

Financial supervision workshop 2018

“Enforcement of banking regulations in the Eurozone”

Presenter: Silvia Allegrezza, University of Luxembourg

University of Luxembourg

Multilingual. Personalised. Connected.

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The enforcement of banking regulations in the Eurozone

The case of the Single Supervisory Mechanism

Silvia Allegrezza

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- Focus on sanctions
- Sanctions in the CRD IV
- Direct sanctioning powers
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- Proportionality
- Procedural safeguards

Part III: Criminal law and banking supervision

- Criminal offences on same conducts as SSM administrative breaches

Part IV: Interactions with criminal procedure

- Duty to report
- Professional secrecy and immunities in vertical dimension
- Evidence sharing
- E-evidence
- Ne Bis In Idem

EUBAR The Enforcement Dimension of the European Banking Union Regulations

□ FACULTY OF LAW, ECONOMICS AND FINANCE



**Banking
supervision**



**Criminal
enforcement**

Banking sanctions:

- Having a punitive nature
- Overlaps with criminal law

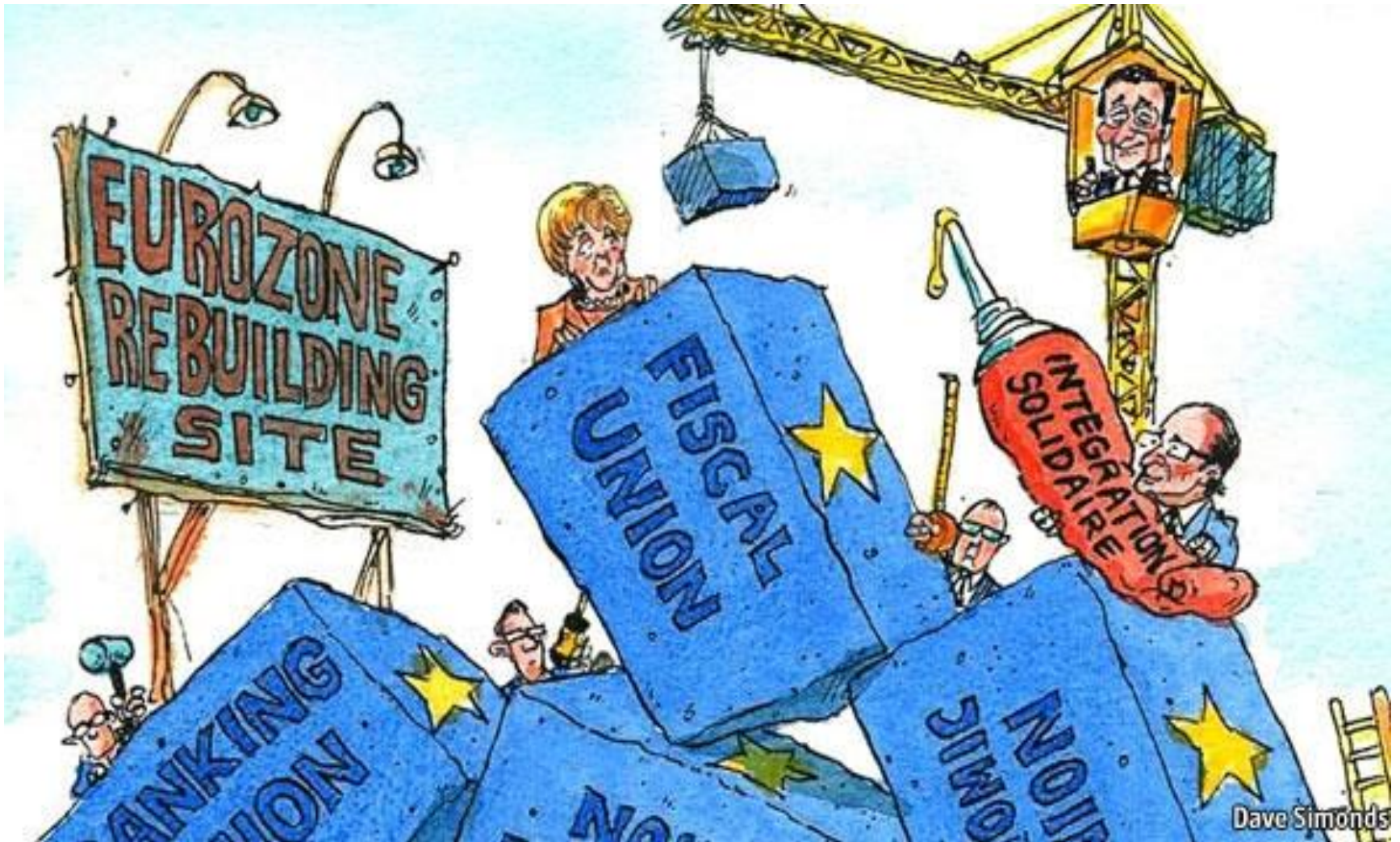


EUBAR Final conference: 29-30 November 2018



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Post-crisis scenario



Setting the scene:

Level of intervention	Legal framework
International level	Basel III standards
European banking regulation	<u>Single Rule Book</u> <ul style="list-style-type: none">-Capital Requirements Regulation (CRR)-Bank Recovery Resolution Dir (BRRD)- Single Resolution Mechanism (SRM)
European level to be implemented at national level	Capital Requirements Directive (CRD IV) Partly the CRR (O&Ds)
Limited to the Eurozone	Single Supervisory Mechanism (SSM) <ul style="list-style-type: none">- Regulation 1024/2013 on the SSMR- Regulation 2532/1998- Framework regulation 468/2014 SSMFR

EU's framework for supervision

European System of Financial Supervision

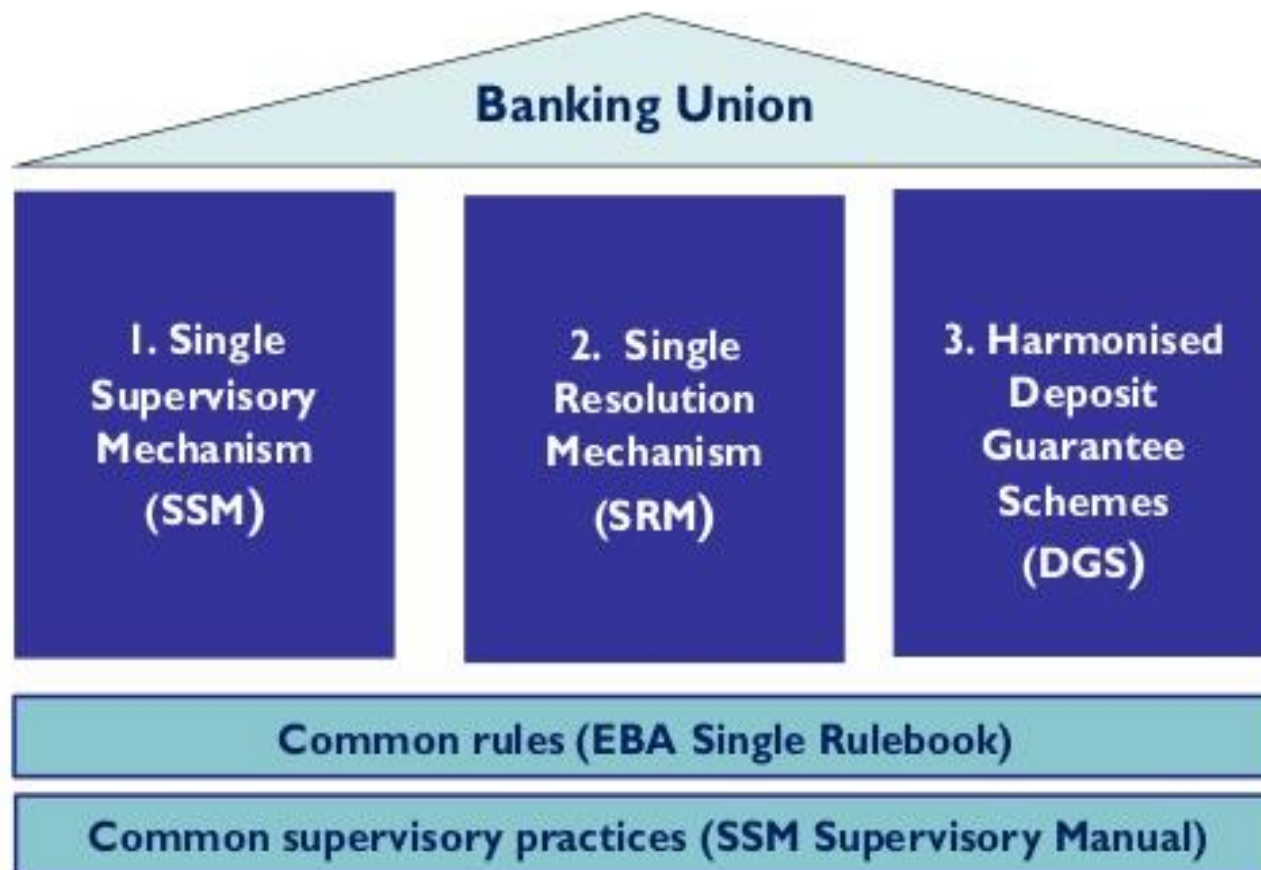
Micro-prudential supervision



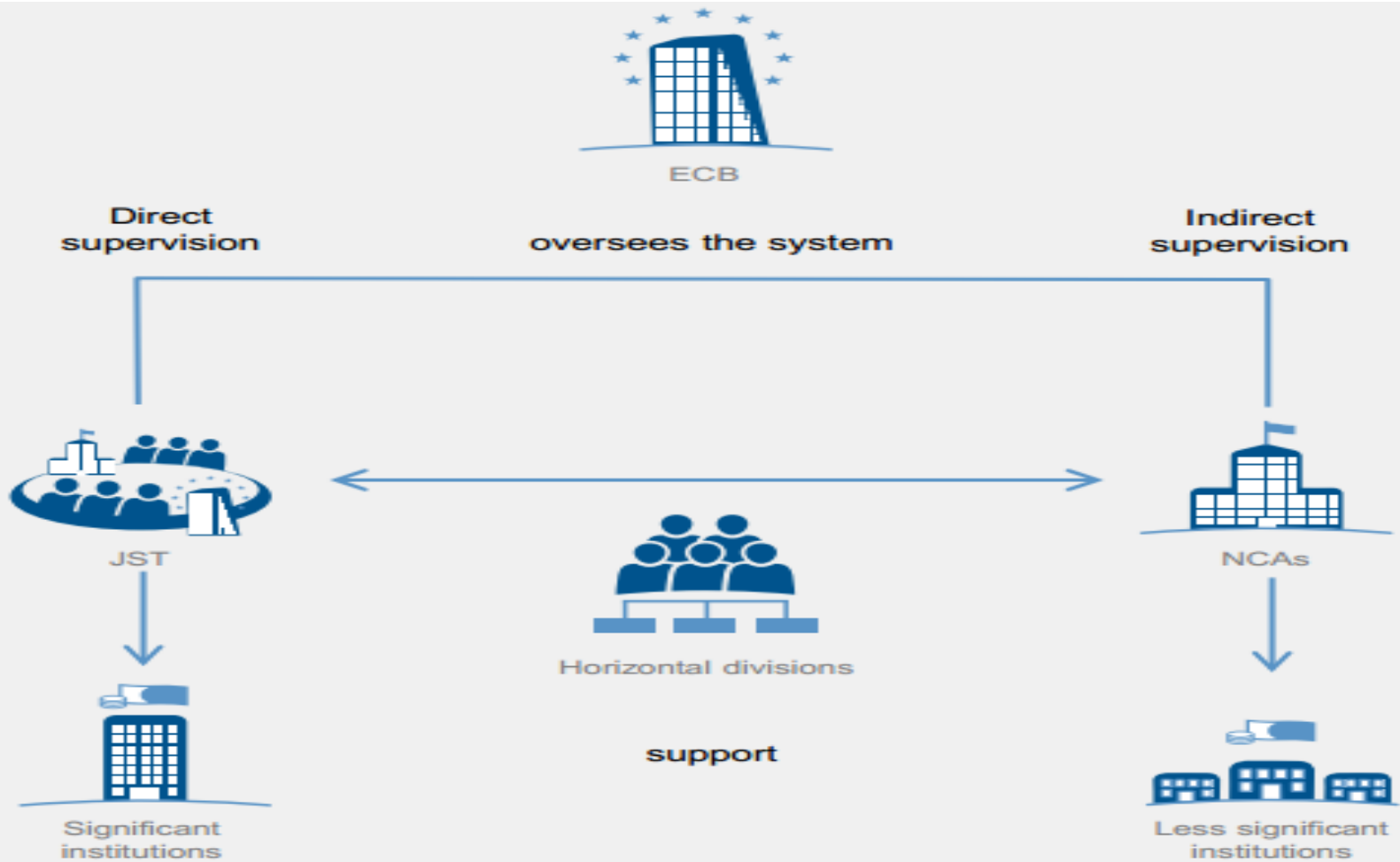
Macro-prudential oversight



Banking Union: elements



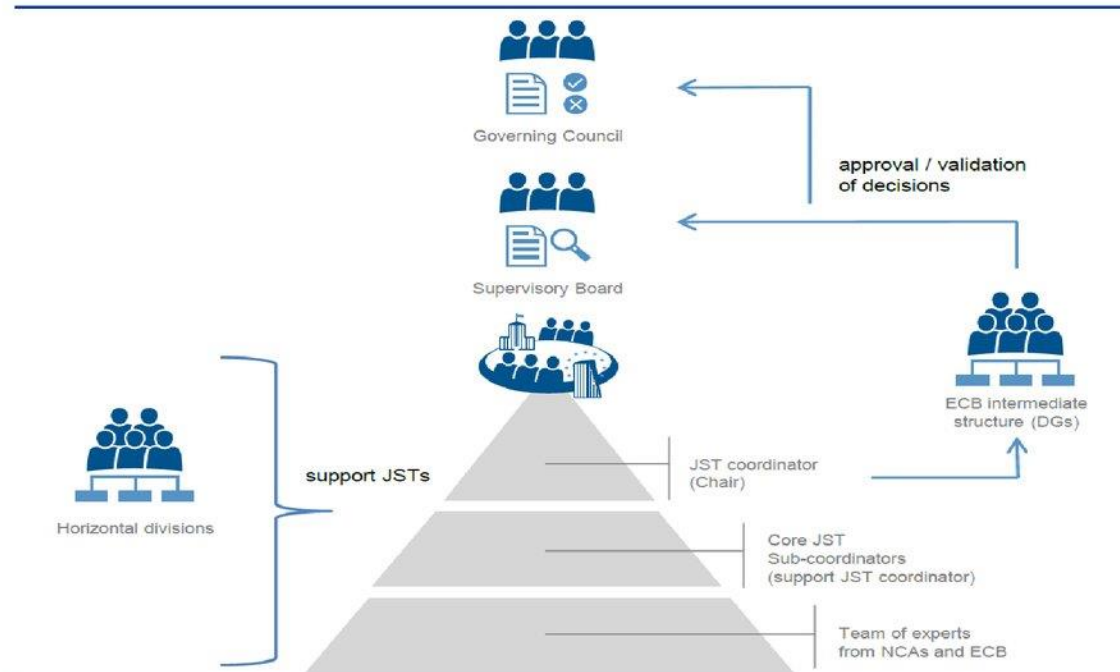
The SSM...in a nutshell



Banking supervision of significant entities

Single supervisory mechanism (SSM)

Functioning of the Joint Supervisory Teams



Source: ECB (2015)

26/04/2016
Slide 24

Common procedures

Authorisation and acquisitions of qualifying holdings

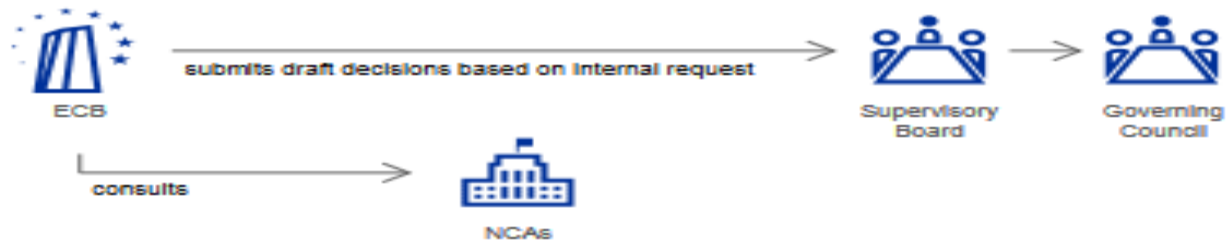


Withdrawal of authorisation

NCA initiative



ECB initiative



Source: ECB Banking Supervision.

Part II:

On the SSM as a “quasi-criminal” enforcement system

Administrative v criminal sanctions: the CRD IV provisions



Administrative or Criminal?

- MS are required to provide:
- **administrative penalties** and other **administrative measures** or **criminal measures**
- **Effective, proportionate and dissuasive**
- **Naming and shaming**



Potential addressees

- **Potential addressees** institutions;
- those who effectively control the business of an institution;
- members of an institution's management body;
- other natural persons who under national law are responsible.



Type of penalty

- **Minimum lists on the breaches**
- Mandatory: for breaches listed in articles 66(1) CRD IV and 67(1) CRD IV **Article 67:**
 - False statements to obtain an authorization
 - Failure to report
- Optional: MS may add further breaches



Procedural rules

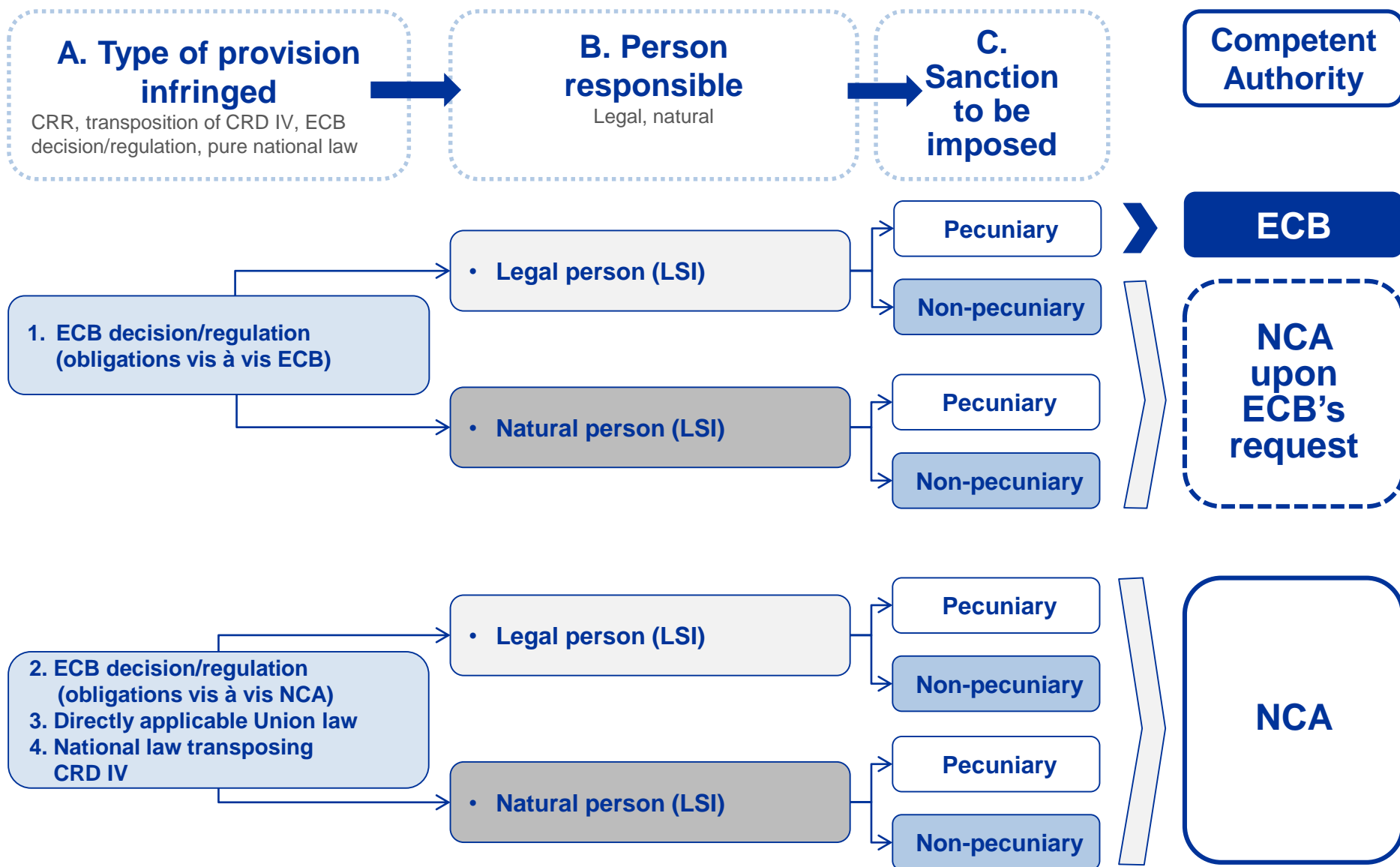
- NCAs should have the **necessary investigative powers**
- Without prejudice of the **rights of the defence**

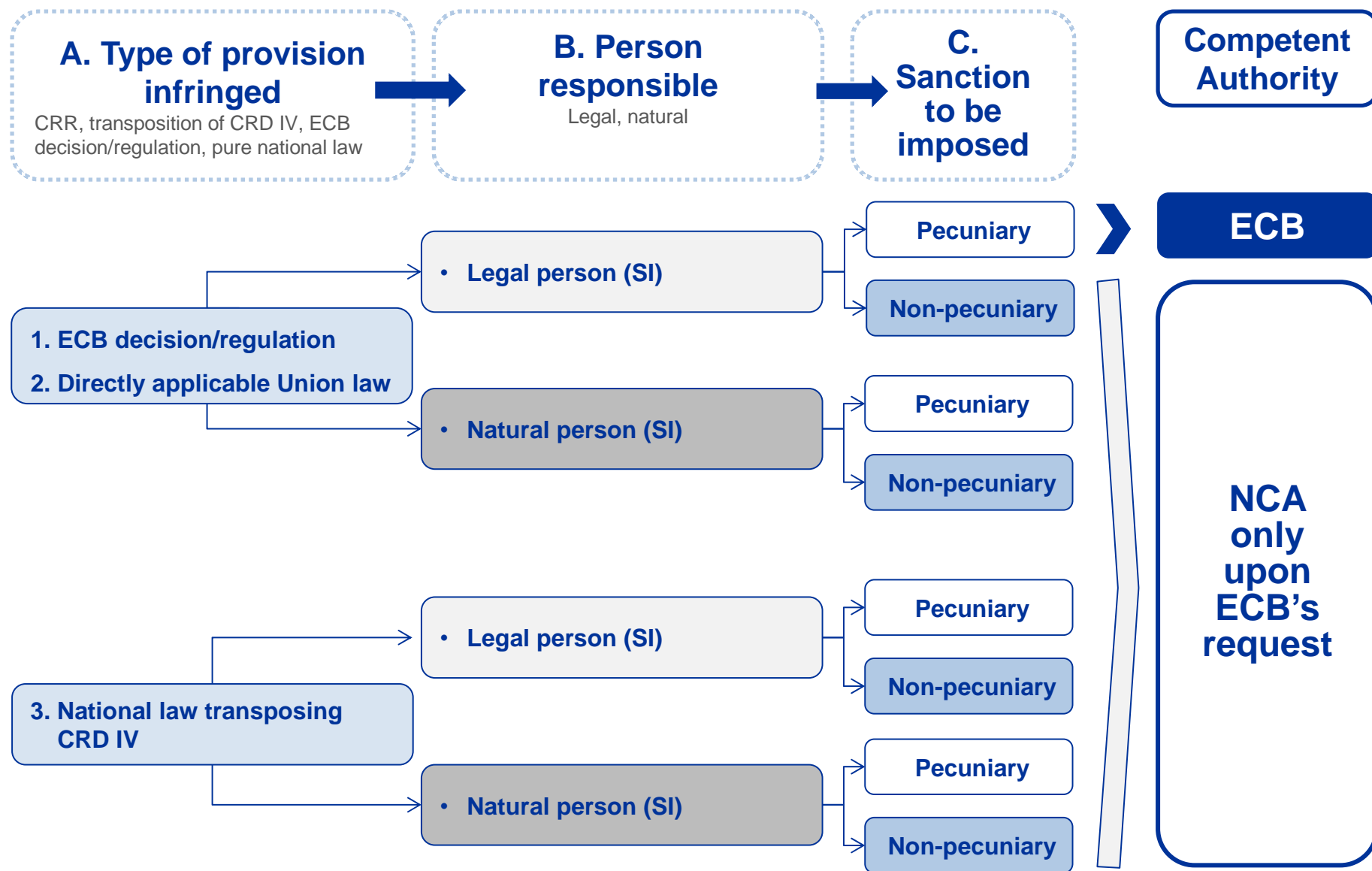
Direct sanctioning powers (18(1) 18(7) SSMR)

- Applied only by the ECB
- Only legal entities (significant credit institutions, Article 6(4))
- Reviewed only by the CJEU

Indirect' sanctioning powers (18(5) SSMR)

- Request by the ECB and decided by the NCAs
- Less significant legal entities and individuals
- Reviewed by national courts





Article 18(1) SSMR: ECB direct sanctioning powers

Supervised legal entities	credit institutions, financial holding companies, or mixed financial holding companies (Raffaele)
<i>Mens rea</i>	Intentionally or negligently
Material scope	breach a requirement under relevant directly applicable acts of Union law
Legal basis	in relation to which administrative pecuniary penalties shall be made available to competent authorities under the relevant Union law
addresses	Significant credit institutions
sanction	<p>Administrative pecuniary penalties</p> <p>The ECB may impose administrative pecuniary penalties of</p> <ul style="list-style-type: none"><u>up to twice the amount of the profits gained or losses avoided</u> because of the breachor up to <u>10 % of the total annual turnover</u> of a legal person in the preceding business year (consolidated account of the ultimate parent undertaking)or such other pecuniary penalties as may be provided for in relevant Union law.

JOINT SUPERVISORY TEAMS (JSTs)

ECB coordinator / National sub-coordinator / Team of experts (mixed)

Suspicion/Observation of alleged breach in day-to-day supervision

Art 22 SSMR

- **Right to be heard**
- **Due process rights**

INTERNAL INDEPENDENT INVESTIGATING UNIT (IU)

Investigating officers designated by the ECB (independent from SB & GC)
Investigation (exercise of supervisory powers under SSMR)

Qualification of breach and assessment of direct ECB competence to sanction

Art 125 SSMFR

- Right to be **informed** about the subject matter and purpose of the investigation

INTERNAL INDEPENDENT INVESTIGATING UNIT (IU)

Investigating officers designated by the ECB (independent from SB & GC)

Preparation of draft decision to Supervisory Board

Art 126 SSMFR

- Right to be **informed** by means of notification of the IU's findings & objections raised against the entity
- Right to be **heard** (right to make submissions in writing, within reasonable time limit set by IU)
- IU **may** invite the entity to an **oral hearing** – right to be assisted and/or represented by lawyers or other qualified persons
- Right to have **access to the file** in accordance with Article 32 SSMFR:
 - The file consists of all documents obtained, produced or assembled by the ECB during the ECB supervisory procedure, irrespective of the storage medium
 - Access is subject to the legitimate interest of other legal and natural persons (protection of business secrets)
 - The right does not extend to confidential information
 - Access may be granted as follows:
 - Electronic storage devices
 - Copies in paper sent by mail
 - Invitation to examine the accessible file in the ECB offices

SUPERVISORY BOARD

Chair / Vice-Chair / 4 ECB representatives / NCA representatives (1-2 per MS)

Adoption of draft penalty decision

Art 127(7) SSMFR: If the SB concludes that there is a different breach / factual basis:

- Right to be **informed** by means of notification of the SB's findings & objections raised against the entity
- Right to be **heard** (right to make submissions in writing, within reasonable time limit set by IU)
- Right to have **access to the file** in accordance with Article 32 SSMFR (see above)

GOVERNING COUNCIL

All six members of ECB Executive Board / Governors of national central banks of euro area MS

Adoption of final decision under non-objection procedure

Investigative measures

Request for information
(Article 10 SSMR)

General investigations
(Article 11 SSMR)

On-site inspections
(Article 12 SSMR)

“Criminalising” administrative procedure:

CL Procedural safeguards sufficiently protected in adm proc	CL Procedural safeguards not sufficiently protected in adm proc
Principle of culpability (<i>mens rea</i> requirements) Intent or negligence in art. 18(1) No requirement in 2532/98	Legality principle No specific provision in the SSMR Limit to articles 66 and 67 CRD IV
Right to be heard Article 22 SSMR	Presumption of innocence No specific provision in the SSMR Presumptions in the CRR, CRD IV, SSM regulations
Access to the file (Article 22 SSMR)	Proportionality
Right to legal assistance	Impartiality (IU and SB)
Duty to state reasons	Public hearing
	Privilege against self incrimination/ACP
	Right to judicial review

Material scope of Article 18(1):

- « **breaching a requirement under relevant directly applicable acts of Union law** »
- **Legality principle**: no direct identification of breaches
- The direct sanctioning power of the ECB SSMR is limited to the breaches listed in Article 67 CRD IV
- It follows that:
 - The ECB cannot sanction any breach that is not listed in Article 67 SSMR
 - Even when the MS implemented the CRD IV increasing the violations, the ECB cannot use these powers
 - The case of O&Ds

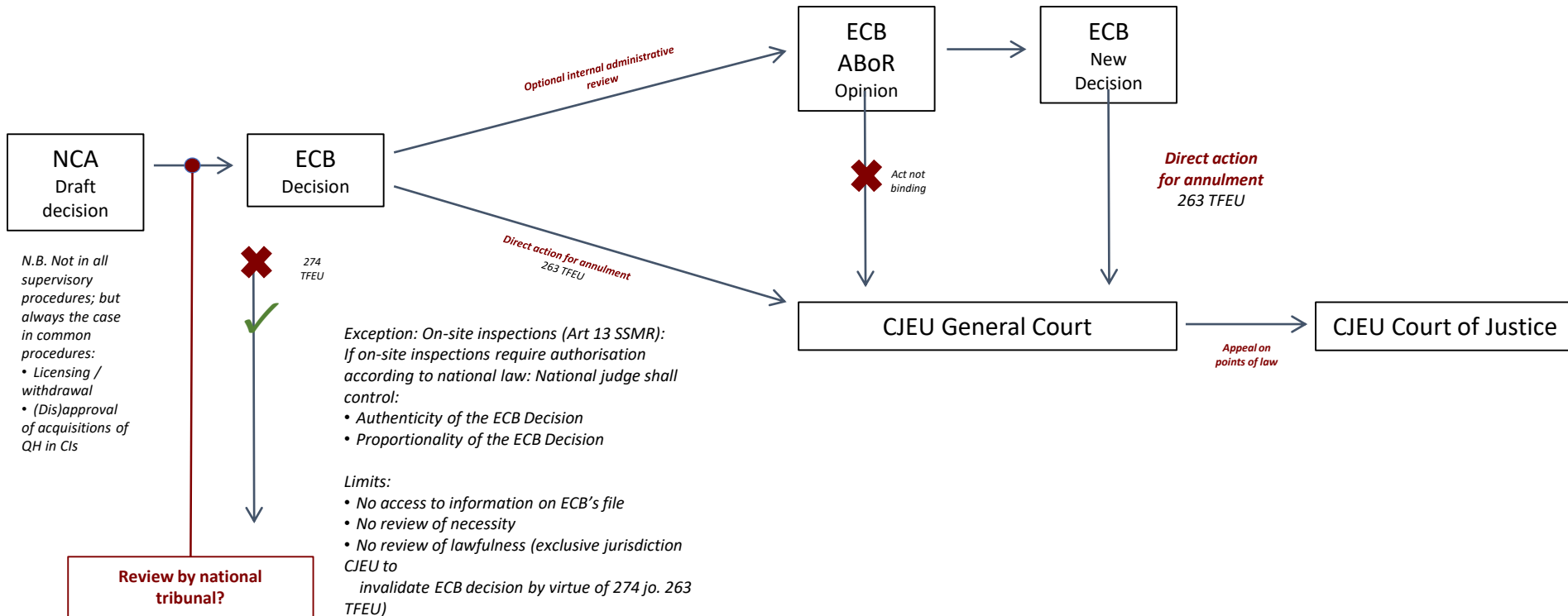
Material scope of Article 18(1):

- **Legality of the penalty:** « In relation to which administrative pecuniary penalties shall be made available to competent authorities »
- **Transposition of the CRD IV in national law:** what if...
- No transposition
- And the implementation expired?
- MS decided to implement 'measures' and not penalties?
- MS decided to implement criminal penalties?

Proportionality in the SSM: horizontal dimension

- No (public) guidelines for the sanctioning powers of the SSM
- **On the *an*:**
 - What for minor offences?
- **On the *quomodo*:**
 - Which are the criteria to choose between a measure (cease and desist) or a pecuniary penalty?
 - Leniency programs?
- **On the *quantum*:**
- Lack of ranking among the offences (cardinal proportionality)
- Lack of ranking among the sanctions (ordinal proportionality)
- No minimum
- Proportionality *strictu senso*: “profits gained or loss avoided”
- “Limited judicial review”: 7 cases before the CJEU

JUDICIAL REVIEW OF ECB DECISIONS

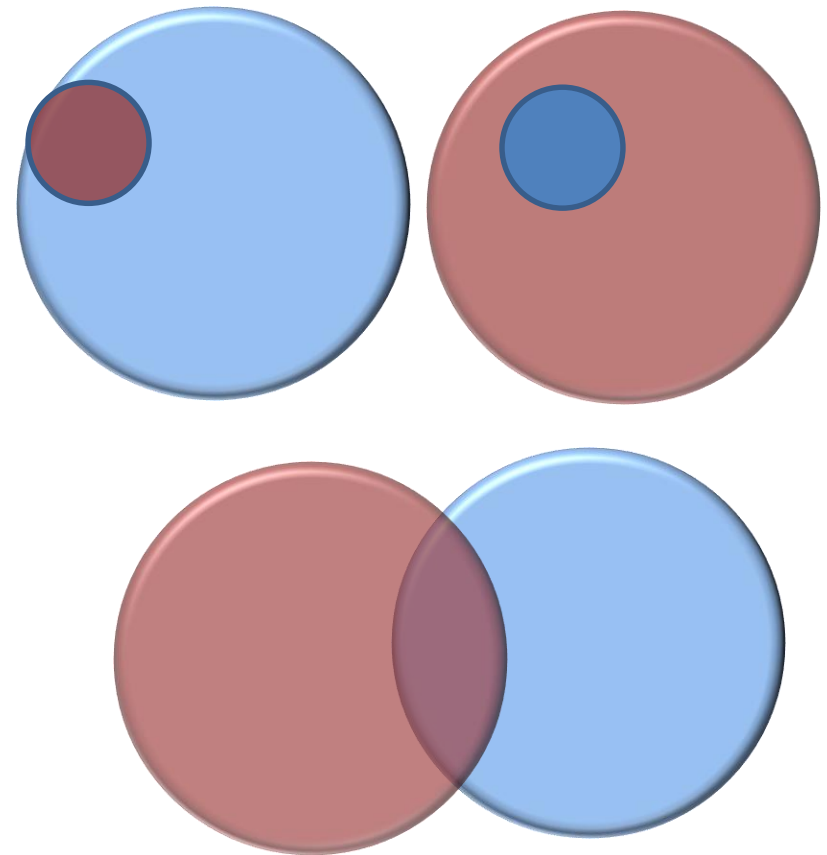
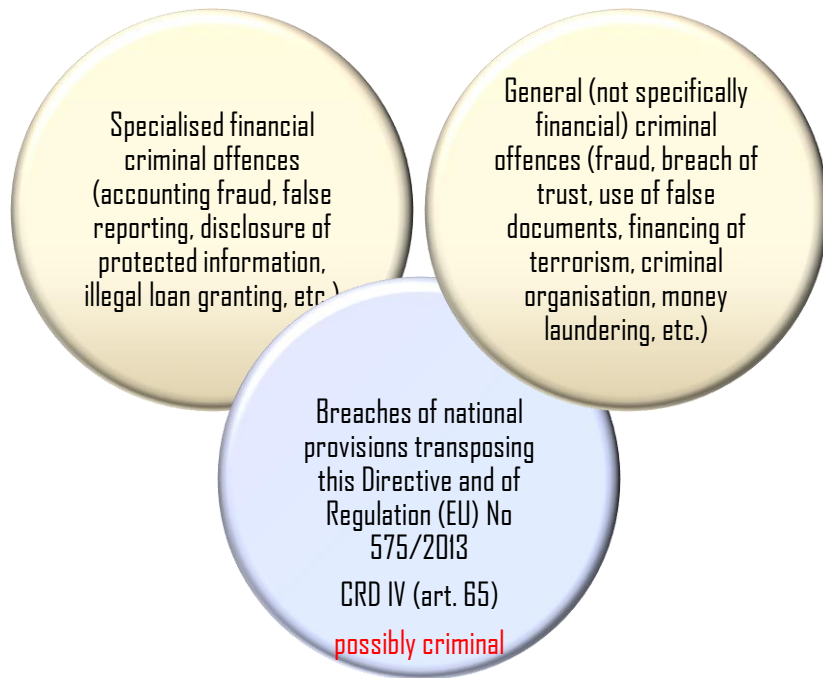


N.B. Decisions in common procedures are largely based on national legislation











Part III:

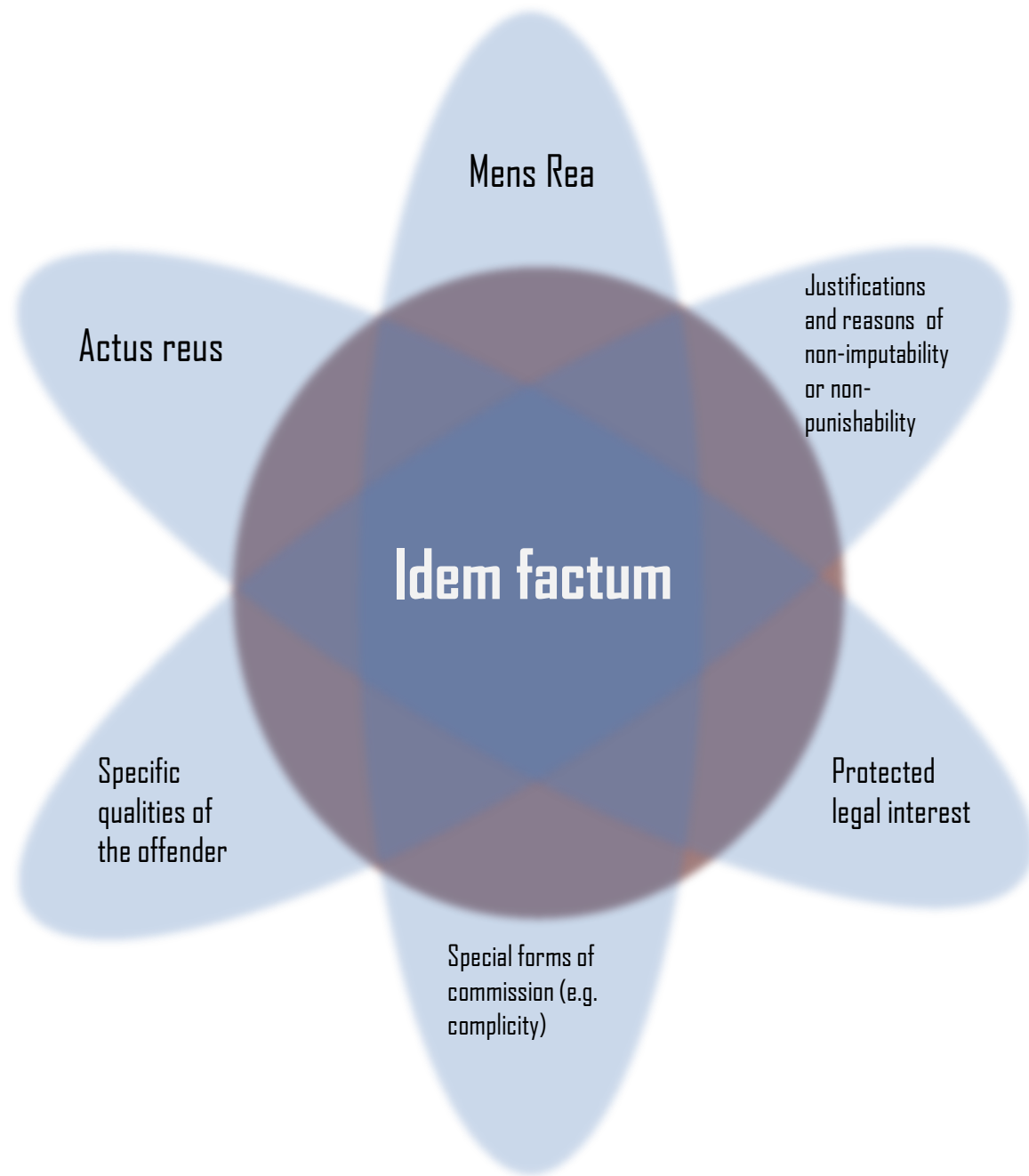
Criminal law and banking supervision

Different types of overlaps



Administrative v criminal

	Breaches of authorisation requirements (art. 66 CRD IV)	Obstruction of supervision	Failures to report (including false reporting) (art. 67 CRD IV)
	N/A	N/A	N/A
	●		●
	●	●	●
	●	●	●
	●		●
	●		●
	●	●	●
	●		●
	●		●
		●	●



How many NBII do we have?

- ECtHR Engel criteria (alternative):
 - Categorisation in the domestic law as criminal;
 - Punitive nature of the offence,
 - Nature and degree of severity of the possible penalty
- Three possible outcomes:
 - Administrative sanctions *stricto sensu*
 - “Quasi-criminal” sanctions or “criministrative” sanctions
 - Hard core criminal law sanctions (ECtHR, Jussila, 2006)
- Applicable to fines against legal entities (ECtHR, Menarini, 2011)



- ECHR Article 4 Prot. No. 7
 - Both Adm and Crim
 - Only national cases
 - Both legal entities and individuals
- Article 54 CISA
 - Only fully fledged criminal final decisions
 - Only individuals (freedom of movement)
 - Only transnational cases
 - Enforcement clause
- Article 50 CFREU
 - Both Adm and Crim
 - National and transnational cases
 - No clause of enforcement
 - Limitations ONLY ex 52 CFREU

CJEU

C-524/15, Menci;

C-537/16, Garlsson et al.;

C-596/16, Di Puma

- Criminal penalty block adm punitive penalty
- Criminal acquittal always wins
- Need of coordination but no clear rules on “sufficient connection in substance and time”
- No ‘Spasic’ effect: Execution of the penalty does not count
- Anrechnung prinzip

ECtHR, A.B. v Norway,
16 November 2016:

“*there is no violation of the ne bis in idem when there is **sufficient connection in substance and in time** between the two sets of proceedings, to consider them **as forming part of an integral scheme of sanctions***”
but...

Johanssen and o. v Iceland, 18 May 2017: § 55, breach

Rivard c Suisse, 2016, no breach

Sismanidis & Sitaridis v Greece, 9 June 2016, §43, breach:

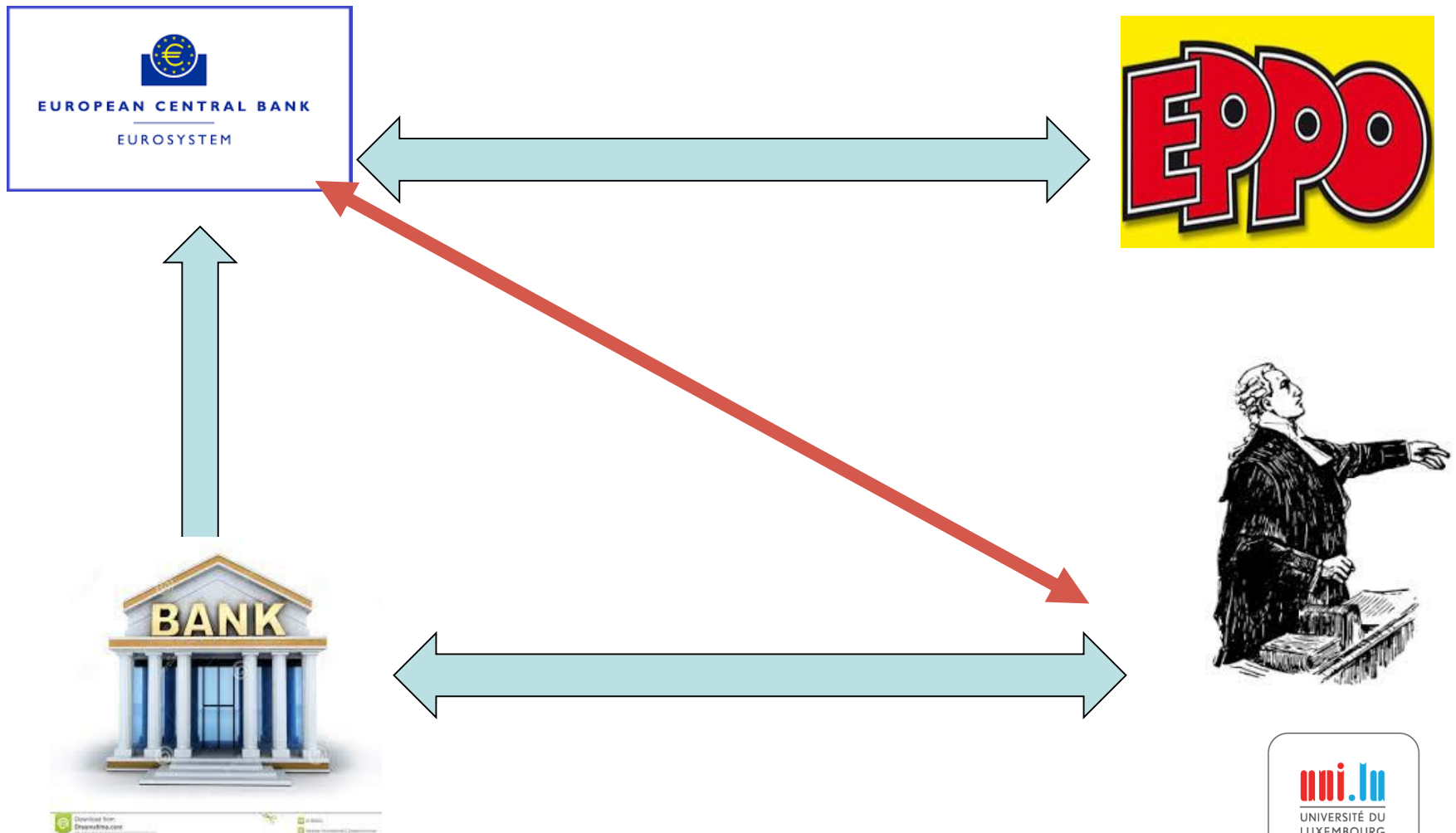
ECtHR

Potential conflicts between SSM and CL:

Case N1: breach of reporting requirements committed by significant banks (18(1) SSMR and crime under national law)

Case N2: allowing a loan in breach of prudential requirement and terrorism financing committed by a significant bank (18(1) SSMR and Terrorism financing)

New NBII dimensions (legal entities)



Current NBII between AdminP/CrimP in the Eurozone

Administrative decision comes first	Consequences on criminal proceedings
Imposition of AdminP	Obstacle to the CrimProc and CrimPen
'Denial' of AdminP	?
Judicial Annulment of AdmP	?
Criminal decision comes first	Consequences on administrative procedure
CrimP	Obstacle
Not guilty/Aquittment	Obstacle
Judicial Annulment	?

Part IV: Interactions with criminal procedure

Duty to report: Article 136 SSMR

ECB has
Evidence of facts
potentially giving
rise to criminal
offence

Because of
supervisory tasks

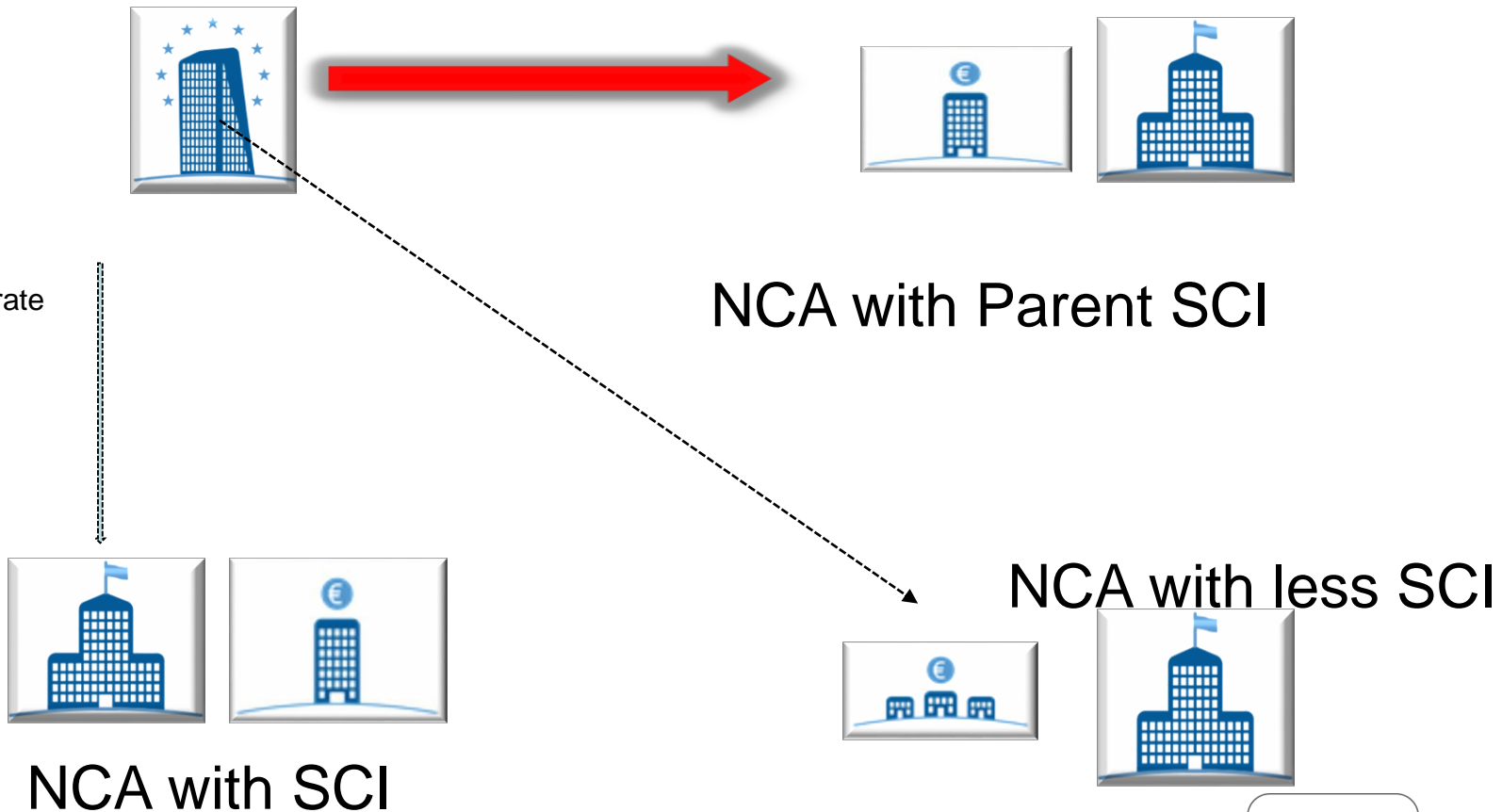
“shall” request the
NCAs to refer the
matter to the
national
investigative
authorities

**In accordance
with National law**

- Definition of the crime*
- Duty to report to the criminal investigative authorities
- Modality of the Interaction between administrative and criminal investigation

What national law should be applicable?

- Evidence law?
- Judicial authorisation?
- Legality or opportunity?
- Immunities?
- Duty to cooperate with CLAs?



Requests received by the ECB

NCAs should answer on behalf of the ECB

express obligation to disclose

no overriding reasons:

- To safeguard the interest of the Union
- To avoid any interference with the functioning or the independence of the ECB

Requests received by the NCAs

Duty to inform the ECB of every information disclosed (no difference between significant and non significant credit institutions)

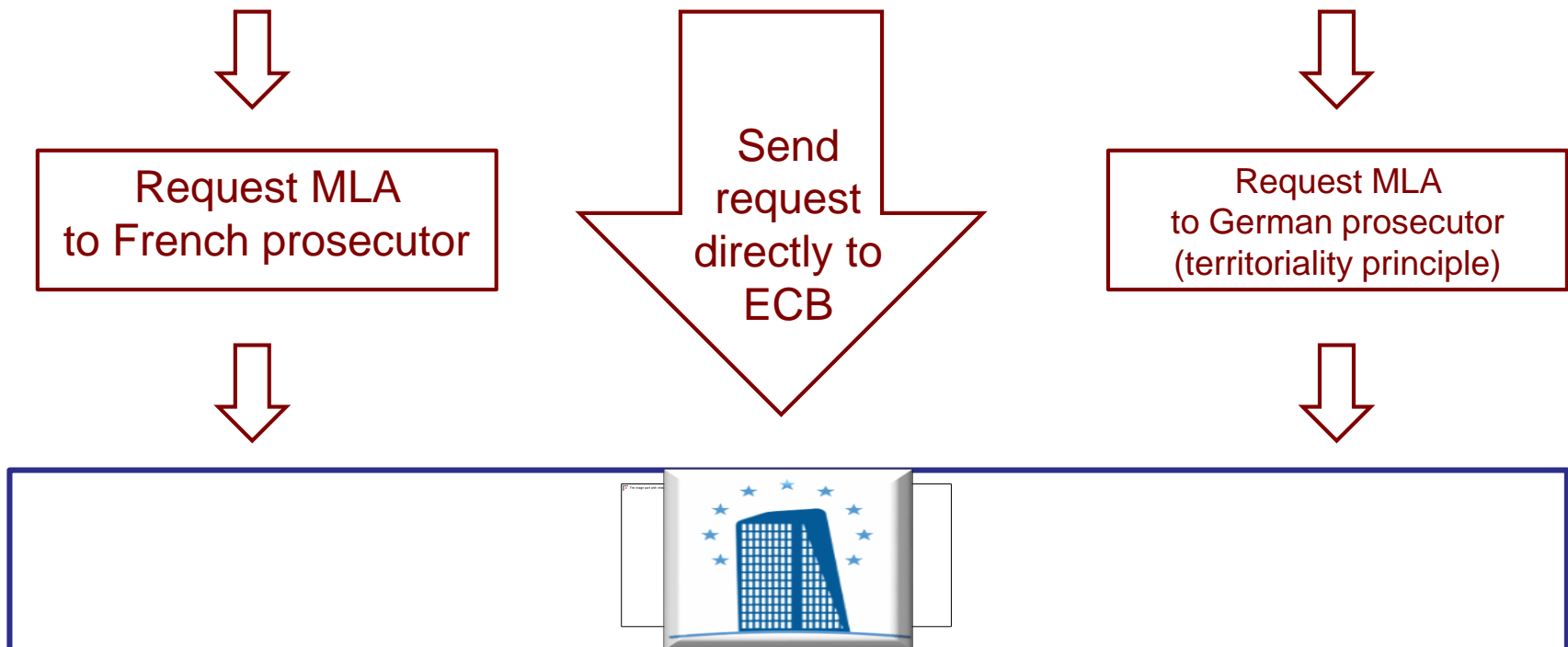
Duty to consult the ECB that “shall advise” as to whether the information may be disclosed

Duty for NCAs staff to communicate the information to criminal investigative authorities
The refusal is a crime!

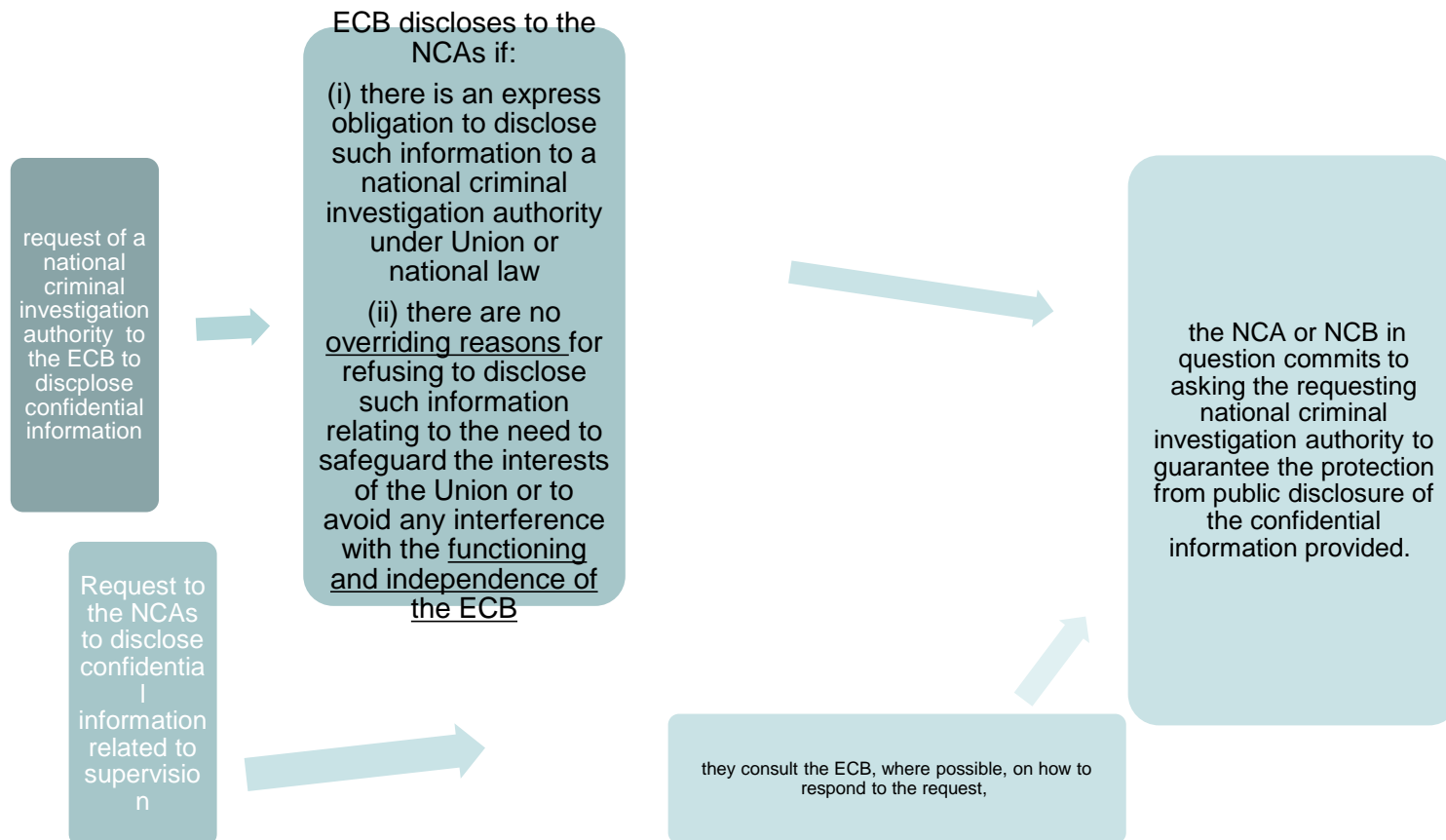
Disclosure of information: which criminal prosecutor is entitled to request the ECB?

- Case study:

Italian prosecutor investigating on a subsidiary of a significant bank having his parent in France



Decision (EU) 2016/1162 of the ECB on disclosure of confidential information in the context of criminal investigations (ECB/2016/19)



Immunities of the ECB

Disclosure of information in cases where the ECB's or its personnel's liability is also examined

Inviolability of premises and buildings
Inviolability of archives
Inviolability of communications



Immunity from legal proceedings (civil, administrative, criminal, OLAF investigations):
a) Of the ECB as a legal person
b) Of the ECB staff

Disclosure of information in cases where the ECB's or its personnel's liability is **NOT** examined

Inviolability of premises and buildings
Inviolability of archives
Inviolability of communications

III. Immunities of the ECB

Slovenian raids:

July 2016, Slovenian police searched four locations in the Slovenian capital as part of investigation into possible irregularities during a 2013 rescue of the country's banks. Draghi, in a separate letter to European Commission President Jean-Claude Juncker, said hardware and networks at the Bank of Slovenia contained information belonging to the ECB that was protected by "the Protocol on the Privileges and Immunities of the European Union." Fiser, however, said on Thursday that the raid was legal and out of his control as it was ordered by an investigating judge, according to a press conference transcript sent by Slovenian prosecutors to OCCRP. Slovenian police have also said the move was legal.

Professional secrecy and criminal investigation

- General regime: *obligation to exchange information within the SSM prevails over professional secrecy*
- Articles 53 ff. CRD IV - professional secrecy obligation does not preclude exchange of information with supervisory authorities of different MSs
- Under Articles 53(1) CRD IV professional secrecy is without prejudice to cases covered by national criminal law
- No specific provisions under SSM and SRM regulations

Evidence sharing: problematic issues

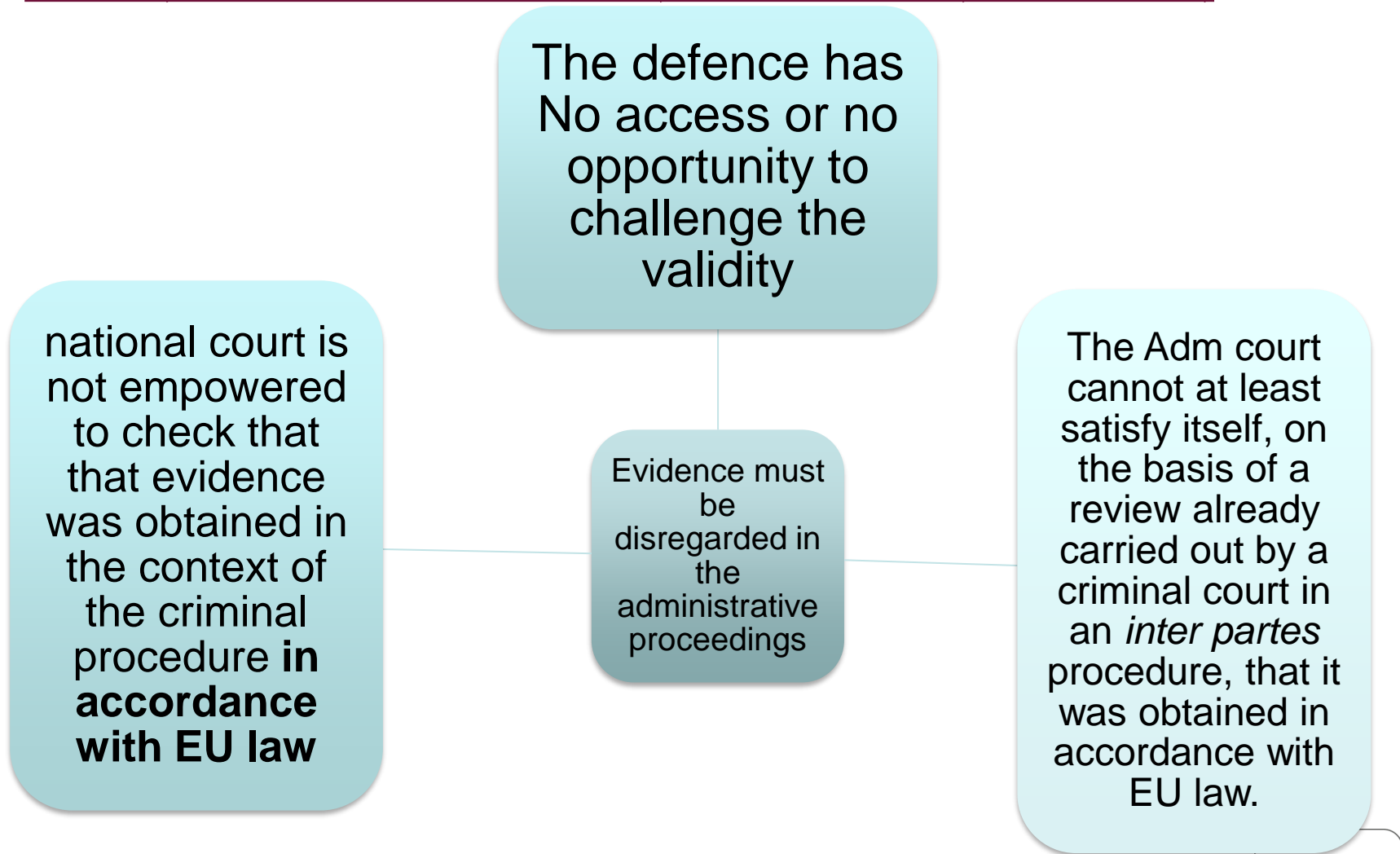
- **Administrative proceedings**
- **Documents**
 - Onsite inspections/Dawn raids
 - Digital documents
 - E-evidence
 - Surveillance evidence
- **Request of information/statements of witnesses**



- **Criminal proceedings**
- Privilege against self incrimination
- Jurisdiction: Lex loci or lex fori?
- Real-time surveillance?
- Mandatory judicial authorisation
- Legal assistance
- ACP
- Privilege against self incrimination
- Whistleblowers?

Surveillance evidence in administrative proceedings

CJEU, WebMindLicenses, 17.12. 2015, C-419/14,



Toward an integrated enforcement model?

No Clear distinctive criteria
between administrative
breaches and criminal offences

Legal basis

Article 82(2) TFEU

Targeting the individuals?

Respect of fundamental rights
in the administrative
investigative measures in order
to facilitate/allow the “file
sharing”

**Integrated
Enforcement?**

**Mixed composition of the
investigative units and
flaw of information**

Avoid double penalties
(prevention of
ne bis in idem)

Thank you for your attention!

silvia.allegrezza@uni.lu