The European Central Bank's duty of care for the unity and integrity of the internal market

Pierre Schammo[*]
Durham University

Single Supervisory Mechanism; Banking Union; European Central Bank; prudential supervision; credit institutions

Abstract

As a result of the establishment of the Single Supervisory Mechanism, the ECB was vested with significant supervisory tasks in the prudential field. The ECB exercises these tasks with a view to contribute to the safety and soundness of credit institutions and the stability of the financial system. Besides its objectives, the ECB is, when exercising its tasks, also subject to a specific duty of care for the unity and integrity of the internal market. The fact that the ECB was vested with this duty is noteworthy. It is neither at first obvious why the ECB ought to be subject to such a special duty; nor is it clear what this duty precisely entails. The aim of this article is to examine the ECB's duty of care and its raison d'être. In this process, it will offer suggestions on how the ECB ought to discharge it.

Introduction

The establishment of the Single Supervisory Mechanism (SSM), as the first pillar of a Banking Union, led to a significant transfer of competences from the national to the EU level. The SSM places the ECB at the heart of a new system of prudential supervision within the Banking Union. It vests it with significant tasks and entrusts it with a mandate to contribute to the safety/soundness of credit institutions and the stability of the financial system. Combined with its other tasks, especially its role as guardian of the single currency, the ECB is undoubtedly one of the EU's most powerful institutions.

However, the transfer of supervisory competences to the ECB, as part of the establishment of the SSM and the Banking Union, was also a source of concern for some. Specifically, concerns were raised about the future of the internal market in a more fractured EU: i.e., in an EU where a group of Member States (the Eurozone) continues to seek closer integration of which other Member States decide to abstain. In response to these concerns, provisions were agreed with the aim of addressing potential threats to the internal market.[1] Among other provisions, art.1 of Council

---

[*] Reader in Law, Durham University, School of Law. I wish to thank Derrick Wyatt, Carmelo Salleo and the anonymous referees for their insightful comments.

[1] Demands for internal market safeguards go back to at least December 2011 when the UK government attempted – unsuccessfully – to obtain safeguards from other Member States in return for agreeing to Treaty changes that would have buttressed fiscal coordination among Eurozone countries (see Letter from George Osborne to the Chairman of the Treasury Committee, "Draft UK Requests on Financial Services at the December 2011 European Council" (February 2012), http://www.parliament.uk/documents/commons-committees/treasury/120228-LetterfromChxtoChair.pdf [Accessed 23 August 2016]). Safeguards were agreed in various shapes and

Regulation (EU) No 1024/2013, which vests the ECB with specific tasks concerning policies relating to the prudential supervision of credit institutions (the 'SSM Regulation'), was adopted.[2] It states that the ECB has both a duty to have 'full regard' and a 'duty of care' 'for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage'. The ECB's duty of care was championed by the European Parliament as a – supposedly – important internal market safeguard. As the (former) chairwoman of the European Parliament's Economic and Monetary Affairs Committee put it during the debates on the Banking Union/SSM:

> 'More work needs to be done to protect the single market. A duty of care must be required from the ECB in relation to the single market, in the same way that it is required of the Commission'[3]

The aim of this article is two-fold. First of all, the paper seeks to offer an assessment of the *raison d'être* of the duty of care for the unity and integrity of the internal market. Admittedly, it is not obvious why the ECB ought to be subject to special safeguards regarding the unity or integrity of the internal market. I will show that the matter must be seen in light of the functional and geographical scope of prudential supervision in the EU. The second aim is to offer an assessment of the substance of the duty of care and especially to consider how the ECB ought to discharge it. While the literature on the SSM and the Banking Union continues to grow,[4] no attempt has

---

forms subsequently: see e.g. Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1. Moreover, at the European Council in June 2012, European leaders agreed to the need for 'concrete proposals on preserving the unity and integrity of the Single Market in financial services'. See European Council, Conclusions (28/29 June 2012), para.4, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131388.pdf [Accessed 23 August 2016].

[2] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.

[3] Debates of the European Parliament, 12 September 2012, p.173, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+CRE+20120912+SIT+DOC+PDF+V0//EN&language=EN [Accessed 23 August 2016].

[4] For first contributions on the SSM, see e.g. E. Ferran and V. Babis, "The European Single Supervisory Mechanism" (2013) 13 *Journal of Corporate Law Studies* 255; E. Wymeersch, "The Single Supervisory Mechanism or "SSM", Part One of the Banking Union", ECGI Law Working Paper No. 240/2014 (February 2014); G. Ferrarini and L. Chiarella, "Common Banking Supervision in the Eurozone: Strengths and Weaknesses", ECGI Law Working Paper No. 223/2013 (August 2013); B. Wolfers and T. Voland, "Level the Playing Field: the New Supervision of Credit Institutions by the European Central Bank" (2014) 51 *Common Market Law Review* 1463; R. Lastra, "Banking Union and Single Market: Conflict or Companionship" (2013) 36 *Fordham International Law Journal* 1190; S. Seyad, "The Impact of the Proposed Banking Union on the Unity and Integrity of the European Union Single Market" (2013) 18 *Journal of International Banking Law and Regulation* 99; P. Schammo, "Differentiated Integration and the Single Supervisory Mechanism: Which Way Forward for the European Banking Authority?" in P. Birkinshaw & A. Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (The Netherlands: Kluwer International, 2016); D. Busch and G. Ferrarini, *European Banking Union* (Oxford: OUP, 2015). In this paper, I am not assessing the broader question of the constitutional impact of closer integration within the Eurozone of which the SSM is an important part. For contributions to this debate, see e.g., K. Tuori and K. Tuori, *The Eurozone Crisis – a Constitutional Analysis* (Cambridge: CUP 2014), A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford: OUP, 2015); F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes, Constitutional Challenges* (Oxford: OUP, 2016).

so far been made to assess the ECB's duty of care for the unity and integrity of the internal market. With respect to this duty, I will argue that it is effectively 'conduct-focused'. Accordingly, this article rejects the idea that the duty of care commits the ECB to securing the unity or integrity of the internal market. Suggestions will be offered on how the ECB should discharge it. In the process of assessing the ECB's duty of care, I will also assess its relationship with the case law on duty of care (or duty of diligence) which the Court of Justice of the European Union (the 'Court') has championed. Indeed, the Court has long insisted that EU institutions such as the Commission owe a duty of care. However, I will argue that the latter should not be confounded with the ECB's duty of care for the unity and integrity of the internal market.

To address the above aims, this article proceeds as follows. It begins by assessing the *raison d'être* of the duty of care for the unity and integrity of the internal market. It then goes on to present the duty of care concept and offer a normative assessment. It ends with a few concluding comments.

The raison d'être of the ECB's duty of care: prudential supervision and the internal market

This section examines the *raison d'être* of the ECB's duty of care: i.e., to contribute to addressing potential threats to the unity/integrity (or the 'singleness') of the internal market caused by supervisory activities. *A priori*, this is somewhat counter-intuitive since sound supervision, by promoting confidence and stability, contributes to ensuring that the single market functions properly. However, as we will see, there is room for tension. To assess the *raison d'être*, two issues need to be clarified: first, the functional scope of supervision by which I mean the prudential activities or functions which supervisory authorities undertake; and secondly, the geographical scope of these activities by which I mean the distribution of prudential oversight competences in the banking sector in the wake of the establishment of the SSM.

The functional scope of prudential supervision

This sub-section looks at the functional scope of prudential supervision with a view to explaining how the exercise of supervisory activities might come to disrupt the functioning of the internal market. However, I will first begin by introducing the subject area: prudential supervision.

In the prudential field, it is common to differentiate between micro- and macro-prudential supervision. Micro-prudential supervision focuses on the safety and soundness of individual credit institutions.[5] It deals with matters such as the licensing of credit institutions, the supervision of individual banks, the enforcement of rules and regulations, etc.[6] Macro-prudential supervision is meanwhile about the stability of the

[5] Supervisors may have other objectives (e.g. consumer protection) besides this primary objective. According to the Core Principles for Effective Banking Supervision of the Basel Committee, any such other objectives should not conflict with the primary objective. See Bank for International Settlements (Basel Committee on Banking Supervision), "Core Principles for Effective Banking Supervision" (September 2012), pp.4-5, http://www.bis.org/publ/bcbs230.pdf [Accessed 23 August 2016].

[6] A typical list of micro-prudential tools includes instruments such as those found in art.4 of the SSM Regulation. See E. Wymeersch, "The Single Supervisory Mechanism or "SSM", Part One of the Banking Union", National Bank of Belgium, Working Paper Research No 255 (April 2014) p.13, https://www.nbb.be/doc/ts/publications/wp/wp255en.pdf [Accessed 23 August 2016], describing the list as 'constitut[ing] the core activity of any prudential supervisor'. See also Deutsche Bundesbank,

financial system as a whole.[7] It was one of the great lessons of the financial crisis that more attention needed to be paid to the latter.[8] From this emerged a much greater focus on macro-prudential policy as a key area for addressing systemic risk which had hitherto gone unnoticed by supervisors who were primarily focused on the oversight of individual institutions.[9] The legal bases of much of the macro-prudential toolkit are found in EU capital requirements legislation (that is, the CRD IV and CRR),[10] although some tools have purely a national origin.[11] The macro-prudential toolkit includes instruments such as capital surcharges, requirements regarding liquidity or other bank balance sheet restrictions,[12] but also measures which target borrowers instead of banks: e.g. caps such as loan-to-value (LTV), loan-to-income (LTI) and debt service-to-income (DSTI) caps.[13] Capital buffers are common instruments in the

---

"European Single Supervisory Mechanism for Banks - a First Step on the Road to a Banking Union", Deutsche Bundesbank Monthly Report (July 2013), p.16, https://www.bundesbank.de/Redaktion/EN/Downloads/Publications/Monthly_Report_Articles/2013/2013_076_single.pdf?__blob=publicationFile [Accessed 23 August 2016], noting that '... the tasks conferred on the ECB essentially cover the entire spectrum of material rules relating to the prudential supervision of credit institutions …'.

7 e.g. European Central Bank, "Financial Stability Review" (May 2014), p.135, https://www.ecb.europa.eu/pub/pdf/other/financialstabilityreview201405en.pdf??b9ad281efe7751025dd1bb9b6673e07c [Accessed 23 August 2016].

8 e.g. The High-Level Group on Financial Supervision in the EU, "Report" (25 February 2009), p.39, http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf [Accessed 23 August 2016]; FSA Turner Review, "A regulatory response to the global banking crisis" (March 2009) p.84, http://www.fsa.gov.uk/pubs/other/turner_review.pdf [Accessed 23 August 2016].

9 For an overview of developments in this area, see A. Baker, "Macroprudential Regulation" in D. Mügge (ed), *Europe and the Governance of Global Finance* (Oxford: OUP 2014) p.172.

10 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338; Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 [2013] OJ L176/1. See also European Systemic Risk Board, "Flagship Report on Macro-Prudential Policy in the Banking Sector" (March 2014), p.21, https://www.esrb.europa.eu/pub/pdf/other/140303_flagship_report.pdf [Accessed 23 August 2016], highlighting CRD arts 130 and 135-140 (countercyclical capital buffer); CRD Art 131 (systematically important institution buffer); CRD arts 133 and 134 (systemic risk buffer); CRD Art 105 (liquidity requirements under so-called Pillar 2); CRD art 103 (other macroprudential use of Pillar 2); CRR Art 458 (for higher requirements on capital, liquidity, large exposures and risk weights); CRR Art 124 (for higher real estate risk weights and stricter lending criteria); CRR Art 164 (for higher minimum exposure weighed average LGDs).

11 The latter include loan-to-value (LTV), loan-to-income (LTI) or debt service-to-income (DSTI) caps. The caps affect the credit which a person is able to borrow by taking as a measure the value of real estate (LTV cap) or the income of the borrower ((LTI/DSTI cap). See European Systemic Risk Board, "The ESRB Handbook on Operationalising Macro-Prudential Policy in the Banking Sector" p.8, https://www.esrb.europa.eu/pub/pdf/other/140303_esrb_handbook_mp.en.pdf?ac426900762d505b12c3ae8a225a8fe5 [Accessed 23 August 2016].

12 See I. Angeloni, "Towards a Macro-Prudential Framework for the Single Supervisory Area" (20 April 2015), https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150420.en.html [Accessed 23 August 2016]. For a more detailed overview, see e.g. ESRB, "Flagship Report" (fn.10); "ESRB Handbook on Operationalising Macro-Prudential Policy in the Banking Sector' (fn.11).

13 The caps affect the credit which a person is able to borrow by taking as a measure the value of real estate (LTV cap) or the income of the borrower ((LTI/DSTI cap). Note however that these caps have a national, as opposed to an EU, origin. See 'ESRB Handbook on Operationalising Macro-Prudential Policy in the Banking Sector' (fn.11) p.8.

capital-based toolkit.[14] A countercyclical buffer for example attempts to counteract pro-cyclicality in the financial system by seeking to act on a bank's lending activity.[15] Specifically, during an economic 'upswing', a buffer can contribute to dealing with the development of vulnerabilities in the banking system by raising the cost of capital for banks, thereby seeking to prevent credit from becoming too cheap and banks from lending excessively. During an economic downswing, 'releasing' the buffer can help to improve the resilience of the banking system and thereby help to make sure that the economy continues to benefit from a steady supply of credit.[16]

However, there are complications. Firstly, there is an element of conjecture in forecasting the effects of prudential action. Indeed, the effectiveness of, say, capital requirements depends a great deal on how banks decide to react to the imposition of such requirements.[17] They can respond to an increase in capital requirements – supposed to incentivise them to curb excessive lending activities – by reducing risk-weighted assets (that is, assets that are weighed according to their riskiness).[18] As a result, they might also decide to reduce lending activities.[19] However, they might also respond by retaining earnings, reducing dividend payments, raising new capital, possibly using existing (voluntary) buffers to absorb the increase, or try to transfer capital within their group. Secondly, complications arise because of the way in which micro- and macro-prudential supervision can interact. They can complement each other, but there is also room for tension or conflict.[20] Tensions might for example arise during economic downturns when the objectives of macro- and micro-prudential supervisors can differ. Thus, for the former loosening regulatory requirements might

[14] European capital requirements legislation makes provision for a variety of capital buffers. Among the relevant provisions are arts 130 and 135-140 CRD (countercyclical capital buffer); art. 131 CRD (systemically important institution buffer); arts 133 and 134 CRD (systemic risk buffer); art. 129 CRD (capital conservation buffer). For a description of the purpose of each of these buffers, see European Commission, "Capital Requirements – CRD IV/CRR – Frequently Asked Questions" (16 July 2013), http://europa.eu/rapid/press-release_MEMO-13-690_en.htm [Accessed 23 August 2016] and "ESRB Handbook on Operationalising Macro-Prudential Policy in the Banking Sector" (fn.11).

[15] See for details "ESRB Handbook on Operationalising Macro-Prudential Policy in the Banking Sector" (fn.11) pp.25-47.

[16] ESRB, "Flagship Report" (fn.10) p.12.

[17] In relation to the CCB, see for details "ESRB Handbook on Operationalising Macro-Prudential Policy in the Banking Sector' (fn.11) p.31. For a study assessing the effects of raising capital requirements on cross-border bank lending activities, see e.g. S. Aiyar, C. Calomiris, J. Hooley, Y. Korniyenko and T. Wieladek, "The International Transmission of Bank Capital Requirements: Evidence from the United Kingdom" Bank of England Working Paper No. 497 (April 2014) finding that banks tend to respond to an increase in capital requirements by reducing cross-border credit to banks rather than to firms or households 'suggesting that cross-border spillovers are transmitted primarily through a liquidity shock to the foreign banking system'. See also S. Ongena, A. Popov and G. Udell, '"When the cat's away the mice will play": does regulation at home affect bank risk-taking abroad?' (2013) 108 *Journal of Financial Economics*, p.727.

[18] The riskier an asset, the more capital a bank must have.

[19] "ESRB Handbook on Operationalising Macro-Prudential Policy in the Banking Sector" (fn.11) p.31.

[20] See e.g. J. Osiński, K. Seal and L. Hoogduin, "Macroprudential and Microprudential Policies: Toward Cohabitation", IMF Staff Discussion Note 13/05 (June 2013) p.9, https://www.imf.org/external/pubs/ft/sdn/2013/sdn1305.pdf [Accessed 23 August 2016]. See also ECB, "Financial Stability Review" (fn.7) p.135, https://www.ecb.europa.eu/pub/pdf/other/financialstabilityreview201405en.pdf??b9ad281efe7751025dd1bb9b6673e07c [Accessed 23 August 2016]; S. Claessens "An Overview of Macroprudential Policy Tools", IMF Working Paper WP/14/214, pp.10-11, https://www.imf.org/external/pubs/ft/wp/2014/wp14214.pdf [Accessed 23 August 2016]; P. Angelini, S. Nicoletti-Altimari and I. Visco, "Macroprudential, Microprudential and Monetary Policies: Conflicts, Complementarities and Trade-offs", Questioni di Economia e Finanza Number 140 (November 2012), http://www.bancaditalia.it/pubblicazioni/qef/2012-0140/QEF_140.pdf [Accessed 23 August 2016].

be an appropriate strategy during downturns since it might facilitate the supply of credit to the economy.[21] Yet for the latter the opposite may be true: maintaining or tightening requirements might be necessary in order to ensure that the interests of depositors are protected.[22] Thirdly, questions over tensions and complementarities also arise in relation to other areas,[23] such as monetary policy.[24] Indeed, much been said about potential conflicts between monetary policy and supervision. The EU legislature insisted on a clear separation of functions when vesting the ECB with its supervisory tasks.[25] However, this is not to say that it is desirable that each function takes place in a vacuum. There are benefits to be reaped, especially in terms of information sharing between both functions.[26]

Fourthly – and crucially for our purposes – prudential action can affect the internal market and the free movement principles which underpin it. To be sure, the objectives of prudential supervision, its emphasis on the safety and soundness of banks and the stability of the financial system are meant to contribute importantly to the proper functioning of a single market: for example, in the case of macro-prudential policy by addressing systemic risk and the externalities which give rise to such risk.[27] However, the tools that micro- and macro-prudential supervisors have at their disposal can potentially cause fragmentation or otherwise disrupt the working of the internal market. These tools include (micro-prudential) tools such as licensing which conditions access to host states,[28] but also tools which are more complex to use and whose effects are more complex to assess: think of capital or liquidity buffers for

---

[21] Claessens "An Overview of Macroprudential Policy Tools" (fn.20) p.11. See also ESRB, "Flagship Report" (n 10) 16.

[22] Ibid.

[23] See e.g. Claessens, "An Overview of Macroprudential Policy Tools" (n 20) 10-11 (focusing on macro-prudential policy).

[24] See I. Angeloni, "Towards a Macro-Prudential Framework for the Single Supervisory Area" (20 April 2015), https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150420.en.html#17 [Accessed 23 August 2016], with respect to monetary policy and macro-prudential policy. See also International Monetary Fund, "The Interaction of Monetary and Macroprudential Policies' (29 January 2013), https://www.imf.org/external/np/pp/eng/2013/012913.pdf [Accessed 23 August 2016]; P Fisher, "Microprudential, Macroprudential and Monetary Policy: Conflict, Compromise or Co-ordination?" (1 October 2014), http://www.bankofengland.co.uk/publications/Documents/speeches/2014/speech759.pdf [Accessed 23 August 2015].

[25] See e.g. recitals 65 and 73, art.25 SSM Regulation. See also ECB, "Decision of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank" (ECB/2014/39), https://www.ecb.europa.eu/ecb/legal/pdf/en_ecb_2014_39_f_sign.pdf [Accessed 23 August 2016].

[26] See in this context ECB, "Decision of the European Central Bank of 17 September 2014" (fn.25), Recital 14. In the case of the ECB, confidential information between the supervisory and monetary policy functions can be exchanged on a 'need to know' basis and according to rules set out in the above ECB decision (see arts 5 and 6). See also art.8 on the special provisions governing exchange of information in emergency situations.

[27] See also in this context Recital 27 of Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1, noting that '…systemic risks include risks of disruption to financial services caused by a significant impairment of all or parts of the Union's financial system that have the potential to have serious negative consequences for the internal market and the real economy'.

[28] Recital 20 SSM Regulation, noting that licensing (i.e. prior authorization) 'for taking up the business of credit institutions is a key prudential technique …'.

instance.[29] Such prudential measures can have important spillover effects across jurisdictional boundaries which affect cross-border flows of capital. To be sure, from a macro-prudential point of view, cross-border effects might be intended. Thus, in the case of interconnected jurisdictions whose financial cycles coincide, capital buffers can have similar positive effects by, say, counteracting the effects of excessive credit growth during economic upturns. However, problems arise in the case of uncoordinated action or where prudential measures are discriminatory or disproportionate. This might for example be the case where prudential measures are used in order to 'ring fence'[30] bank capital or liquidity domestically: for instance at the level of a subsidiary located in a host jurisdiction with a parent entity located elsewhere.[31] Ring fencing has been the subject of controversy. While it is seen by some as a necessary and legitimate means to protect local economies from the effects of capital or liquidity transfers between jurisdictions,[32] EBA has described it as the 'most severe case of damaging the internal market'.[33] Measures might also be considered undesirable because they unlevel the playing field: for example where institutions holding the same portfolios are subject to different capital requirements in different Member States.[34]

There are of course rules in place for dealing with internal market disruptions.[35] There will be more to say about safeguards later. For now suffices to note that various national authorities adopted 'ring fencing' measures during the financial crisis years.[36] These were either individual measures or measures affecting the banking system as a whole.[37] As the Commission noted:

> 'some banking supervisors introduced measures with 'ring-fencing' effects between 2008 and 2013, mostly in response to the economic and financial

[29] See also generally on this issue, European Banking Authority, "EBA Opinion on the Macroprudential Rules in CRR/CRD", EBA/Op/2014/06 (30 June 2014).

[30] For the Commission 'ring-fencing' arises where competent authorities 'take actions aimed at retaining liquidity, dividends and other bank assets within national borders' (see Commission, "Legal Obstacles to the Free Movement of Funds between Institutions within a Single Liquidity Sub-group" COM(2014) 327 final, p.4).

[31] See also European Banking Authority, "EBA Opinion on the Macroprudential Rules in CRR/CRD' (fn.29) p.32 (note 23), noting that 'ring fencing' can be achieved if '… a Member State restricts the flow of capital between subsidiaries (or sub-consolidated levels) of a group by requiring that the subsidiaries (or sub-consolidated levels) in its jurisdiction must hold a certain amount of capital, effectively locking in the capital within that subsidiary (or sub-consolidated level)'.

[32] See in this context the opinion article by M. Hampl and V. Tomšík (vice-governors of the Czech national bank), "Europe Risks Creating another Icesave", Financial Times, (18 July 2011), http://www.ft.com/cms/s/0/e1e635be-b173-11e0-9444-00144feab49a.html#axzz3xyEMW61o [Accessed 23 August 2016].

[33] European Banking Authority, "EBA Opinion on the Macroprudential Rules in CRR/CRD" (fn.29) p.15.

[34] Ibid.

[35] See e.g. the Treaty freedoms (but recall that obstacles can be justified: see e.g. in the context of the free movement of capital, art.65(1)(b) TFEU). Provisions in capital requirements legislation also address internal market concerns (e.g. art.458(4) CRR).

[36] According to the Commission, areas in which such measures were identified were in the Pillar 2 area, the large exposure regime and under domestic liquidity frameworks. See Commission, "Legal Obstacles to the Free Movement of Funds" (fn.30) p.4. See also Commission, "Commission Staff Working Document on the Movement of Capital and the Freedom of Payments" SWD(2015) 58 final, p. 27.

[37] "Staff Working Document on the Movement of Capital and the Freedom of Payments" (fn.36) p.27.

> crisis, in order to keep bank assets within national borders or to pre-emptively strengthen the liquidity position of local banks'[38]

The Commission also noted that:

> '… in certain cases supervisors decided to take action unilaterally, without consulting the other supervisors concerned, even in areas where EU banking legislation so requires. ... In addition, some of the measures reported raised questions about their appropriateness and proportionality in relation to the prudential concerns they were designed to address. Ring-fencing along national borders has thus increased market fragmentation …'.[39]

Hence, the relationship between prudential action and the internal market can be complex and multi-faceted. Indeed, this relationship is arguably further complicated by the fact that macro-prudential policy, its effects and concepts, are not yet fully understood.[40] Admittedly, since the financial crisis, the prudential framework has grown in sophistication both substantively and institutionally. We saw the establishment of the SSM in 2013. However, the SSM has not put the above problematic fully to rest. To appreciate this point, we need to look closer at the geography of supervision, to which I turn now.

The geographical scope of prudential supervision

In the above section, I looked at the tools which supervisors have at their disposal and how their use might come to affect the internal market. However, I left questions about the geography of supervision in the micro- and macro-prudential fields aside. By geography of supervision, I mean the distribution of prudential oversight competences in the wake of the establishment of the SSM. In order to make sense of the internal market problematic that I highlighted above, this aspect needs closer investigation.

The establishment of the SSM marked a significant shift towards centralised supervision. Like the BU, the decision to put the SSM in place is firmly tied to the Eurozone's efforts to get a handle on the sovereign debt crisis which hit the Eurozone in the years that followed the financial crisis. However, as we will see, the SSM is geographically limited to a group of Member States. As a result, the EU institutional set-up in the prudential field is rather complex. I will begin by looking at the geography of prudential supervision in the SSM area, after which I will turn to the whole of the EU. In each part, I will seek to clarify how the geography of supervision relates to concerns over internal market disruptions.

---

[38] Ibid. See also Commission, "A Single Market for Growth and Jobs: an Analysis of Progress made and remaining Obstacles in the Member States' COM(2013) 785 final, p.9. For further examples, see European Bank for Reconstruction and Development, "Transition Report 2012: Integration Across Borders", p.54, http://www.finpolconsult.de/mediapool/16/169624/data/Housing_Markets/EBRD_Transition_Report_12.pdf [Accessed 23 August 2016].

[39] "Commission Staff Working Document on the Movement of Capital and the Freedom of Payments" (fn.36) p.27.

[40] See e.g. Claessens, "An Overview of Macroprudential Policy Tools" (fn.20). See also Angeloni, "Towards a Macro-Prudential Framework for the Single Supervisory Area" (fn.12) noting that using macro-prudential policy in SSM area will be difficult 'partly because some of the concepts are not yet sufficiently developed'.

Geographical scope (I): prudential supervision in the SSM area

As noted, the SSM does not extend to the EU as a whole. It is an example of closer integration among a group of Member States (known as 'participating Member States'), which are first and foremost Eurozone countries. The SSM is also open to Member States which do not have the euro as their currency. However, to join the SSM, these non-Euro Member States must enter into a close cooperation agreement with the ECB and as such submit to the authority of the ECB in its role under the SSM Regulation.[41] I will first look at micro-prudential supervision in the SSM area, after which I will turn to macro-prudential supervision in this area.

- Micro-prudential supervision in the SSM area

The establishment of the SSM changed the institutional landscape in the micro-prudential area. It led to a significant transfer of competences from participating Member States to the ECB. The ECB became a day-to-day micro-prudential supervisor with broad powers. [42] Admittedly, the ECB only directly supervises 'supervised entities' or 'supervised groups' which are judged to be 'significant' according to criteria set out in the SSM Regulation and the SSM Framework Regulation.[43] 'Less significant' supervised entities will as a general rule be supervised by the authorities of participating Member States.[44] That said, even if an institution is deemed to be 'less significant', the ECB will solely be competent to (i) authorise or withdraw the authorisation of a credit institution and (ii) assess the notifications of the acquisition and disposal of holdings in credit institutions.[45] Moreover, authorities of participating Member States are subject to the authority of the ECB, which has also an oversight role to play.[46] Indeed, the SSM Regulation goes as far as providing that the ECB can take over the supervision of a credit institution which would otherwise be

[41] See art.7 SSM Regulation.
[42] For details on the ECB's tasks, see art.4 SSM Regulation (to be applied according to the criteria set out in art.6(4)). Note that the ECB is also responsible 'for the effective and consistent functioning of the SSM' (art.6(1)).
[43] The SSM Regulation refers to size, importance for the economy, or significance of cross-border activities (see art.6(4) sub-para 1). Significance is established on an individual or on a consolidated basis. See for details Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation with the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L141/1. However, the SSM Regulation makes it plain that a bank should generally 'not be considered less significant' – and hence *be* subject to direct supervision by the ECB – in one of the following scenarios: the total value of its assets is more than 30 billion euros; the ratio of its total assets over the GDP of the participating Member State represents more than 20% 'unless the total value of its assets is below EUR 5 billion'; or where a national competent authority notifies the ECB that it considers an institution to be of significant domestic economic relevance and the ECB, after evaluation, confirms its significance. An institution must also be considered significant where public financial assistance has been requested or received 'directly from the ESFS or the ESM'. The regulation also provides for the ECB to consider of its own initiative an institution to be significant in case where the latter operates across the border by way of subsidiaries in at least one participating Member States and where its cross-border assets or liabilities 'represent a significant part of its total assets or liabilities'. Finally, the regulation requires the ECB to carry out its supervisory tasks in relation to the 'three most significant credit institutions' in each participating Member State 'unless justified by particular circumstances'. See art.6(4). 'Supervised entity' and 'supervised group' are among the terms that are defined in art.2 of the SSM Framework Regulation.
[44] See art.6(4) SSM Regulation.
[45] See art.6(4).
[46] See art.6(5)(c).

subject to national supervision if 'necessary to ensure consistent application of high supervisory standards'.[47]

Hence, the ECB plays a key micro-prudential role in the SSM area. Because the ECB was vested with supervisory tasks, the traditional home-host model has been significantly eroded as an arrangement that governs the relations between authorities within the SSM space.[48] Recall that together with the principle of mutual recognition, the home-host model – especially the home country principle – is key for distributing supervisory competences among horizontally arrayed national authorities in many regulatory fields. Specifically, the home-host model has lost most of its significance where the ECB assumes competence in lieu of national authorities pursuant to the SSM Regulation.[49] Moreover, whilst national authorities continue to act as home and host authorities in the case of less significant entities,[50] they nevertheless act in the shadow of the ECB which has, as noted, inter alia an oversight role to play.[51] For groups, the ECB may now also act as consolidating supervisor (based on the 'significance' criteria), hence assuming competences that were hitherto exercised by national authorities.[52]

One of the expectations associated with these changes is that they will resolve some of the problems of the past: for example, the fact that some supervisors were seen as biased. Such behaviour unlevels the playing field and has also been associated with 'ring-fencing' that is prejudicial to the internal market and that I described in the previous section. As Danièle Nouy, chair of the ECB's Supervisory Board put it somewhat bullishly when describing the benefits of the Banking Union for financial markets and the single market:

> '…the possibility of "national bias" playing a part in supervision will be eliminated. Under the old supervisory system, situations may have occurred in which supervisory agencies treated national and foreign institutions differently. This allowed for behaviours such as the promotion of national champions and the ring-fencing of capital, which clearly distorted the functioning of free financial markets and created de facto barriers to the single European market'.[53]

[47] See art.6(5)(b). The provision adds that the ECB can also do so 'where financial assistance has been requested or received indirectly from the ESFS or the ESM'.

[48] Note that whilst the home-host model applies in relation to branches, it is also common to use this terminology in relation to subsidiaries in a cross-border context.

[49] However, even when the ECB assumes direct supervisory competence, cooperation between national authorities and the ECB is crucial at the operational level. See for details on the procedure applying in relation to the establishment of branches where the ECB is competent according to the 'significance' criteria, art.11(1) and (3) SSM Framework Regulation. For the free provision of services, see art.12(1) SSM Framework Regulation. See also in this context art.17(1) SSM Regulation which states that existing procedures for the exercise of cross-border rights (by way of the free provision of services or the establishment of branches) and home-host competence remain unchanged 'for the purposes of the tasks *not* conferred on the ECB by Article 4 [of the SSM Regulation]' (emphasis added).

[50] See art.11(2) and (4) SSM Framework Regulation in relation to the establishment of branches. For the free provision of services, see art.12(2). However, recall also that the ECB is competent to authorise credit institutions irrespective of the 'significance' criterion.

[51] See also art.6(5)(b) SSM Regulation which allows the ECB to take over supervision from national authorities.

[52] See art.8 SSM Framework Regulation. See also art.17(2) SSM Regulation.

[53] D. Nouy, "The Banking Union and Financial Integration' (27 April 2015), https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150427.en.html#2 [Accessed 23 August 2016].

That said, scope for supervisory failures will undoubtedly remain. No institutional arrangement is fool proof and even if the ECB is better placed than national authorities to take a pan-SSM view, national authorities, whose failings contributed importantly to bringing about the SSM, ultimately continue to play an important role in the ECB's decision-making processes. Moreover, as we will see below when considering supervisory arrangements outside the SSM area, the fact that the ECB was vested with supervisory competence did not put concerns over internal market disruptions to rest.

- Macro-prudential supervision in the SSM area

In contrast to the ECB's micro-prudential competences, the ECB's role in macro-prudential supervision is more limited. The main actors in the macro-prudential field are national bodies. By national bodies, I mean mainly central banks. However, financial supervisors or cross-institutional committees, which bring together representatives from different bodies, might also be competent.[54] The ECB's powers in the macro-prudential field are said to be asymmetrical. The main provision is art.5 of the SSM Regulation. The thrust of this provision is to allow the ECB to tighten macro-prudential tools: i.e., to apply higher requirements or more stringent measures than authorities/bodies in participating Member States.[55] However, the ECB cannot loosen measures. Moreover, some tools – say LTV and LTI caps – are out of the ECB's reach because they have no EU origin, but are based purely on national law.

Hence, the institutional landscape in the macro-prudential and micro-prudential fields differ markedly. The prime competence of national authorities/bodies in macro-prudential supervision is believed to be justified because of continuing differences between Member States: for instance in terms of their financial cycles or in terms of systemic risks which they might come to face.[56] Hence, the argument is that more granular action (i.e., action at Member State level, as opposed action at EU level) might be more appropriate.

However, national authorities have national mandates and their life and death are decided nationally. Unsurprisingly, there is a risk that unilateral actions by Member State authorities have detrimental effects beyond national borders. These negative effects are externalities for other jurisdictions and they may come to disrupt the internal market. Indeed, these risks do not just appear to be academic since national authorities do not in actual practice appear to spend much effort on examining potential cross-border effects.[57] Moreover, *in*action by national authorities

[54] See e.g. V. Constâncio, "Strengthening Macroprudential Policy in Europe" (3 July 2015), https://www.ecb.europa.eu/press/key/date/2015/html/sp150703.en.html#footnote.10 [Accessed 23 August 2016], noting that '[h]eterogeneity also extends to the competent authorities for implementing the measures. In some countries it is the central government, in others it is the central bank, and in still others authority is in the hands of a committee that involves different national bodies (cross-institutional committee)'.

[55] See art.5(2).

[56] See IMF Country Report, "European Union: Publication of Financial Sector Assessment Program Documentation - Technical Note on Macroprudential Oversight and the Role of the ESRB", IMF Country Report No. 13/71 (March 2013) p.21 noting that '[n]ational authorities will be allowed to retain macroprudential powers under the SSM – providing flexibility to tailor solutions to local conditions—but in close cooperation with the ECB'; cf. ECB, "Opinion of the European Central Bank of 25 January 2012 …" [2012] OJ C105/1, p.4 noting that '… economic and financial cycles are not completely harmonised across Member States, and Member States may face different types of systemic risk'.

[57] European Systemic Risk Board, "A Review of Macro-Prudential Policy in the EU one Year after the

might just as much be an issue than action. During economic boom times, for example, national authorities might be reticent to intervene by tightening macro-prudential measures.[58]

To be sure, a number of safeguards were put in place in order to address these risks. As noted, the ECB has macro-prudential powers. Thus, the fact that the ECB can tighten macro-prudential measures which have an EU origin should contribute to preventing any ‘inaction bias’.[59] Moreover, to prevent uncoordinated action by national authorities, art.5 of the SSM Regulation sets out a notification procedure between national authorities and the ECB.[60] Generally speaking, it is expected that the ECB will, within the scope of its powers, seek to ensure that potential cross-border externalities among participating Member States are identified.[61] However, it is also worth acknowledging that the ECB’s own macro-prudential powers can have unwanted side-effects: for example, if actions lack sufficient granularity or if country specificities are not taken properly into account by ECB. Art.5 of the SSM Regulation seeks to address this type of concern by putting in place notification requirements and requiring the ECB to cooperate with the relevant national authorities.[62] Moreover, art.5(5) states explicitly that when taking macro-prudential action, the ECB must take ‘into account’ the specificities of the ‘financial system, economic situation and the economic cycle in individual Member States or parts thereof’. However, it does not explicitly require the ECB to have regard to the internal market.[63]

Geographical scope (II): prudential supervision in the EU as a whole

To fully make sense of the problematic which links prudential supervision to threats to the singleness of the internal market, it is crucial to pay closer attention to the limited geographical scope of the SSM. As previously noted, the SSM does not extend to the whole of the EU. It is an example of closer integration among a group of Member States which are currently all Eurozone Member States. Outside the SSM area, micro- and macro-prudential supervision remains primarily a matter for national authorities. These authorities are central banks, financial authorities and possibly

---

Introduction of the CRD/CRR” (June 2015), https://www.esrb.europa.eu/pub/pdf/other/150625_review_macroprudential_policy_one_year_after_intro_crdcrr.en.pdf [Accessed 23 August 2016], noting that ‘[i]n general, national authorities do not analyse the potential cross-border effects of national macroprudential measures in great detail’. See ECB, “Annual Report 2014” (2015), p.58, https://www.ecb.europa.eu/pub/pdf/annrep/ar2014en.pdf?e0dd86a5e7ab86204869c181ad6c1478 [Accessed 23 August 2016], noting that ‘… the assessment by authorities of the potential cross-border impact of national measures has been rather limited, although work on the matter has been carried out by the ESRB’.

[58] C. Salleo, “Single Market versus Eurozone” in F. Allen, E. Carletti and J. Gray (eds), *The New Financial Architecture in the Eurozone* (Florence: European University Institute, 2015, RSCAS, Florence School of Banking and Finance), p.179, at p.189.

[59] See also art.102 SSM Framework Regulation which clarifies that the ECB is not prevented from setting buffer requirements where a national authority does not set a buffer rate.

[60] See also arts 101-105 SSM Framework Regulation.

[61] IMF Country Report (fn.56) p.21, noting that ‘[t]he macroprudential powers of the ECB will facilitate early identification and action on systemic risks, and enhance information sharing, home host coordination, and internalization of cross-border externalities within the SSM’.

[62] See art.5(4) SSM Regulation.

[63] Other provisions however do. See e.g. art.1 SSM Regulation. See also the provisions of the CRD/CRR.

other bodies which bring together representatives from different institutions, including national governments.[64]

Because the SSM does not extend to the EU as a whole, the allocation of powers and competences between Member States which are part of the SSM and those that are not continues to be based on the traditional home-host model. However, following the establishment of the SSM, the ECB will assume functions that were previously exercised by national authorities that are now part of the SSM. Thus, the ECB will, when it is competent according to the SSM Regulation, act in its relations with authorities of *non*-SSM Member States as either the competent authority of the home Member State or as competent authority of the host Member State.[65] For groups, it might also act as consolidating supervisor.

In order to ensure effective cross-border supervision throughout the EU, cooperation and coordination arrangements will continue to remain crucial. These arrangements include specific obligations to cooperate, but also supervisory colleges as far as banking groups are concerned. Interventions by EU bodies such as the European Banking Authority or the (non-binding) activities of the European System Risk Board at macro-prudential level will also continue to prove important.

To be sure, even if the SSM is geographically limited, it is expected to benefit Member States which are not part of the SSM. This is because a more stable Eurozone benefits the EU as a whole. Moreover, even if the home-host model remains in place in the relations between the SSM and non-SSM Member States, the ECB might prove to be a more effective interlocutor in a home-host setting than some national authorities. However, it is also plain that some of the expected benefits of ECB supervision which I highlighted earlier – e.g. addressing 'national bias' in supervisory decisions – cannot be replicated on an EU wide basis. Furthermore, the establishment of the SSM, as a geographically limited mechanism, created an entirely new set of issues: it opened up a new fracture in the EU's fabric: that is, between Member States that are part of the SSM and those that are not. Unsurprisingly, the establishment of the SSM and the Banking Union gave rise to some noticeable anxieties in Member States such as the UK. Thus, for the UK, closer integration in the Eurozone raised the outlook of the Eurozone and the ECB coming to share interests which were at odds with the interests of non-SSM Member States. These anxieties were typically intertwined with concerns about the future of the internal market in a more fractured Union.[66] They were voiced inter alia during the UK government's so-called 'Balance of Competences Review':

---

[64] See e.g. the Financial Stability Council in Sweden, http://www.riksbank.se/en/Financial-stability/The-Financial-Stability-Council/Council-for-cooperation-on-macroprudential-supervision/ [Accessed 23 August 2016].

[65] In case of 'passporting out' of the SSM area, see art.4(1)(b) SSM Regulation and art.17 SSM Framework Regulation. With regard to 'passporting in' (i.e. into the SSM area), see art.4(2) SSM Regulation and arts 13-17 SSM Framework Regulation. In both scenarios, the distribution of home-host competence between the ECB and national authorities within the SSM space depends on the 'significance' criteria. However, with respect to the free provision of services, note that that in the case of 'passporting in', the ECB will carry out the tasks of the authority of the host Member State *irrespective* of the 'significance' criterion (see art.16 SSM Framework Regulation).

[66] See e.g. House of Commons (Foreign Affairs Committee), "The Future of the European Union: UK government policy" (First Report of Session 2013-14, Volume I) p.41, http://www.publications.parliament.uk/pa/cm201314/cmselect/cmfaff/87/87.pdf [Accessed 23 August 2016], noting that '[t]he Government has been concerned above all about the risk that further integration in the Eurozone might 'spill over' into the Single Market and jeopardise the UK's ability to participate meaningfully in Single Market decision-making'.

> While the development of the banking union and the European System of Financial Supervision were generally welcomed by stakeholders as important responses to the crisis, there were also strong views that the UK, other Member States and the EU institutions should ensure that steps to support the stability of the euro area do not impair the integrity of the Single Market or act against the UK's national interest[67]

Hence attempts to stabilize the Eurozone and to vest the ECB with extensive supervisory tasks were not welcomed unreservedly. From a UK standpoint, these efforts risked being double-edged: by creating conditions for the singleness of the internal market to be undermined and threatening inter alia the ability of UK based institutions to have access to the internal market.

Admittedly, following the EU referendum of June 2016, these concerns are now dwarfed by a new set of issues regarding the future relationship of the UK with the EU and the question of whether UK based institutions will continue benefiting from single market access. This is not the place to discuss these issues. Suffices to note that the reality of the concerns that were voiced in relation to the Banking Union and the SSM remains to be established.[68] There is in theory room for friction between the SSM and non-SSM Member States because prudential policy can be used for competitive purposes, hence for purposes other than were intended.[69] Moreover, even where prudential actors share the same overall ambitions (in terms of bank resilience for instance), they might still see the world (as it were) through different lenses because of, say, structural differences between jurisdictions.[70] As a result, they may also adopt different policy standpoints, which might ultimately create frictions. Be that as it may, the likelihood of externalities and more generally of disruptions to the internal market will also depend on the effectiveness of the arrangements that are put in place in order to address such effects.[71] These arrangements include a duty of care for the integrity and unity of the internal market to which I turn now.

[67] HM Government, "Review of the Balance of Competences between the United Kingdom and the European Union - The Single Market: Financial Services and the Free Movement of Capital" (Summer 2014) p. 65, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332874/2902400_BoC_FreedomOfCapital_acc.pdf [Accessed 23 August 2016].

[68] It is worth noting that the UK's view that the integrity of the internal market might be at threat appears to have been significantly shaped by the ECB's attempt to implement its location policy for Central Counterparties (CCPs) (see "Review of the Balance of Competences between the United Kingdom and the European Union" (fn.67) p.69). The latter required CCPs which clear significant amounts of Euro denominated products to be located in the Eurozone area (e.g. ECB, "Eurosystem Oversight Policy Framework" (July 2011) p.10, http://www.ecb.eu/pub/pdf/other/eurosystemoversightpolicyframework2011en.pdf [Accessed 23 August 2016]). The UK successfully challenged the policy before the Court (*United Kingdom v European Central Bank (ECB)* (T-496/11) EU:T:2015:133). However, it is important to note that the location policy did not concern the SSM. As noted, the reality of spillovers remains to be determined as far as the SSM is concerned.

[69] Salleo, "Single Market vs. Eurozone" (fn.58), p.193.

[70] Ibid. As far as the UK is concerned, such structural differences exist. As Salleo points out, banks are dominant in the Eurozone while markets play a much more significant role in the UK (ibid).

[71] The SSM Regulation includes a clause which requires the Commission to report regularly on the SSM Regulation 'with a special emphasis on monitoring the potential impact on the smooth functioning of the internal market' (art.32 SSM Regulation).

The ECB's duty of care for the unity and integrity of the internal market

In the previous section, I discussed a specific problematic which links prudential supervision to threats to the 'singleness' of the internal market. I began by noting that effective supervision had an important role to play in ensuring that the internal market functioned properly. However, I went on to describe a more complex picture where supervisory action could also be a cause of internal market disruptions. I argued in this context that the SSM and the ECB were seen both as part of the solution and as part of the problem. Thus, within the SSM area, the ECB was viewed as part of a solution to issues which had come to be associated with domestic (national) supervision in the financial crisis years: e.g. national bias or discriminatory treatment of banking institutions which could affect the proper functioning of the internal market. However, I noted that in the macro-prudential field the picture was more complex because national authorities continued to have primary competence. Outside the SSM area – in the UK in particular – a more powerful ECB was also perceived as a potential threat to the unity/integrity of the internal market: notwithstanding the benefits of a Banking Union in terms of financial stability, the assumption was that members of the SSM might over time come to share interests which were at odds with those of non-SSM Member States. As a result, the ECB/SSM might fail to internalize the cost of its actions which might come to affect, via disruptions to the internal market, the interests of non-SSM states in the internal market.

Against this background, this section assesses the ECB's duty of care for the unity and integrity of the internal market which is found in art.1 of the SSM Regulation. As noted in the introduction, the provision was championed as an important internal market safeguard by the European Parliament. However, before turning to the SSM Regulation, I will first look at existing case law on duty of care which the Court applies to EU institutions such as the Commission or indeed the ECB.

Duty of care in the Court's case law

The Court of Justice of the European Union (the 'Court') has long recognised that EU institutions owe a duty of care.[72] While the Court does not necessarily use a 'duty of care' label or at times uses other labels (e.g. 'duty of diligence'),[73] it is common for the Court to speak of an EU administration as having an obligation to 'carefully and impartially' examine all relevant aspects – factual and legal – of an individual case.[74] A failure to do so may result in an EU measure being successfully challenged.

[72] See generally on the duty of care, H-P. Nehl, *Principles of Administrative Procedure in EC Law*, (Oxford: Hart Publishing 1999) pp.106-165; P. Craig, *EU Administrative Law* (Oxford: OUP 2012) pp.333-340; H. Hofmann, G. Rowe and A. Türk, *Administrative Law and Policy of the European Union* (Oxford: OUP, 2011) pp.446-449.

[73] Using the notion of a duty of diligence, see e.g. *Davidoff SA v Office for Harmonisation in the Internal Market* (Case T-108/08) [2011] E.C.R. II-05585 at [28]; *MyTravel Group plc v Commission of the European Communities* (Case T-212/03) [2008] E.C.R II-01967 at [49].

[74] See e.g. *Technische Universität München v Hauptzollamt München Mitte* (Case C-269/90) [1991] E.C.R. I-5469 at [14] referring to a 'duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case'; *La Cinq SA v Commission of the European Communities* (Case T-44/90) [1992] E.C.R. 1992 II-00001 at [86]; *Davidoff SA v Office for Harmonisation in the Internal Market* (Case T-108/08) [2011] E.C.R. II-05585 at [19]; *Agraz, SA and Others v Commission of the European Communities* (Case T-285/03) [2005] E.C.R. 2005 II-01063 at [49].

Many of the decisions on duty of care originate from case law dealing with grievances that persons have against decisions taken by an EU administration exercising powers of administration or management: for instance, in competition law, anti-dumping measures, custom duties, or state aid. In *Nölle* for instance, the Court was concerned with verifying whether Community institutions had acted with the necessary care when determining a reference country for establishing the value of certain Chinese products. [75] The choice of a reference country was a matter for Community institutions. However, the Court considered that it was within its competence to examine whether Community institutions had considered 'with all the care required' relevant documentary evidence for determining the normal value of the Chinese products.[76]

By insisting on a duty of care, the Court ensures that an EU administration does not fall below a certain standard of behavior. For the Court, the duty of care is a procedural guarantee, which in its eyes is especially important where an EU institution benefits from wide discretion and where the Court's powers of judicial review are as a result more limited.[77] Moreover, when insisting on a duty of care in cases involving grievances such as the above, the Court also offers parties protection.[78] On occasions, the Court has said so explicitly. Thus, in *Nölle II*, the Court noted that the duty of care principle was meant to 'protect individuals'.[79] The point was crucial since this finding formed the basis of the Court's enquiry into whether breach of the duty could attract Community liability.[80]

---

[75] *Nölle v Hauptzollamt Bremen-Freihafen* (Case C-16/90) [1991] E.C.R. I-05163. The point about identifying a reference country was to make sure that no account was taken of prices and costs in non-market economies (which were not the result of market forces). See ibid. at [10].

[76] Ibid. at [13].

[77] See e.g. *Agraz, SA and Others v Commission of the European Communities* (Case T-285/03) [2005] E.C.R. 2005 II-01063 at [49]; *Technische Universität München v Hauptzollamt München Mitte* (Case C-269/90) [1991] E.C.R. I-5469 at [14]; *Nölle v Council of the European Union and Commission* (Case T-167/94) [1995] E.C.R. II-02589 at [73]; *Métropole télévision and Others* v *Commission* (Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93) [1996] E.C.R. II-649 at [93]; *NVV, Marius Schep and NBHV v Commission of the European Communities* (Case T-151/05) [2009] E.C.R. II-01219 at [163].

[78] See also H-P. Nehl, "Good Administration as Procedural Right and/or General Principle?" in H. Hofmann and A. Türk, *Legal Challenges in EU Administrative Law – Towards and Integrated Administration* (Cheltenham: Edward Elgar, 2009) pp.322-351, at p.349 noting that '… one should bear in mind that the EC Courts' primary concern in reviewing the legality of administrative decision-making is still aimed at protecting the individual against illegal encroachments upon his or her rights and interests'.

[79] *Nölle v Council of the European Union and Commission* (Case T-167/94) [1995] E.C.R. II-02589 at [76]. See also *MyTravel Group plc v Commission of the European Communities* (Case T-212/03) [2008] E.C.R. II-01967 at [49]. Elsewhere, the Court described the duty of care as applying 'generally' in the relations of an EU administration 'with the public'. See *Masdar (UK) Ltd v Commission of the European Communities* Case C-47/07 P [2008] E.C.R. I-09761 at [92]. See also art.41 of the Charter of Fundamental Rights [2012] OJ C326/391 which states inter alia that every person has 'the right to have his or her affairs handled impartially…', which is inspired by the Court's case law, including the case law on duty of care, such as *Nölle v Council of the European Union and Commission* (Case T-167/94) [1995] E.C.R. II-02589. See 'Explanations relating to the Charter of Fundamental Rights of the European Union', http://www.europarl.europa.eu/charter/convent49_en.htm [Accessed 23 August 2016].

[80] Note that the description of the duty of care as a rule which is meant to protect individuals must also be seen in the light of the requirements governing non-contractual liability: i.e., that the rule of law infringed was intended to confer rights on individuals; that the breach was sufficiently serious; and that there is a causal link between the breach and the damage sustained by the aggrieved party (e.g., *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* (Case C-352/98 P) [2000] E.C.R. I-05291 at [42]). The reference to a rule that

However, the Court has insisted on the need for impartiality and diligence in other contexts as well, which are ostensibly removed from an individual rights protection rationale.[81] For instance, in *Netherlands v Commission*, the Court found the Commission to have breached a duty of care when adopting a decision rejecting certain national provisions adopted by the Netherlands under art.114(5) TFEU (art. 95(5) EC).[82] The provision in question allows a Member States to seek to derogate from measures adopted by way of harmonization under art.114 TFEU (art.95 EC). In another case, the Court insisted on assessing whether the Council had acted 'carefully and impartially' when taking a decision in the context of art.20(2) TEU which allows the Council to authorise enhanced cooperation between a group of Member States.[83] Meanwhile in *Gauweiler*, the Court turned to the duty of care requirements in a case involving the ECB.[84] At the heart of this case was the Eurosystem's outright monetary transaction programme (the OMT programme). Under the latter, the ECB offers to buy bonds issued by euro Member States in secondary markets. The German *Bundesverfassungsgericht* requested a ruling regarding the validity of certain decisions taken in the context of this programme. The European Court noted that given the technical choices which the ECB – or more precisely, the European System of Central Banks or 'ESCB' – was called upon to make in preparing and implementing the OMT programme, the ESCB benefited from broad discretion in this area. [85] The Court went on to insist on the need to respect certain procedural guarantees.[86] According to the Court:

> '… where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance. Those guarantees include the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question … .[87]

Taken together, the above decisions testify to the fact that a duty of care principle owed by institutions such as the Commission or indeed the ECB is well established in the Court's case law. Moreover, they show that the Court uses this principle in a versatile manner. Indeed in *Gauweiler*, the Court folded the requirement to 'examine carefully and impartially all the relevant elements of the situation' into an assessment

---

is protecting individuals is another way of describing the first of the above requirements (i.e., a rule which is 'intended to confer rights on individuals'). See *Jose Maria Sison v Council of the European Union* (Case T-341/07) [2011] E.C.R. II-07915 at [33] and K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford: OUP, 2014) p.516. Note that in *Nölle II*, the Court took the view that the breach of the duty had not been sufficiently serious (see *Nölle v Council of the European Union and Commission* (Case T-167/94) [1995] E.C.R. II-02589 at [89]). Specifically, since the Commission benefited from discretion in the field in question, a serious breach would have required the Commission to have manifestly and gravely disregarded the limits of its powers (ibid. at [85]).

[81] For examples, see e.g., *Estonia v Commission* (Case T-263/07) [2009] E.C.R. II-03463 at [99]; *UEFA v European Commission* (Case C-201/11 P) EU:C:2013:519 at [19]; *FIFA v Commission* (Case C-204/11 P) EU:C:2013:477 at [20].

[82] *Kingdom of the Netherlands v Commission of the European Communities* (Case C-405/07 P) [2008] E.C.R. I-08301 at [56]-[57] and [72].

[83] *Kingdom of Spain and Italian Republic v Council of the European Union* (Joined Cases C-274/11 and C-295/11) EU:C:2013:240 at [54].

[84] *Peter Gauweiler and Others v Deutscher Bundestag* (Case C-62/14) EU:C:2015:400.

[85] Ibid. at [68]. The ECB is given wide discretion in implementing monetary policy: see also the legal opinion of AG *Cruz Villalón* in ibid. at [111].

[86] Ibid. at [69].

[87] Ibid.

of proportionality.[88] Clearly there is an affinity between the former and the latter, including in those cases where the Court's review is limited. This is because a failure to act with care and impartiality is likely to compromise the reasoning and arguments which underpin the choice of a measure, thereby making a measure manifestly inappropriate. I will return to the Court's duty of care principle in the next section where I will explain why it should be distinguished from the duty of care under art.1 of the SSM Regulation. First however, it is necessary to introduce the ECB's duty of care under the said regulation.

The ECB's duty of care for the unity and integrity of the internal market

The ECB's duty of care for the unity and integrity of the internal market is found in art.1 of the SSM Regulation, which also sets out the ECB's objectives when it exercises its tasks under the SSM Regulation – i.e., to contribute to the safety and soundness of credit institutions, as well as to the stability of the financial system.

The origin of the ECB's duty of care can be traced back to a European Parliament amendment of the Commission proposal for the SSM Regulation.[89] Initially, art.1 of the Commission proposal only required the ECB to have 'due regard for the unity and integrity of the internal market'. As adopted, the somewhat tortuous – or torturous – language of art.1 requires the ECB to have 'full regard' and 'duty of care' for the unity and integrity of the internal market. Thus, art.1 of the SSM Regulation states that:

> '[t]his Regulation confers on the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions, with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage'.

As adopted, the ECB's duty of care under art.1 is both *distinct* and *specific*. It is distinct because the SSM Regulation ties this duty to the ECB's tasks under the SSM Regulation. As a result, the duty of care of art.1 does not apply to the ECB in its role as guardian of the single currency. Nor does it apply to national authorities which are part of the SSM.[90] The point is worth noting because the SSM is made of the ECB

[88] Ibid. at [66]-[77]. See also H. Hofmann, 'Gauweiler and OMT: Lessons for EU Public Law and the European Economic and Monetary Union', Working Paper Version (19 June 2015) p. 16, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621933 [Accessed 23 August 2016].

[89] European Parliament (Committee on Economic and Monetary Affairs), "Report on the proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions", A7-0392/2012 (3 December 2012); European Parliament, "Amendments adopted by the European Parliament on 22 May 2013 on the proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions", P7_TA(2013)0213, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0213&language=EN [Accessed 23 August 2016]. The proposal for the SSM Regulation (a Council Regulation) was negotiated as a package with a proposal amending the European Banking Authority's founding regulation. The former was adopted under the special legislative procedure, but the latter was adopted under the ordinary legislative procedure.

[90] See in this context the SSM's 'mission statement', https://www.bankingsupervision.europa.eu/about/mission-statement/mission-statement-of-the-

and national authorities, and the latter continue to play an important role: a lesser role in the micro-prudential field, but a significant role in the macro-prudential field. Moreover, as noted in the previous section, internal market disruptions caused by the behavior of national authorities were not uncommon in the past.[91] That said, the provisions of art.1 might still come to affect national authorities. For example, they might be affected in case where the ECB exercises authority over them. They might also be affected if the ECB presses for greater harmonization of national regulatory frameworks on the back of its duty of care. Recall that under the SSM Regulation the ECB is expected to apply (where relevant) national laws that transpose directives, as well as national laws that exercise Member State options.[92] Variation among national frameworks is likely to complicate the ECB's tasks. As a result, the ECB may take the view that it also affects its ability to discharge its duty of care under art.1. Hence, it might press for greater harmonization.[93]

The duty of care of art.1 can also be described as *specific*. This is because of its subject matter: the unity and integrity of the internal market. The latter is according to art.1 based on 'equal treatment of credit institutions with a view to preventing regulatory arbitrage'. As noted, concerns over the unity and integrity of the internal market were associated with the SSM project, or for that matter the Banking Union project, right from the start.[94] The SSM Regulation does not specify the meaning of the unity and integrity of the internal market. But the meaning can be ascertained by reference to the general context in which these terms are employed and by reference to their ordinary meaning.[95] In the present context, it is plain that the choice of terms is meant to underline the importance of preventing internal market *fragmentation*, a problematic which I described in detail earlier. Meanwhile, the reference to an internal market that is 'based on equal treatment of credit institutions' underscores the need for the ECB to pay attention to a level playing field between institutions. Finally, the reference to preventing 'regulatory arbitrage' – i.e., preventing market actors from taking advantage of differences in regulation or supervision between Member States – drives the point home that in a post-crisis world, regulatory arbitrage is viewed as undesirable.[96]

---

ssm/html/index.en.html [Accessed 23 August 2016], which states that actors within the SSM (hence, also national authorities that are part of the SSM) are committed to respecting *inter alia* 'the unity and integrity of the internal market' *without* making reference to a duty of care.

[91] See e.g., text to fn.53.

[92] See art.4(3) SSM Regulation.

[93] See in this context, S. Lautenschläger, "Single Supervisory Mechanism – Single Supervisory Law?" (27 January 2016), https://www.ecb.europa.eu/press/key/date/2016/html/sp160127_2.en.html [Accessed 23 August 2016], noting that '… many variations in national legislation can no longer be justified now that we have European banking supervision. … Article 1 of the SSM Regulation requires the ECB to carry out prudential supervision with full regard and duty of care for the unity and integrity of the internal market. The Article also refers to the equal treatment of credit institutions with a view to preventing regulatory arbitrage. A fragmented regulatory framework makes it difficult for the ECB to meet these requirements'.

[94] European Council, The President, "Towards a Genuine Economic and Monetary Union" (26 June 2012) p.4, www.consilium.europa.eu/en/workarea/downloadasset.aspx?id=17220; European Council, "Conclusions" (28/29 June 2012) at [4], http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131388.pdf [Accessed 23 August 2016].

[95] See e.g., *DIR International Film Srl and others* (Case C-164/98) [2000] ECR I-00447 at [26].

[96] The regulatory arbitrage concern finds expression elsewhere as well: for instance in the founding texts of the European Supervisory Authorities or indeed in the concept of a single rulebook. Thus, Recital (14) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending

As noted above, the duty of care requirement shares much of its language with the requirement of the same article to have 'full regard' to the unity and integrity of the internal market. The latter is based on the Commission's proposed text which provided that the ECB ought to have 'due regard for the unity and integrity of the internal market'. The distinction between the duty of care and the 'full regard' requirement is somewhat obscure. This is also because the duty of care concept lacks substance. In comparison to the latter, the duty to have full regard to the unity and integrity of the internal market could arguably be said to be more closely linked to the ECB's supervisory objectives under the SSM Regulation: that is to contribute to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State. These objectives provide a lens through which the ECB is meant to see and interpret the 'world' when exercising its functions under the SSM Regulation. The 'full regard' requirement could be described as part of this 'frame of reference' which contributes to defining the ECB's new role,[97] even though it is clear from the way in which art.1 was drafted that the 'full regard' requirement is not a supervisory objective under art.1.[98]

Which duty of care for the ECB?

The aim of this section is to reflect on the ECB's duty of care for the unity and integrity of the internal market. Specifically, the objective is to establish what the duty ought to entail for the ECB. First however, the Court's case law on duty of care, which I introduced in the previous section, must be distinguished. Hence, I will begin by suggesting that the duty of care principle recognized in the case law seen above should be distinguished from the ECB's duty of care under art. 1 of the SSM Regulation.

The CJEU concept of care (or diligence)

The 'duty of care' label that the Court uses at times to describe the obligation of an EU administration to carefully and impartially review all relevant aspects of an individual case is something of a misnomer. As noted, this 'duty of care' can be subsumed into a good administration principle: it is a procedural guarantee, a 'centre-piece of procedural impartiality and fairness'.[99] As such, it has more affinity with procedural rules, such as the German principle of investigation (*Untersuchungsgrundsatz*),[100] than with a duty of care typical of common law systems (e.g. in trust law). The *Untersuchungsgrundsatz* is found in the German Administrative Procedure Act.[101] It provides (inter alia) that an authority must 'take

---

Regulation (EU) No 648/2012 [2013] OJ L176/1 states that the 'single rulebook ensures a robust and uniform regulatory framework facilitating the functioning of the internal market and prevents regulatory arbitrage opportunities'.

[97] Admittedly, this explanation is not entirely satisfactory from a legal point of view since it has no solid legal basis. It is rather grounded in an appreciation of what I consider to be broad normative orientations and other considerations.

[98] I will return to this point hereinafter when considering the substance of the duty of care.

[99] J-P. Schneider, "Basic Structures of Information Management in the European Administrative Union" [2014] *European Public Law* p.89 at p.94.

[100] § 24 Abs. 2 VwVfG (German Administrative Procedure Act).

[101] Drawing parallels, see M. Fehling, *Verwaltung zwischen Unparteilichkeit and Gestaltungsaufgabe* (Tübingen: Mohr Siebeck, 2001) p.302; T von Danwitz, *Verwaltungsrechtliches System und Europäische Integration* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1996) pp.171-172.

account of all circumstances of importance in an individual case, including those favourable to the participants'. Affinities between the *Untersuchungsgrundsatz* and the Court's duty of care principle also extend to their *raisons d'être*.[102] Thus, the *Untersuchungsgrundsatz* has been associated with a public interest rationale in ensuring factually correct decisions in administrative proceedings, but also with the need to protect individuals in such proceedings.[103] In a similar way, the CJEU has on a number of occasions underlined that the requirement to act carefully and impartially was meant to protect individuals.[104] Moreover, even in those cases that were divorced from an individual protection rationale, the application by the Court of the duty of care as a procedural guarantee can easily be squared with a public interest rationale in ensuring sound decision-making.[105]

All this is very different from the ECB's duty of care for the unity and integrity of the internal market. As seen earlier, the latter is primarily about addressing threats to the 'singleness' of the internal market: the risk of fragmentation prompted by actions in the prudential area. It is not about protecting individuals by ensuring procedural fairness or impartiality in administrative decision-making.[106] It is also not about ensuring sound or rational decision-making in administrative proceedings. Nor is the *raison d'être* of the ECB's duty of care intrinsically linked to the needs of judicial review. Recall that the duty of care which the Court has championed is a means for the Court to exercise control over an EU administration especially where the latter benefits from discretion and where judicial review is as a result limited.

That said, it does not follow from what I have said so far that the ECB, when acting under the SSM Regulation, is not *also* subject to the duty of care principle which the Court developed in the above case law.[107] In fact, the establishment of the

---

[102] See generally Nehl, "Good Administration as Procedural Right and/or General Principle?" (fn.78) pp.343-350.

[103] J. Brandt and M. Sachs, *Handbuch Verwaltungsverfahren und Verwaltungsprozess* (Heidelberg: C F Müller Verlag, 2009) p.52. See also von Danwitz, *Verwaltungsrechtliches System und Europäische Integration* (fn.107) p.172, with respect to the individual protection function of the *Untersuchungsgrundsatz* and the ECJ's duty of care concept.

[104] See fn.79.

[105] See also Nehl, "Good Administration as Procedural Right and/or General Principle?" (fn.78) p.349, describing the duty of care (like the duty to state reasons) as 'process standards involving both the need for individual protection and the public interest in ensuring the rationality of the procedure's final outcome'. See also *Arizona Chemical BV and Others v Commission of the European Communities* (Case T-369/03) [2005] ECR II-05839 (Order of the Court of First Instance) at [87]-[88], the Court of First Instance described the duty of care as 'an essential and objective procedural requirement, imposed in the public interest …'. By doing so, it sought to differentiate between a duty of care, as applied in the context of procedures resulting in the adoption of measures of general application and a duty of care, as applied in proceedings resulting in the adoption of individual measures.

[106] If there is an individual protection aspect, it is not about guaranteeing procedural fairness or impartiality, but by affirming within the context of the ECB's duty of care, an economic actor's right to equal treatment under EU law. Recall that art.1 of the SSM Regulation speaks of a 'duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage'.

[107] Likewise the ECB will be subject to other procedural guarantees, including those listed in art.41 of the Charter of Fundamental Rights (right to good administration), which, as noted, was inter alia inspired by the Court's case law on duty of care (see fn.85 above) and which states the right to have one's affairs handled impartially, fairly and within a reasonable time, and lists (in a non-exhaustive manner) the right to be heard, the right to have access to one's file and the duty of an administration to give reasons. For a detailed assessment of how art.41 will matter in administrative proceedings under the SSM, including where administrative proceedings involve both national competent authorities and the ECB, see M. Lamandini, D. Muñoz and J. Álvarez, 'Depicting the Limits of the SSM's Supervisory

SSM provides a strong rationale for insisting on such a duty. Not only does the ECB benefit from discretion when exercising its tasks. In its role as prudential supervisor, it has significant powers over (inter alia) supervised entities: for example when deciding to authorise an institution to take up the business of a credit institution or when withdrawing such an authorisation,[108] when deciding whether an institution is deemed to be significant or less significant in accordance with art.6 of the SSM Regulation; when adopting supervisory measures vis-à-vis supervised entities;[109] when imposing administrative penalties;[110] or taking over the supervision of a less significant entity.[111] The point is not simply academic. A challenge against an ECB decision has been brought by *Landeskreditbank Baden-Württemberg*.[112] The case is currently pending before the General Court. It concerns a decision by the ECB to treat *Landeskreditbank* as a 'significant' entity and hence to put it under its direct supervision. As part of its challenge, the applicant claims *inter alia* that the ECB breached 'its duty to assess and take into consideration diligently and impartially all of the relevant facts and points of law of the case at issue'.

Hence, a duty to examine carefully and impartially all the relevant elements – factual and legal – of an individual case is likely to prove an important procedural guarantee for supervised entities.[113]

The concept of care under art.1 of the SSM Regulation

The aim of this final subsection is to reflect on the way in which the ECB ought to discharge its duty of care for the unity and integrity of the internal market. Given that the latter is a concept that is distinct from the duty of care principle that the Court has fashioned, I am left with the task of determining what it entails for the ECB. This is a difficult task given that there is very little in the SSM Regulation which helps to put flesh on it. Indeed, given the lack of detail, it does not seem exaggerated to say that the duty of care in art.1 of the SSM Regulation is a notion without much substance.

The ECB's duty of care for the unity and integrity of the internal market: a notion without substance?

It is common for a duty of care to be underpinned by a certain standard of care. The latter provides a benchmark against which the conduct of a person who owes a duty of care can be evaluated. In common law systems, the standard may be that of a reasonable man or that of an ordinary prudent man. In trust law, for example, the latter corresponds to the 'traditional common law rule'[114] which requires a trustee 'to

---

Powers: the Role of Constitutional Mandates and of Fundamental Rights' Protection' (2015) 79 *Quaderni di Ricerca Giuridica della Consulenza Legale* p.1 at pp. 78-85. See also the provisions that were enshrined in the SSM Regulation and the Framework Regulation: e.g. art.22 SSM Regulation or arts 25-33 SSM Framework Regulation.

[108] See art.14 SSM Regulation, arts 73-84 SSM Framework Regulation.

[109] See art.16 SSM Regulation.

[110] See art.18 SSM Regulation.

[111] See art.6(5)(b) SSM Regulation.

[112] *Landeskreditbank Baden-Württemberg v ECB* (Case T-122/15) [2015] OJ C178/17.

[113] The ECB's very own provisions on supervisory procedure must be seen in this light. See e.g., arts 28 and 29 SSM Framework Regulation.

[114] The Law Commission and the Scottish Law Commission, "Trustees' Powers and Duties", Law Com No 260, Scot Law Com No 172 (May 1999), p.41, http://www.scotlawcom.gov.uk/files/7912/7989/7339/rep172.pdf [Accessed 23 August 2016].

conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs'.[115] Because a standard of care helps to operationalize a duty of care, it is an important aspect of it.

Admittedly, the issue before us is not a common law one and at any rate the meaning of a concept in national law is, in order to preserve the autonomous character of EU law, generally of little concern to the Court which will 'to the greatest extent possible, interpret the concepts of [EU] law in light of the rules of [EU] law itself'.[116] That said, standards of care have their use in EU law as well: for example the standard of a 'normally prudent and diligent administration' which the Court has, at least on occasions, explicitly articulated in its case law on non-contractual liability and duty of diligence.[117] Unfortunately, the SSM Regulation is silent with regard to a 'standard of care'. In fact, save for the term 'duty of care' in art.1, there is nothing in the SSM Regulation which mentions or refers to a duty of care. Even Recital 30 which lists the 'unity and integrity of the internal market' alongside the ECB's supervisory objectives makes no mention of a duty of care. The SSM Framework Regulation is also silent on the matter.

Moreover, the ECB has so far said very little about its duty of care. The ECB has a mission statement and also supervisory principles. However, both are applicable to the SSM as a whole. Since the duty of care only applies to the ECB (and not to national authorities), neither the mission statement nor the supervisory principles have something to say about a duty of care. The SSM mission statement merely notes that the SSM respects the 'unity and integrity of the internal market' with no reference to a duty of care.[118] Meanwhile, principle 4 of the SSM's supervisory principles, which is entitled 'consistency with the single market' and which together with the other supervisory principles is meant to 'guide the ECB and the NCAs [national competent authorities] in performing their tasks',[119] offers no hint on the meaning or content of a duty of care.

Given the lack of detail, including on a standard of care, it does not seem unreasonable to suggest that the ECB's duty of care for the unity and integrity of the internal market is currently an idea without much substance. Certainly, it is not a fully-fledged concept which as such would be underpinned by a standard of care. The latter would not only have given flesh to the ECB's duty of care; it would also have helped to differentiate it from the obligation made to the ECB to have 'full regard' to the unity and integrity of the internal market. As noted, both requirements share the same language.

However, see now the new statutory duty of care in section 1 of the UK Trustee Act 2000.

[115] See *Bartlett and Others v Barclays Bank Trust Co. Ltd.* (Nos. 1 and 2) [1980] 2 W.L.R. 430, 440.

[116] K. Lenaerts, "Interlocking Legal Orders in the European Union and Comparative Law" (2003) 52 *International and Comparative Law Quarterly* p.873 at p.894 who also discusses exceptions to this principle.

[117] *MyTravel Group plc v Commission* (Case T-212/03) [2008] ECR II-01967 at [49]; *Agraz SA and others v Commission* (Case T-285/03) [2005] ECR II-01063 at [40]. 'Reasonableness' is not entirely unknown in EU law either. However, it might be absorbed into other more common principles such as proportionality, see e.g., G. Tesauro, "Reasonableness in the European Court of Justice Case-Law" in Court of Justice of the European Union, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, (The Hague: T.M.C. Asser Press, 2013) p.307 at p.316.

[118] https://www.bankingsupervision.europa.eu/about/mission-statement/mission-statement-of-the-ssm/html/index.en.html [Accessed 23 August 2016].

[119] ECB, "Guide to Banking Supervision" (November 2014) p.7, https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf?807838fa2a8bb958749f411c432d1f3e [Accessed 23 August 2016].

How to discharge the duty of care for the unity and integrity of the internal market?

I will focus hereinafter on the question of how the ECB should discharge its duty of care. This requires me to put some flesh on the concept. I will begin by distinguishing the ECB's duty of care from its supervisory objectives under art.1 of the SSM Regulation. As a reminder, according to art.1, the ECB exercises its tasks with a view to contribute to the safety and soundness of credit institutions and the stability of the financial system. These objectives are common objectives among micro- and macro-prudential supervisors. Thus, when performing its tasks under the SSM Regulation, the ECB must do so with a view to discharging these objectives. The ECB does not have a self-standing objective to promote or safeguard the unity and integrity of the internal market. Nor does the ECB have an explicit duty to discharge its objectives with care.[120] The ECB has a duty of care for the unity and integrity of the internal market when it exercises its tasks under the SSM Regulation in order to deliver the above objectives. All this is clear from the language of art.1.[121] Hence, objectives and duty of care should not be mixed up.[122] For the avoidance of doubt, the ECB's requirement to have 'full regard' to the unity and integrity of the internal market is not an objective under art.1 either.[123] It is submitted that the requirement to have 'full regard' to the unity and integrity of the internal market is something that the ECB must 'only' consider when performing its tasks with a view to discharging the above objectives, even though it is plain that the requirement to have *full* regard means that the ECB must give it the most serious and conscientious consideration.[124]

Admittedly, Recital 30 gives rise to some confusion. It lists the unity and integrity of the internal market alongside the ECB's objectives. However, it does not mention a duty of care and at any rate the language of Recital 30 is not in line with art.1. The latter is the legally binding provision. To the extent that the ECB performs its tasks with a view to delivering its objectives, there is – of course – no reason to object if its actions contribute to the unity and integrity of the internal market.[125] This is all the more so because the ECB is not only subject to a duty of care, but also (as noted) a duty to take 'full account' of the unity and integrity of the internal market.

The duty of care for the unity and integrity of the internal market must also be differentiated from a duty to achieve a particular result (*obligation de résultat*). The

[120] For the avoidance of doubt, I am not suggesting that the ECB is not *also* subject to the Court's case law on duty of care (or diligence) – an obligation to 'carefully and impartially' examine all relevant aspects of a case – which I discussed above.

[121] Assuming for a moment that the ECB had among its objectives the goal of safeguarding the unity and integrity of the internal market, complications would arise. In case where the latter would underpin a conflicting course of action, the ECB might have to balance the unity and integrity of the internal market against its other objectives. Such a balancing exercise is not unknown in EU law. See e.g., *Viking* (Case C-438/05) [2007] ECR I-10779 at [78]-[79]. Admittedly, balancing objectives against each other might be necessary in any event: e.g. where micro- and macro-prudential objectives point towards different courses of action.

[122] Cf. S. Lautenschläger, "Single Supervisory Mechanism - Achievements after one year" (9 December 2015), https://www.ecb.europa.eu/press/key/date/2015/html/sp151209_slides.en.pdf [Accessed 24 August 2016], who adopts a different reading by suggesting on the basis of art. 1 SSM Regulation that one of the objectives of the SSM is to create a 'supervisory level playing field'.

[123] The language of art.1 supports this point by clearly differentiating between the ECB's objectives (identified by the words 'with a view to') and other requirements.

[124] This reading is in line with the meaning of the formulation to 'have regard to'. It will also help to avoid conflicts between the ECB's objectives and the 'full regard' requirement.

[125] Conversely, if the ECB failed to discharge its objectives, it might also fail to fulfill its duty of care if such failure undermines the proper working of the internal market.

former is not compatible with the latter. Indeed, if the ECB's duty of care were characterized as a duty to achieve a particular result (i.e. to achieve the unity and integrity of the internal market), it would no longer matter whether the ECB acted with 'care': the ECB would breach its duty of care even if it acted with the utmost care and attention. All that would matter is that the ECB failed to achieve a particular result: to achieve the unity/integrity of the internal market. Moreover, such a 'results-based' obligation would make little sense given that the ECB's competences are limited functionally and geographically. The notion of an obligation to achieve a particular result is familiar to lawyers in the French legal system and other jurisdictions of the same legal family (e.g. Belgium).[126] But the notion is known in EU law as well. The Court uses it for instance in its case law, juxtaposing a 'mere duty of diligence' with 'an obligation to achieve a particular result'.[127] Hence, instead of committing the ECB to a certain result, it is submitted that the duty of care in art.1 commits the ECB to a certain behavior. This conclusion imposes itself for a number of reasons: first and foremost, it is the interpretation which best gives expression to the basic notion of a duty of care: to act with care (or prudence, diligence, etc.) is to behave in a certain manner. [128] Care, prudence, diligence, etc. all express standards of behavior even if in quite a general manner. Focusing on conduct (as opposed to a specific result that must be met) also offers a way to avoid conflicts between the duty of care and the ECB's supervisory objectives. Recall that while the ECB's efforts to exercise its prudential tasks will on many occasions serve both its objectives and the functioning of the internal market (e.g. by guaranteeing consistent supervisory standards), there might well be times where measures which have valid prudential purposes have negative effects on free movement. It is submitted that the fact that the ECB is subject to a duty of care for the unity and integrity of the internal market does not prevent the ECB from adopting such measures, provided that the ECB acts in an appropriate way with respect to the unity and integrity of the internal market.[129] I will offer some suggestions on what is 'appropriate' below. For now suffices to note that taking a different approach with respect to the duty of care might leave the ECB unable to deliver its supervisory objectives. It would also contradict the BIS core principles for bank supervision according to which any additional responsibility given to bank supervisors should not conflict with their primary objectives (the safety and soundness of banks and the banking system).[130]

I am left with the task of attempting to flesh out the requirements which the ECB should satisfy in order to discharge its duty of care. This is a difficult task in the abstract, but based on the discussion so far, a number of suggestions can nevertheless be made. My starting point is that appropriate behavior is underpinned by appropriate processes. In other words, 'care' is demonstrated by the steps which the ECB takes in

[126] See M. Fontaine, '"Best efforts", "reasonable care", "due diligence" and industry standards in international agreements' (1988) 8 *International Business Law Journal* p.983 at pp.1016-1019. In relation to Belgium, see e.g., W. Bocken and W. De Bondt, *Introduction to Belgian Law* (Bruxelles: Bruylant, 2001) p.236.

[127] *Commission v Spain* (Case C-121/03) [2005] ECR I-7569 at [108]; *Commission v Ireland* (Case C-316/00) [2002] ECR I-10527 at [37] and [38]. This case law is entirely unrelated to the present context. At issue was art.7(6) of Directive 80/778 on the quality of water intended for human consumption.

[128] Cf. R. Galer, '"Prudent person rule" standard for the investment of pension fund assets' (2002) 83 *Financial Markets Trends* p.41 at p.47, referring to the 'prudent person rule' as 'behaviourally-oriented rather than outcome-focused'.

[129] The ECB's measures would of course have to be compatible with other provisions as well.

[130] See Bank for International Settlements, "Core Principles for Effective Banking Supervision" (September 2012), (fn.5), pp.4-5.

relation to the unity and integrity of the internal market. Steps might include notifying or consulting other actors, or coordinating its prudential activities with others operating in the prudential field. In case of potential conflicts, it might involve demonstrating that it has weighed the benefits of prudential action against any potential costs for the unity and integrity of the internal market. Procedures might also be put in place in order to monitor the effects of its measures on the internal market. Where there is a choice of appropriate measures, the ECB might be required to demonstrate that it has taken steps to identify the least onerous measures in terms of safeguarding the unity and integrity of the internal market. It might be required to pay particular attention to certain effects – for example, ring-fencing side effects (because of their impact on the integrity of internal market) – but since the duty also explicitly mentions equal treatment and the prevention of regulatory arbitrage, the focus of any assessment should also be on the effects of a decision on a level playing field and on regulatory arbitrage.

Many of the above requirements are found in some form or shape elsewhere as well. For instance, the basic idea of weighing the benefits of prudential measures (in terms of financial stability) against the cost of these measures for the internal market is also found in the CRR.[131] Likewise, EBA in its opinion on macro-prudential rules in the CRR/CRD suggested that the 'benefits in financial stability should be weighed against the negative impact these measures may have on the internal market'[132] Obligations to consult or notify are also found elsewhere: for instance in capital requirements legislation.[133] They are supported by various other requirements such as duties to cooperate among authorities.[134] Hence, the duty of care cannot be seen in isolation. It is part of a toolkit of measures aimed at safeguarding the internal market from potential side effects of prudential action.[135]

Although the above considerations help to make progress with respect to the ECB's duty of care, the absence of any indication of a standard of care nevertheless continues to complicate our task. Since the SSM Regulation is silent on the matter, there is no standard against which an observer can assess the ECB's behavior. Like in many other cases where the EU legislature fails to flesh out concepts, the matter would ultimately be one for the Court to consider.

Conclusion

The aim of this article was to assess the ECB's duty of care for the unity and integrity of the internal market under the SSM Regulation. In order to make sense of this duty, the article began by assessing the relationship between prudential supervision and the functioning of the internal market. It distinguished the duty of care under the SSM Regulation from the Court's case law on duty of care. It rejected the idea that the duty of care committed the ECB to a specific result: i.e., to secure the unity and integrity of the internal market. Instead, it argued that the duty of care under art.1 was effectively 'conduct-focussed'. Admittedly, it might well be that the Court chooses to take a different route by simply amalgamating the duty of care with the ECB's supervisory

[131] See art.458(4) CRR.

[132] European Banking Authority, "EBA Opinion on the Macroprudential Rules in CRR/CRD" (fn.29) p.14.

[133] See e.g., art.133 CRD, art.458 CRR.

[134] See e.g., art.3(1) SSM Regulation.

[135] According to Recital 13 of the CRD IV for instance '[s]upervisory processes and decisions should not hamper the functioning of the internal market …'. See also recitals 15 and 123 of the CRR.

objectives.[136] The Court might thus conclude that objectives and duty of care are effectively co-equals and that art.1 simply requires the ECB to balance these ‘values’ against each other whenever there is friction between them.[137] However, such an approach would not be satisfactory. It would not give proper effect to the language of art.1; it would also fail to give proper recognition to the duty of care concept.

A more complicated question which the Court will come to face in the future concerns the relationship between the ECB’s objectives under the SSM Regulation and its primary objective under the Treaties (price stability). The interaction between art.1 – especially the financial stability objective – and the ECB’s primary objective is not unproblematic. There is room for conflict. However, untangling this relationship is a separate question which goes beyond the present enquiry whose focus was firmly on the ECB’s duty of care for the unity and integrity of the internal market.[138]

[136] It might use Recital 30 of the SSM Regulation to support this approach.
[137] See also fn.121 above.
[138] On this issue, see Lamandini et al. “Depicting the Limits of the SSM’s Supervisory Powers” (fn.108), pp.40-43.