; the significance of the profits gained; the conduct of the investigated subject (e.g. in terms of cooperation with the supervisor); in case of physical persons, the role played by the investigated subjects in the decision-making process; and

133. Such as securities trading, cf. the Guidelines on the Imposition of Administrative Fines for Offences relating to the German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*), 2nd ed., Feb. 2017, available at <www.bafin.de/SharedDocs/Downloads/EN/Leitfaden/WA/dl_lf_bussgeldleitlinien_2017_en.html;jsessionid=26AADB20E22D4603E6F6AB6B6FD513E6.1_cid501?nn=9646522> with Albrecht, op. cit. *supra* note 131, p. 293 et seq.

134. Cf. Art. 144 and 144-ter *Testo unico bancario* (TUB).

135. Then, if the supervised entity does not comply with the order, pecuniary penalties apply again, and their amount is increased up to a third, cf. Art. 144 TUB; see also D'Ambrosio, Cossa and Lasagni, "Italy" in Allegrezza (Ed.), op. cit. *supra* note 49, p. 399 et seq.

136. Banca d'Italia, "Le sanzioni amministrative della Banca d'Italia: principi generali, procedura e tempi", *Banca d'Italia* (2013), p. 1, available at <www.bancaditalia.it/media/approfondimenti/2013/sanzioni-amministrative-bi/sanzioni_amministrative.pdf>.

the gravity of the infringement.[137] Moreover, similar to France, the possibility to combine pecuniary penalties with a temporary ban shall be limited only to the most severe cases, to be identified in light of: the severe financial consequences suffered by the undertaking, the system or by public trust; the significance of the profits gained from the violation; and the previous application to the author of the illicit conduct of sanctions in supervisory or financial matters in the previous five years.[138]

Lastly, Spain also presents a taxonomy with mixed features. Breaches are classified according to their gravity into "minor", "serious" and "very serious".[139] Penalties are differentiated for each category, following an incremental approach.[140] Within each group of infringements, conducts are identified partially by specific descriptions, partially by a generic reference to the relevant legal bases (e.g. performing functions or operations prohibited by regulatory and disciplinary rules with the status of law or by EU regulations[141]).

The law also establishes the criteria that *Banco de España* shall adopt in setting the amounts of the imposed fines. According to it, sanctions shall be determined on the basis of: the nature and scale of the infringement; the degree of responsibility for the events; the gravity and duration of the infringement; the significance of the profits gained or losses avoided thanks to the violation; the financial strength of the person responsible for the infringement; the unfavourable consequences of the events for the financial system or the national economy; the rectification of the infringement on the initiative of the infringer; the reparation for the damage or harm caused; the losses for third

137. Which, in turn, shall be established against the (even just potential) impact of the conduct on clients, investors, the market; the potential adoption of specific tools to mitigate the consequences; the reliability of the financial situation of the undertaking, as presented to the supervisor; the potential commission of several breaches with the same factual conducts, cf. Banca d'Italia, "Disposizioni in materia di sanzioni e procedura sanzionatoria amministrativa. Provvedimento del 18 dicembre 2012 e successive modifiche", *Banca d'Italia* (2022), p. 19, available at <www.bancaditalia.it/compiti/vigilanza/normativa/archivio-norme/disposizioni/pro-sanz/Disposizioni_procedura_sanzionatoria.pdf>.

138. Ibid., p. 19 et seq.

139. Cf. Laws 39/2015, 40/2015 (general regime of public administration) and 10/2014 of 26 June 2014 on the regulation, supervision and solvency of credit institutions (*Boletín Oficial del Estado* of 27 June 2014).

140. For minor breaches: a fine between twice and three times the amount of the gains arising from the infringement, when such gains may be quantified; or between 0.5% and 1% TAT; or a fine between EUR 100,000 and EUR 1 million. For serious breaches: a fine between twice and three times the amount of the gains arising from the infringement, when such gains may be quantified; or between 3% and 5% TAT; or a fine between EUR 2 million and EUR 5 million. For very serious breaches: a fine between twice and three times the amount of the gains arising from the infringement, when such gains may be quantified; or between 5% and 10% TAT; or a fine between EUR 5 million and EUR 10 million. Cf. Arts. 96–102, Law 10/2014.

141. Cf. Sarmiento, "Spain" in Allegrezza (Ed.), op. cit. *supra* note 49, p. 494.

parties caused by the infringement; the level of cooperation with the competent authority; the role of the infringer within the credit institution; the objective difficulties in the way of attaining or maintaining the legally required level of own funds; and the previous conduct of the infringer in relation to the regulatory and disciplinary rules at issue, with regard to final penalties having been imposed, over the past five years.[142]

A few considerations could be drawn from these very brief overview. Firstly, when it comes to the methods to set fines, the SSM Guide, with its elaborated content, results in rather advanced methods in comparison to the domestic ones. Although the principle of proportionality plays an essential role before all national authorities, as shown by the publicly available sanctioning decisions, in France and Germany no openly accessible guideline exists which discloses the method applied by the supervisor. In Italy, the relevant circumstances to the sanctioning procedure are listed in soft law documents published by *Banca d'Italia*, though with a lower level of details than in the ECB case. The case of Spain is different, where a higher level of foreseeability in ensured by having those criteria directly established in statutory law.

On the other hand, the SSM model falls short of domestic regulations with regard to the definition of illicit conducts and correlation between the latter and the applicable penalties. In this respect, the taxonomy established by law at the national level (more specifically in Germany and Italy, in broader terms in France and Spain) and the clear listing of penalties for groups of breaches (especially in Spain and Germany) could represent an interesting reference model for the ECB to ensure greater adherence to the proportionality principle.

4.3. *The decision on the anonymization of sanctions*

The decision to publish the sanction with or without anonymization is the last significant step examined here in which proportionality plays a determinant role. The issue is particularly sensitive within the ECB supervisory sanctioning proceedings, as Article 132(1) SSMFR requires the publication of sanctions in a non-anonymized way, unless that "would either: (a) jeopardize the stability of the financial markets or an on-going criminal investigation; or (b) cause, insofar as it can be determined, *disproportionate damage* to the supervised entity concerned".

In principle, therefore, anonymization is the exception in SSM proceedings. In practice, however, the magnitude of its scope largely depends on the discretional interpretation given by the ECB to the requirements of Article

142. Art. 103 Law 10/2014.

132, which are rather vague per se.[143] Despite its significance for supervised entities, for instance, the meaning of the expression "disproportionate harm" is not clarified in the SSM Regulation, nor in the Guide. This means that the case law is entrusted with a prominent role in ensuring the foreseeability of the decision on anonymization.

In the already mentioned *VQ* decision, for example, the CJEU affirmed that the gravity of the breach shall not be deemed determinant to this end. Rather, the focus should be on the "consequences of the lack of anonymization for the situation of the entity": to opt for anonymization, "the effects of publication of the penalty without anonymization would have to be liable to exceed those resulting from the reputational damage inherent in that publication".[144]

Nevertheless, this interpretation in turn also remains relatively vague. To cite an instance, it is not clear whether the percentage of a penalty imposed in terms of "total annual turnover", as per the wording of Article 18(1) SSMR, may be considered a decisive factor in the assessment. Such uncertainty is especially striking in light of other elements highlighted in the case law. Indeed, the CJEU seems to place on the credit institution the burden of presenting "evidence to show" that anonymization is necessary to avoid disproportionate damage.[145] The standard, however, is rather difficult to meet where no clarity exists as to how the ECB shall assess that parameter.

5. Some proposals to strengthen the SSM legal framework in light of the proportionality principle

To conclude this contribution, some proposals are made to improve the framework currently applicable in the SSM sanctioning proceedings with regard to the aspects considered above. The idea is to use the principle of proportionality as a key to ensure better enforcement of supervisory activities, both in terms of efficiency and fairness of the proceedings, a yardstick for the increasing EU punitive powers. Three main recommendations are advocated: a) the establishment of a taxonomy for SSM punitive sanctions (and measures); b) the recognition of unlimited jurisdiction in reviewing the SSM punitive sanctions; c) the amendment of the Guide to integrate other key aspects currently not finding adequate coverage in light of the proportionality principle.

143. Cf. also Lackhoff, *Single Supervisory Mechanism. European Banking Supervision by the SSM. A Practitioner's Guide* (Beck/Hart/Nomos, 2017), p. 217.
144. Case T-203/18, *VQ*, paras. 79–87 and 99.
145. Ibid., para 99.

5.1. *Which taxonomy for SSM punitive sanctions (and measures)?*

Considering the overview outlined so far, the first need that emerges concerns the establishment of a taxonomy for SSM punitive sanctions (and measures, in the terms discussed above).

It has already been highlighted how the framework currently in force shows both a lack of ranking among the breaches (cardinal proportionality) and among the sanctions (ordinal proportionality).[146] This is further mirrored by the absence of minimum penalty thresholds and the identification of specific rules for infringements that have a minimal impact.[147] Addressing these lacunas requires a thorough examination of how the obligations established in the applicable relevant law shall be carried out, to define a ranking of which breaches of prudential requirements are to be considered more severe.

Although the task obviously demands a specific supervisory expertise which goes beyond that of the authors of this contribution, it is mentioned here as it constitutes the necessary basis for the second suggested line of action. That is the adoption of a taxonomy model which organizes the ranked breaches in a way that is foreseeable to the parties. To this end, different potential models could be considered.

One model emerges from the already illustrated *Commission Guidelines* applied in competition law, where a number of breaches is listed and identified as the most severe infringements which will also be sanctioned more heavily. On the one hand, this example presents the advantage of being rather minimal, and thus potentially easier to establish. On the other hand, due to the same features, it allows only a limited foreseeability for the subjects potentially affected by sanctions. Whether this threshold could be considered satisfactory in case of punitive sanctions thus remains doubtful.

Looking at other potentially relevant paradigms, a different option is represented by a clear indication of at least the illicit conducts (as in France, Italy and, to a certain extent, in Spain).

Finally, an even more structured archetype is the one where not only infringements are clearly described, but where penalties are also defined by minimum-maximum penalty thresholds which are graduated according to the severity of the breach (as in Germany, Spain – to a large extent – and in the ESMA sanctioning proceedings). By restricting the discretion of the authority to a greater extent, this last model ensures good compliance with the principle

146. Section 3.2 *supra*.

147. Significant, in this regard, is also the lack of leniency programs before the ECB, which in turn are in some cases established at the national level, such as in Belgium or Ireland, see Lasagni and Rodopoulos, "A comparative study on administrative and criminal enforcement of banking supervision at national level" in Allegrezza (Ed.), op. cit. *supra* note 49, 599.

of legal certainty, allowing parties to clearly foresee which range of penalties is likely to be imposed. At the same time, it does not seem to unreasonably restrict the discretion of the supervisor, by affecting only the calculation of the basic amount of the fines and without touching on the adjustment phase in which aggravating and mitigating circumstances come into play. It seems, therefore, to be a paradigm that could also be replicated within the context of the ECB supervisory sanctioning proceedings.

5.2. *Which standards for judicial review?*

While increasing foreseeability and legal certainty addresses the need to comply with the principle of proportionality in its *ex ante* dimension, the *ex post* function of the principle must also not be forgotten. Despite the broad debate on the scope of judicial review in the field of banking supervision (section 4), some open aspects need to be examined in light of the proportionality principle.

As illustrated above,[148] because of the technical complexity of the matter at stake, typical of administrative proceedings carried out before independent authorities, the *ex post* function of proportionality mainly plays a role in the second phase of decision-making, i.e. the determination of the amount (or type) of the sanction.

In the ECB context, these considerations bring back the question of whether the current legal bases support this exigency. Indeed, as known, the SSM Regulation confers unlimited jurisdiction to the Court of Justice in explicit terms only in a limited number of cases, namely for the penalties applicable *ex* Council Regulation 2532/98.[149] Limiting the analysis to the sanctions directly imposable by the ECB leaves out penalties established by Article 18(1) SSMR.[150]

The question thus arises whether an amendment of the SSM Regulation is necessary, or whether it could suffice, at least for the time being, to include an explicit statement in this sense in the Guide or, finally, whether the matter could be directly solved by the Court of Justice via judicial interpretation.

148. Section 4.1 *supr*a.

149. Cf. Art. 5 Council Regulation 2532/98: "the CJEU shall have unlimited jurisdiction within the meaning of Article (261 TFEU) over the review of final decisions whereby a sanction is imposed". Recalling that the substitution of judgement on matters of law is the rule in the EU, Craig, "Judicial review of questions of law: A comparative perspective" in Rose-Ackerman, Lindseth and Emerson, *Comparative Administrative Law* (Elgar, 2017), p. 400 et seq.

150. Cf. Voordeckers, "Administrative and judicial review of supervisory acts and decisions under the SSM" in Allegrezza (Ed.), op. cit. *supra* note 49, p. 130, and Lasagni, op. cit. *supra* note 10, p. 227 et seq.

Against an unaffected legal framework, the issue is starting to present itself before the judges in Luxembourg, though so far still only indirectly.

For instance, in the *Crédit Agricole SA* case, the CJEU itself raised the issue of whether it should:

> "have such jurisdiction, pursuant to Article 261 TFEU, in respect of administrative penalties imposed by the ECB pursuant to Article 18(1) of Regulation No 1024/2013 . . . With such a request before it, the Court would have to establish whether it was appropriate, on the date on which it adopted its decision, to substitute its own assessment for that of the ECB, so that the amount of the penalty was appropriate".[151]

Since "no request for alteration of the amount of the penalty imposed" was raised,[152] the ECJ did not take a position on the matter. It seems, however, just a matter of time before a similar case will present itself.

Taking the opportunity of an amendment of the Guide to introduce a sanctioning taxonomy, the ECB could also take the opportunity to recognize the need to include in the unlimited jurisdiction of the Court also the penalties under Article 18(1) SSMR. Though void of binding value, this could help clarify the legal terms of judicial review in the case of SSM sanctions and perhaps speeding up its official recognition by the Court.

5.3. *Integrating the Guide in the method of setting penalties*

In light of the critical remarks illustrated so far, further elements could be integrated in the SSM Guide to ensure overall better compliance with the principle of proportionality.

First, as mentioned above, it could be opportune for the Guide to include some more detailed indications on which parameters the ECB takes into account in deciding whether to publish a sanction in an anonymous form, and how such an assessment is carried out.

The need to strengthen the foreseeability, and thus the fairness of the supervisor, however, emerges also with regard to other profiles that directly concern the calculation of fines. For instance, a feature that has already emerged as potentially controversial in the case law before the Court of Justice is the notion of "total annual turnover" (TAT).

Only mentioned in Article 18(1) SSMR, the term is better defined by a combined reading of the SSM Framework Regulation (SSMFR) and the

151. Case T-576/18, *Crédit Agricole SA* v. *ECB*, paras. 73–74.
152. Ibid.

CRD/CRR package.[153] Doubts, however, may be raised on whether this framework allows for sufficient clarity on how the number should be calculated. In *Crédit Agricole SA*, for instance, it was a matter of debate whether the amount of the penalty imposed was 0.0015 percent of the TAT or ten times higher.[154] Such a broad range of uncertainty is bound to have a significant impact on the expectations of all parties to the proceedings, and naturally especially of the credit institutions. This raises the issue of whether the notion of TAT in itself is sufficiently clear within the SSM Regulation. A clarification is in order in this regard: it is not suggested here that a single notion of TAT should necessarily be defined in absolute terms. Indeed, there are several and diverse contexts in which TAT is currently used in sanctioning. To mention just a few, the expression may be found in competition law, or in data protection, and even in pure criminal law.[155] The divergences among different fields of law may well justify diverging ways of measuring the TAT. What is important, however, is that at least within each subject matter, foreseeability is ensured on how the parameter is calculated. With regard to the SSM, the Guide could well represent a way to ensure the calculation methodology is adequately shared between the supervisor and supervised entities.

Another element that seems in need of clarification, and that could find a useful location in the Guide, is the impact of time in the ECB sanctioning evaluations. Currently, time is considered only in a twofold perspective. On the one hand, in the SSMFR, time comes into play with regard to the statute of limitations.[156] On the other hand, the Guide makes it clear that the duration of the infringement is a relevant factor in determining the final amount of a sanction.[157] To this end, on the contrary, no consideration is paid in this context to the time that has elapsed since the occurrence of a breach and the moment when the sanction is applied.[158] The issue, however, does not seem to be

153. Art. 128 SSMFR (see note 10 of the SSM Guide), which refers in turn to Art. 67(2)(e) CRD, which refers to Art. 316 CRR.

154. Case T-576/18, *Crédit Agricole SA* v. *ECB*, para 120.

155. Cf. e.g. Regulation 1/2003 and the Commission Guidelines cited *supra* note 108; EDPB, "Guidelines 04/2022 on the calculation of administrative fines under the GDPR", *European Data Protection Board* (2022), available at <edpb.europa.eu/system/files/2022-05/edpb_guidelines_042022_calculationofadministrativefines_en.pdf>; or, for the criminal matter e.g. in the AML/CFT domain, cf. e.g. Art. 59(3) Directive (EU) 2015/849 of 20 May 2015, O.J. 2015, L 141/73, as amended lately by Directive (EU) 2018/843 of 30 May 2018, O.J. 2018, L 156/43.

156. Art. 130 SSMFR and Art. 4c Council Regulation 2532/98.

157. SSM Guide, *supra* note 94, para 12 et seq.

158. Partially different considerations apply instead in case of Fit and Proper Assessments. In this context, the "time elapsed" since the offence was allegedly committed is included among the relevant factors to determine whether previous criminal or administrative records

irrelevant in light of the proportionality principle. In other words, the imposition of a penalty a long time after the illicit conduct ceased might raise issues of disproportionality if it is not supported by adequate reasoning. Although this has not yet come under the scrutiny of the CJEU, the current practice of the ECB to impose sanctions even several years after the occurrence of a breach[159] could well make the issue relevant in the future.

Also in this regard, therefore, adding a clarification in the Guide could be helpful both in ensuring compliance with the principle of proportionality and in strengthening the enforcement of the SSM sanctions.[160]

6. Conclusion

The aim of this article was to contribute to the rich debate surrounding proportionality with a specific focus on punitive powers. Relying on a solid theoretical framework and an analysis of the chosen enforcement mechanisms, three main interrelated arguments were put forward.

First, proportionality in relation to sanctions should be emancipated from its original role of driver of European integration and become an autonomous measure to achieve a balanced exercise of power, especially when the

have an impact on the assessment of good repute, honesty and integrity. See in this sense ECB, *Guide to fit and proper assessment*, Dec. 2021, available online at <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fit_and_proper_guide_update202112~d66f230eca.en.pdf> at p. 22; and *ESMA and EBA joint Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU*, ESMA35-36-2319 EBA/GL/2021/06, 2 July 2021, available online at <www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2021/EBA-GL-2021-06%20Joint%20GLs%20on%20the%20assessment%20of%20suitability%20%28fit%26propoer%29/1022127/Final%20report%20on%20joint%20EBA%20and%20ESMA%20GL%20on%20the%20assessment%20of%20suitability.pdf>, § 73.

159. As it can be observed from the information publicly available on the SSM website <www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html>, ECB sanctions have so far been imposed on average about four years after the committal of the breach, though in some cases even up to seven years after the date in which the conduct was perpetrated (cf. e.g. Crédit Agricole S.A.: breach committed from 30 June 2015 to 30 June 2016 and sanction of 12 July 2022; Allied Irish Banks plc and EBS d.a.c. (separate proceedings): breaches committed from 2014 to 2016 and sanctions of 30 July 2021).

160. Taking the opportunity to amend the Guide, a last profile could also be considered, even if not strictly related to the principle of proportionality. The issue refers to the inclusion of the "lack of cooperation" among the aggravating circumstance listed in § 30 of the Guide. As already stated by the ECJ in *DB* v. *Consob* (Case C-481/19, *Consob*), this parameter appears problematic in light of the privilege against self-incrimination, and its repeal should thus be urgently considered. On the topic, see e.g. Lasagni, "La Corte di giustizia riconosce il diritto al silenzio nei procedimenti amministrativi punitivi (e la Corte costituzionale conferma)", (2021) *Giurisprudenza Commerciale*, 1179–1196.

executive bodies, such as the SSM, rely on a wide margin of punitive discretion.

Second, in this mindset, proportionality should play a pivotal role in legitimating the punitive powers of such executive bodies, by symbolizing the very process of shaping the constraints of their authority. As illustrated by the SSM, ESMA and antitrust cases, the multiplication of executive organs endowed with direct – and indirect – punitive authority increasingly places a duty on legal scholars and policy makers to articulate the principle of proportionality as a tool to rationally limit the potential of such authority to affect the fundamental rights of the individual and entities involved.[161] In other words, the principle should be intended as dialectic tool to counterbalance a purely mechanical application of the law, by creating positive obligations on such authorities.[162]

Last but not least, a sectorial, tailor-made concept of proportionality for punitive sanctions should be cultivated and embraced in the enforcement of such powers. In this regard, the principle should be developed following its ordinal and cardinal dimension. Therefore, two notions of the proportionality should be distinguished: one to be internally applied to each single breach and one external, to ensure an adequate scale of gravity within the whole sanctioning toolbox. This naturally reflects also on the duty to state reasons. All factors considered by the supervisor in the sanctioning procedure, as well as the way in which such elements had been weighted, shall indeed find an adequate blueprint in the decision.[163] Publication limits, on the contrary, hamper the possibility to assess, from an external perspective, the extent to which such general principles are complied with in practice. In relation to the ECB, for instance, this consideration should push for a widening of the publication duties, by expanding them to also encompass decisions not to sanction credit institutions. Essentially, the twofold scope of proportionality makes the concrete exercise of punitive powers intelligible to the affected parties – which in turn is necessary to allow an effective exercise of the right to an effective remedy.

161. Lacey, op. cit. *supra* note 1, 35.

162. Rodopoulos, op. cit. *supra* note 73, pp. 201–216.

163. Cf. again Case T-576/18, *Crédit Agricole SA* v. *ECB*, para 129: "The statement of reasons required must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which such a decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged".

The article also investigated the possibility for the principle of proportionality to become a key factor in ensuring not only a fairer, but also a more efficient enforcement of supervisory sanctioning powers in the Eurozone. Consider the time elapsed between the occurrence of a breach and the moment when the sanction is imposed, which – if too extended – can severely affect the capacity of the authority to promptly intervene on the market. Moreover, recourse to proportionality can help strengthen legal certainty to the benefit of both the affected individual and the supervisor. A telling example in this regard is the taxonomy established by law at the national level (specifically in Germany and Italy, in broader terms in France and Spain) and from the clear listing of penalties for groups of breaches (especially in Spain and Germany). These models could represent an interesting reference for the SSM which currently falls short of domestic regulations with regard to the definition of illicit conducts and a correlation between the latter and the applicable penalties.

The specificities of the executive bodies in a multilevel, shared enforcement system, where European and national law are both essential components, has long pictured proportionality as a cornerstone in the debate on how to regulate the scope of their intrusive punitive powers. The time has come for a step forward, finally recognizing the principle of coherent application throughout the whole sanctioning procedure.