BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

SSM Regulation, ten years since

Conference Papers

Banca d'Italia, Rome, 20 October 2023

July 2024

number 101

BANCA D'ITALIA
EUROSISTEMA

Quaderni di Ricerca Giuridica

della Consulenza Legale

SSM Regulation, ten years since

Conference Papers

Banca d'Italia, Rome, 20 October 2023

Number 101 – July 2024

The series "Quaderni di Ricerca Giuridica", edited by the Legal Services Directorate, publishes the studies conducted by the Bank of Italy's lawyers or by internal and external experts.

The series is focused on legal matters of specific interest to the Bank.

The research papers are selected by an editorial committee which assesses originality, clarity, reasoning consistency, completeness of the information provided.

The opinions expressed and conclusions drawn are those of the authors and do not necessarily reflect the views of the Bank of Italy.

ISSN: 0394-3097 (print)
ISSN: 2281-4779 (online)
Printed by the Printing and Publishing Division of the Bank of Italy

TABLE OF CONTENTS

Afternoon session

Roundtable

Welcome address of the Governor of the Bank of Italy[*]

Ignazio Visco

Legal foundations of the Single Supervisory Mechanism: A retrospective look at future challenges

On June 29, 2012, the Heads of State and Government of the euro-area countries issued a statement announcing that the Commission would present a proposal on the basis of Article 127(6) of the Treaty on the Functioning of the European Union (TFEU) for a single supervisory mechanism. This was meant to be a forceful response to the severe stress experienced by the banking sector in the wake of the Global Financial Crisis and the harsh consequences of the sovereign debt crisis that had hit some of the euro-area economies.

Just over a year later, that statement was followed by the adoption of the Single Supervisory Mechanism (SSM) Regulation on October 15, 2013.

At that juncture, given the urgency, it was decided not to amend the Treaties, but to leverage on the enabling clause of the above mentioned Article 127(6) TFEU, which in any case prescribes a complex and burdensome legislative process, to entrust the European Central Bank (ECB) with extensive and direct micro-prudential supervisory powers over the most important ('significant') banks of the euro area, while at the same time also granting the ECB substantial powers to guide and coordinate the prudential supervision of smaller ('less significant') credit institutions that remained at national level.

The Regulation – whose tenth anniversary we are celebrating today – represented a pioneering experiment in the field of EU administrative law, marking a major advance in the EU integration process. While it involved a substantial transfer of national sovereignty to the ECB, the SSM was conceived as a network with no legal autonomous personality, with a Union Institution at its centre – indeed, the ECB – vested for this purpose with considerable direct and intrusive administrative powers vis-à-vis third parties. The national competent authorities (NCAs) were required to assist the ECB 'in the preparation and implementation' of the acts necessary to perform the supervisory tasks. This included the assessment, on an ongoing basis, of banks' situations, and on-site inspections.

The basic principles of a Banking Union were then drawn up over a very short period, especially so if compared with the time that it took to define the framework and the rules at the basis, within the Economic and Monetary Union,

[*] At the time of the conference.

of a common monetary policy and a common currency, the euro. Furthermore, and also because of this, the SSM can only operate on the basis of a set of multiple (and at times complex) legal schemes.

Ten years ago, the first priority was deemed to be aligning the supervisory practices within the euro area, through a significant but not complete centralisation of administrative powers. At that time, further accelerating the process for harmonising substantive banking law, which had already been under way for years, was not being considered: this is also because, contrary to what the Treaty (Article 140 TFEU) envisages for access to the single currency, primary Union law does not make participation in the single banking supervision conditional on legal convergence.

Thus, the time pressure has certainly imposed some trade-offs. I will just recall three of them.

The first concerns the decision to concentrate the key administrative powers of micro-prudential supervision on the ECB, despite the lack of a fully harmonised substantive banking law. The application of different national laws by the ECB and the need to ensure the equality of treatment among the supervised entities has led to a rather peculiar outcome: that of a Union Institution required to apply the national law of each of the (now 20) EU member states belonging to the euro area when implementing the SSM.

Accordingly, the SSM's administrative decisions must be adopted on the basis of many different domestic legal frameworks, without at the same time jeopardising the obligation to interpret them in accordance with EU law, given the goal of ensuring equality of treatment for the credit institutions concerned. At the same time, the ECB has the power to issue opinions on draft legislation, including national legislation, in the field of banking supervision. While this is only an advisory role, given that it is also aimed at ensuring harmonised rules, it is certainly significant.

The second issue concerns the division of powers between the ECB and the NCAs. A 'political compromise' between the Commission's initial proposal and the significantly divergent stances voiced by the delegations of some Member States was only reached at the end of a complex negotiation. This is reflected in some uncertainty, if not ambiguity, in the SSM Regulation with regard to the exact allocation of powers between the ECB and the NCAs in the matters covered by the Regulation itself.

The reason for this essentially lies in the fact that the original text of the Regulation proposed by the Commission envisaged the exclusive competence of the ECB over all the banks in the euro area. Furthermore, the specification of very delicate aspects relating to the allocation of powers, such as day-by-day supervision, had been assigned by the Founding Regulation (i.e. the SSM Regulation) to the NCAs as a task concerning all banks, including the significant ones, whereas under the Framework Regulation (a 'second-level' regulation) it is assigned to the Joint Supervisory Teams chaired by the ECB.

Thirdly, the ordinary decision-making process within the SSM has been influenced by the constraints imposed by the Treaties and by the Statute of the ESCB and of the ECB, with the additional complexity coming from the separation between monetary policy and micro-prudential supervision. The set-up of the Supervisory Board as a non-decision-making body that approves complete proposals for supervisory measures and submits them – through a non-objection procedure – to the Governing Council, entitled to raise objections especially on monetary policy issues, is the break-even point.

Despite several legal challenges, the SSM has been in many ways a historical achievement. Not least as evidence of the hard balance reached, the text of the SSM Regulation was not deemed as requiring any amendment at the outcome of the two periodic reviews concluded by the Commission on the SSM in 2017 and 2023, pursuant to Article 32 of the same Regulation.

There is no doubt that greater uniformity and effectiveness of prudential supervision has been achieved with regard to all the jurisdictions participating in the SSM. The room for arbitrage within the euro area, fuelled by asymmetrical supervisory approaches, has since been considerably reduced. Moreover, the SSM has acted as a catalyst for a significant banking restructuring process, directed at enhancing soundness and capitalisation. The importance of resilient banks for the euro area became evident during the COVID-19 pandemic as well as in the context of the Russian aggression against Ukraine, but it has also been confirmed very recently in connection with the banking crises that occurred in the United States and in the Switzerland.

The SSM has certainly benefited from the advantages of a single jurisdiction over all ECB acts and measures: that of the Court of Justice of the European Union. The Bank of Italy is fully aware of the growing role of the case law of the Court in the process of building the Banking Union: so much so that we have set up a periodical publication, in our Legal Research Series (*Quaderni di ricerca giuridica*), devoted specifically to reporting and providing comments on these judicial developments.

The Court of Justice – with its rulings – has first and foremost supported the view of the SSM as a centralised EU mechanism, in which the ECB is acknowledged as the holder of supervisory powers over all the banks in the SSM (regardless of their significant or less-significant classification). Meanwhile, the Court has also affirmed its exclusive jurisdiction over the ‘endo-procedural’ or ‘preparatory’ acts adopted by the NCAs, within the perimeter of the common procedures envisaged by the SSM Regulation. It is important that the EU Judge has also provided guidance on the application of national law by the ECB, by making it clear that the ECB – when required to apply national law in transposing directives – must first look to the interpretation provided by the domestic courts.

This brings me back to the beginning of these brief opening remarks.

The urgency with which the SSM was established has led, inter alia, to the exercising of supervisory powers on all credit institutions that operate in the euro area, in compliance with prudential banking rules that were and continue to be only partially uniform at EU level. This asymmetry is clearly still a source of imbalance. Ten years after the enactment of the founding regulation of the SSM, it is now high time to work towards a much more advanced degree of harmonisation of those rules. From this point of view, it would certainly be desirable to launch a systematic and comprehensive assessment at EU level of the extent to which the current dispersive banking rule directives can be merged into a single comprehensive piece of legislation.

It is time to think about a single EU Banking Code, which not only sets out the Pillar 1 capital requirements (as is already the case by virtue of the CRR), but also standardises the organisational and governance requirements for credit institutions, with a view to the wide range of activities that banks are authorised to conduct. In addition, the enforcement mechanisms need to be coordinated with the SSM Regulation as much as possible.

The significant discrepancies that persist among the various SSM jurisdictions, in the areas of commercial law, corporate law, labour law and administrative law should not be an ideological barrier to such an exercise. The regulation of the qualitative prudential standards to be applied vis-à-vis credit institutions could disregard the corporate models provided under each single jurisdiction, and focus instead on a functional approach.

One area, perhaps a minor but not a negligible one, that apparently continues to elude a fully harmonised approach is that of administrative sanctions, as national legislators still retain wide margins of discretion with reference to those who should be sanctioned and, above all, under what conditions. The CRD6 proposal, still under negotiation, seeks to define in a more precise and exhaustive manner the list of infringements that Member States should be obliged to consider when applying sanctions. However, it is still a minimal list, naturally subject to gold plating. Likewise, the precise combination of sanctions against supervised entities on the one hand, and sanctions against their managers, on the other hand, would also seem to remain a matter of domestic law. In the last few years, the European Court of Human Rights as well as the Court of Justice have had a fruitful dialogue with the national judges and drawn up a dense case law on the fundamental procedural principles to be applied to administrative sanctions ('right to be silent', '*ne bis in idem*', and so on). We believe that these rulings could form the basis for a fully uniform EU law on sanctions vis-à-vis credit institutions and their management.

Again with a view to a level playing field in the sensitive area of enforcement, there should also be some thought on the possibility of harmonising – here at a minimum level, considering the conditions imposed by Article 83(2) TFEU – a very delicate area that is still closely governed by national laws: namely that of the criminal law rules intended to safeguard the exercise of banking supervisory tasks and the general interests underpinning them, within the constitutional framework of the Member States. A mature system such as the SSM should be backed and secured by a hard set of criminal law rules, with their basic features enshrined at

EU level. Indeed, any obstruction to the supervisory functions exercised by the ECB or by one of the 20 NCAs ought to be subject to homogeneous criminal sanctioning treatments across the whole SSM area. This would also be true if we refer to an unauthorised exercise of banking activity: with the European dimension of banking supervision, the transnational dimension of such offences does seem to exist per se.

My focus today has been on the genesis of the SSM and on possible leverages to remedy some internal weaknesses within the mechanism. The SSM cannot still be deemed a self-contained system, but rather a part – albeit the key one – of that Banking Union which, ten years after the founding regulation of the SSM, has still not been fully completed, especially on the front of crisis management and depositors' protection. It goes without saying that no banking supervision mechanism – no matter how efficient – can extinguish the risk of banking crises, especially when considering the unending transitions to which the advanced banking sectors are subject in the digital era, as the recent collapse of some US regional banks shows. Following the further postponement of the European Deposit Insurance Scheme announced by the Euro group at its meeting of 16 June 2022, the Commission – on the basis of the outcomes of that same meeting – presented a proposal last April for a revision of the Crisis Management and Deposit Insurance framework.

On the one hand, the proposal – which takes into account many of the suggestions we voiced in recent years – definitely includes some positive elements that could ease the crisis management for small and medium-sized banks, especially insofar as it enhances the potential for Deposit Guarantee Schemes to intervene to support a transfer of assets and liabilities, both in liquidation or in resolution, and to ensure an orderly exit from the market of failing banks. On the other hand, some critical issues remain: the enlargement of the scope for resolution should be guided by the principle of proportionality, requiring an assessment of the bank's actual capacity to issue Minimum Requirements and Eligible Liabilities, which in the Commission's proposal remains the main source of funding for resolution, and the lack of financial stability exemption for addressing systemic crises, such as the one adopted to solve the recent banking crises in the United States. This is not the time to enter into the details of this very technical debate, but – in my view – it is not possible to outline the perspectives of the SSM without considering the frontiers of crisis management.

I leave these thoughts to the eminent panellists of today's conference, which is intended to be an occasion to celebrate a decade in which legal challenges have mostly been successfully overcome, but also to openly discuss the many steps that still await the future generations of colleagues working for and within the EU banking supervision.

Morning session

This time is different: the unprecedented political importance of the SSM

Concetta Brescia Morra[1]

The rules approved by the European institutions 10 years ago are not just another piece of the European banking regulatory framework; they have an unprecedented political importance. The Banking Union, in particular the first pillar represented by the Single Supervisory Mechanism (SSM),[2] has been a game changer in the process of European integration. This paper aims to demonstrate that the successful story of the SSM is due to the day-to-day administrative experience implementing the Euro-area supervisory system. This experience increased the degree of cultural integration in Europe. The high-profile contributions in this volume, written by scholars from different EU countries, testifies to the shared heritage of principles and technical legal tools that the SSM gave rise to.

"This time is different". Let me borrow the title phrase of a very well-known book written by two economists, Reinhart and Rogoff,[3] putting the Global Financial Crisis into historical perspective, as the impetus of this paper. I am aware that the book's title suggested skepticism as to whether the financial crisis that peaked in 2008 was different from others that had occurred in the past. Nonetheless, I am deeply convinced that this time, unlike what happened with the approval of other reforms affecting the financial system, a change has been put in place capable of achieving true institutional integration in Europe. As in other cases in the past, a crisis (financial crisis) pushed the wheel of the European integration progress, an event that was described so well by Jean Monnet's "chain reaction" strategy. This strategy aims at partially integrating policy functions and institutions in a few areas – such as coal and steel, trade, or, later, a common currency – with the expectation that more integration will follow in other areas. The most important limit of the chain-reaction, as highlighted by scholars, is that "it underestimates the heterogeneity costs and constraints involved when political integration is attempted among populations with different preferences, cultures, and identities".[4] I think that the successful build-up of the SSM is more than "a partial integration of policy functions", because it overcomes, to some extent, this limit.

---

1 Roma Tre University, Full Professor.

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 (OJ L 287, 29.10.2013, 63).

3 C.M. Reinhart, K.S. Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press 2011).

4 E. Spolarore, *Monnet's chain reaction and the future of Europe*, VoxEU Column, 25 July 2015.

There are some distinctive features of the SSM that lead me to think that this time the obstacles experienced in the past when attempting political integration can be overcome. Three elements are crucial.

First, unlike what happened in the past, when integration progressed mainly on a regulatory level with the harmonization of European countries' rules, this time the reform changes the public apparatus of the European Union's setting up of a centralized institutional mechanism. Having the same rules is an important factor in creating a single market, but we should admit that this factor has not been able to create a common culture, a common interpretation of the rules, despite the extraordinary efforts made in this direction by the European Supervisory Authorities. Certainly, the turning point was the creation of the ECB and its entrustment with the monetary policy function for the euro area through the Maastricht Treaty. As long as the centralization of powers was limited to monetary policy, the exchange of ideas, sometimes the clash between different approaches, happened at the decision-making phase. It is an exchange of ideas between people, the leaders of central banks, who share values, knowledge, and high-level technical experience. Differently, the centralization at the European level of a policy function implies the taking of numerous administrative decisions. This requires that the people working in the SSM, not only at the decision-making level, but also at the investigation level and at the implementing level, share technical legal expertise that goes far beyond the fields of supervision and finance and concerns the general principles of administrative law and civil law. Considering that these latter fields are very poorly harmonized, if we exclude a few general principles established in the EU Charter of Fundamental Rights, the set-up of the SSM involves the creation of a common heritage of wide-ranging technical-legal expertise. For this reason, I believe that the BU reform implies a more effective step in the process of cultural integration than what has been experienced so far.

Second, the "Single Supervisory Mechanism" is an absolute novelty from a legal perspective. As very well highlighted by scholars,[5] the "single mechanism" is not a new body and has no legal personality. It is an integrated operating and decision-making system between a European institution and national authorities which produces legal acts. It is a complex system of "shared administration" within Europe, resulting in legal administrative acts applying in any euro-area jurisdiction. People who have an employment relationship with the ECB and people who have an employment relationship with the national competent authorities work side by side in the SSM (think about how a Joint Supervisory Team is composed). All these people contribute to the administrative activities attributable to the ECB. In doing so, they bring with them not only their cultural backgrounds, but also their different legal backgrounds. The exercise of an

---

5 See R. D'Ambrosio, *The SSM: Allocation of Tasks and Powers between the ECB and the NCAs and Organisational Issue*, in *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, edited by R. D'ambrosio, Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia No 88, 2020, 52.

administrative function, in the terms described, implies the creation of a common cultural *humus*, a sort of "Esperanto" legal basis, to take administrative decisions.

Third, the creation of an administrative supervisory mechanism, centralized at the European level, which legally refers to a European institution, such as the ECB, means that the contentious phase in the relationship between citizens/businesses and administrative authorities also shifts at the European level. Although this happened in the past in the antitrust field, considering the number of administrative decisions taken by the ECB each year in the supervisory field, the novelty has imposed a radical change in the legal culture. It means that lawyers and practitioners need to learn how EU procedural law works and study the fundamental book written by Judge Koen Lenaerts and other prominent authors.[6] Furthermore, this reform may affect the daily life of EU citizens. Think about the case of a citizen of an adhering country who is deemed unsuitable to hold the role of member of the board of a bank by the ECB within the common procedures established by the SSM. He cannot defend his rights before a national judge but must do so before a European one. A legal issue relating to a natural person's ability to work is decided at the European level, even in the litigation phase. Thus, having an institution whose acts are directly applicable towards citizens and businesses of the Union and with which the latter must dialogue both at the administrative level and in the case of a dispute becomes part of the daily life of businesses and citizens. This is another crucial feature of the SSM: its ability to foster a common legal culture, as I had the privilege to experience in the 8 years I spent as a member of the Administrative Board of Review (ABoR).

Let me spend few words on this body because it is precisely from my professional experience, as a member of the ABoR, that I draw the conviction that the SSM represents a crucial step in the process of European cultural and institutional integration. The ABoR was established by the SSM Regulation to carry out internal administrative review of ECB decisions in the supervisory field. The ABoR has unique features in the European Union legal framework, despite some similarities with other bodies established for the review of decisions taken by European authorities. The Chair of the ABoR, in the early days of the mandate, started an interview to explain the ABoR[7] by saying that "it is important that people know what kind of animal we are". The operating rules of the ABoR are typical of those of a judicial body, although it carries out internal "administrative review" of the ECB decisions in this field; indeed, the final opinions of the ABoR are not binding on the ECB. The ABoR is composed of five members, who may be replaced by one of two alternates under certain conditions. According to Article 24 of the SSM Regulation, the members must act independently and "in the public interest". Rules are provided to ensure that the ABoR's members are independent of the ECB (and of the national competent authorities) as well from potential applicants. The structure of the ABoR, as outlined by the European

---

[6] K. Lenaerts, K. Gutman, J.T. Nowak, *EU Procedural Law*, 2nd ed. (Oxford University Press 2023).

[7] J-P. Redouin, *Explaining the ABoR*, 25 March 2015, ECB website.

legislature, highlights the aim of establishing a body composed of independent experts in the banking supervisory field.

Regarding the scope of the ABoR's review, an internal administrative review pertaining to "the procedural and substantive conformity" of the decisions taken by the ECB in the prudential supervisory field (Article 24(1) of the SSM Regulation) is performed. There has been much discussion among scholars[8] on the meaning of the words "substantive legality" and to what extent this expression allows the ABoR to enter into the merits of the ECB's decisions. The main limitation in this regard comes from Recital 64, which provides that when the decision taken by the ECB involves a margin of discretion, the ABoR should respect "the margin of discretion left to the ECB to decide on the opportunity to take those decisions". I do not consider it useful to delve into this discussion here, because another aspect regarding the scope of the ABoR's review seems more important to me to support the conclusions of my paper.

The added value of the ABoR's review to build a common legal framework is highlighted by two principles expressed in the ABOR opinions. Although the opinions of the ABoR are confidential and are not in the public domain, a careful reading of the document published in December 2022 on the ECB website[9] on the first eight years of ABoR's experience (hereafter referred as the "ABoR document") makes those principles very clear.

First, the ABoR adopted a "principle-oriented" approach in its activity. The opinions adopted so far include an evaluation of the legality of the ECB's decisions regarding the ECB's compliance with general principles of EU law, such as proportionality, equal treatment, legitimate expectations, legal certainty, and good administration.[10] This approach is the consequence of the fact that most of these principles are expressly referred to in the SSM Regulation (recitals 30, 58, 59, 81, and 86; Articles 1 and 22(2)). However, this choice regarding the scope of the ABoR's mandate is consistent with the main purpose of the establishment of an internal review body, namely, to prevent the ECB from carrying out acts that are voidable in court. Indeed, recital 64 of the SSM Regulation expressly states that the ECB should establish an Administrative Board of Review "for reasons of procedural economy". What is important in my view is that the "principle-oriented review" entails, on the one hand, a review of some aspects of the "merits" of the

---

8 See C. Brescia Morra, R. Smits, A. Magliari, *The Administrative Board of the European Central Bank: Experience After 2 Years*, (2017) European Business Organization Law Review 18, 567-589; M. Lamandini, D. Ramos, J. Solana, *The European Central Bank (ECB) as a Catalyst for Change in EU Law. Part 2: SSM, SRM, and Fundamental Rights*, (2017) 23 Columbia Journal of European Law 1, 1-54.

9 Administrative Board of Review. Eight years of experience reviewing supervisory decisions.

10 A different opinion is expressed by E. Wymeersch, *The Single Supervisory Mechanism or 'SSM', Part One of the Banking Union*, National Bank of Belgium *Working Paper Research Series, No 255*, 2014, 55. The author states that because of the literal wording of Article 24(1) of the SSM Regulation (which limits the scope of the ABoR's review to the "procedural and substantive conformity with this regulation"), other grounds – such as conformity with Union law in general, or unequal treatment, discrimination, lack of reasons, or *ultra vires* – would be excluded from the board's mandate.

decision, without interfering with the legitimate sphere of discretion conferred upon the administrative authority. On the other hand, this approach represents an important tool to facilitate an interpretation of the regulatory framework in which European principles prevail over national ones in the activity of the SSM.

The second relevant principle, mentioned by the ABoR document as a crucial tool to ensure that the ECB decisions comply with the SSM legal framework, is that of the "level playing field". A paragraph is devoted to this principle, which expressly states: "In some review cases, the ABoR was confronted with arguments stating that an ECB decision did not respect the level playing field, as the decision would affect the applicant adversely on the banking market. The ABoR assesses such pleas on the basis of the principle of equality and in the context of ECB Banking Supervision's role in furthering consistent prudential standards across the euro area. In such cases, the ABoR has underlined that to ensure a level playing field, the ECB should use its prudential powers in a consistent manner across the participating Member States, in accordance with all general principles established by the Union legal framework." In this perspective, the paragraph entitled "Reading the Single Rulebook" is also important. It highlights that, in some cases, "the ABoR has used references to 'a lack of motivation' to underline that an ECB decision was based on an interpretation without explaining why this interpretation had been chosen and applied, especially when departing from the official guidance of regulatory agencies".[11] A departure from the interpretation of the rules by an EU regulatory body, which is not justified by solid reasoning referring to the specificities of the case at hand, implies a non-homogenous application of the supervisory rules within the European Union legal space, and the risk that the ECB decision does not comply with the principle of equal treatment.

Both principles show that the contribution of an internal administrative review mechanism established at the European level, such as the ABoR, can favor the creation of a common legal environment.

For those reasons, although I certainly cannot say that the first years of activity of this Board are undoubtedly a success story. Nevertheless, I can say that the discussions, sometimes harsh, between people with different legal backgrounds, such as the members of the ABoR, help to improve mutual understanding of rules, supervisory approaches, and business models favouring the search for a compromise. A compromise may be understood as a "non-optimal solution", but in the case at hand was very useful to experiment common technical legal tools to pursue shared values.

---

[11] The ABoR's document refers to some examples. "… the ABoR analysis of the ECB interpretation of the term 'joint control' in the context of Article 22 of Directive 2013/34/EU on annual financial statements (in cases of dominant influence or control), proportionate consolidation governed by Article 26 of Directive 2013/34/EU in cases of joint ventures and the 'integrity' criterion in the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector8 adopted by the European Supervisory Authorities".

In conclusion, looking at the experience of the SSM so far, it reminds me of a lesson I learned in my early years of university, when I studied the foundations of legal systems. A legal system, according to Hauriou and Santi Romano, is not just a sum of rules but is a complex organization, a “social fact such as the organization of a power around an idea”. In light of this theory, the SSM can represent an exemplary model for the construction of a true common European legal order.

SSM ten years since. Where are we

Marco Lamandini[1]

Summary. 1. A short introduction – 2. Where are we with the SSM now: legislative perspective – 3. Where are we with the SSM now: supervisory perspective – 4. Where are we with the SSM now: judicial, quasi-judicial and accountability perspectives – 5. A conclusion

1. A short introduction

If we take a helicopter view of the SSM now, and of its evolution in the last 10 years, I guess it is fair to acknowledge that it has proved an exercise in supranational governance on a scale never attempted before in this Continent. Both the ECB and the NCAs have taken up the challenge and have lived up on the expectations. Today the SSM clearly represents the most advanced, and most successful, experiment of shared administration in the context of the European Union. It is a blueprint for the future of the Union. As Andrea Enria noted in a recent speech[2] the SSM has delivered "very rigorous, demanding supervision", a result that comes from bold institutional design and a deeply rooted, strong internal culture.

Getting where we are now has not been an easy journey, though. And not only from an organizational angle (as exemplified by the intricacies of the SSM governance and of Governing Council's delegation of powers), yet also from an institutional point of view. Suffice to mention here how ambiguities in Article 4 and 6 of the SSMR, resulting from a change in scope of the supervisory remit over LSI which was adopted by the Council at a later stage of the legislative process, morphed into a constitutional drama on the validity of the legal basis in Article 127(6) TFEU. There the CJEU and the German Constitutional Court acrobatically tiptoed on a tight rope,[3] managing in the end to avoid the fall, yet without coming to the same conclusion on the meaning of the "exclusive competence" granted by Article 4 to the ECB. Another example is how important it has been, on account of the fundamental principle of effective judicial protection, the clarification of the CJEU on its judicial review of ECB composite proceedings (including their national preparatory acts) in *Berlusconi I*,[4] and yet the thorny implications of that

---

1 Bologna University, Full Professor. Member of the Appeal Panel of the SRB. Opinions are in personal capacity only. All usual disclaimers apply.

2 A. Enria, *A new stage for European banking supervision*, keynote speech at 22 Handelsblatt Annual Conference on Banking Supervision, Frankfurt am Main, 28 March 2023.

3 Compare R. D'Ambrosio, D. Messineo (eds), *The German Federal Constitutional Court and the Banking Union*, Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, No 91, 2021.

4 Case C-219/17, ECLI:EU:C:2018:502.

judgment in *Berlusconi II*[5] for the constitutionality check of national law when the ECB applies national law under Article 4(3) SSMR and the validity of the law is contested before European courts. This led to unprecedented discussions on a possible reverse referral from European Courts to national Constitutional Courts. Indeed, dialogues between Supreme courts are essential in the law of finance. It comes to little surprise, thus, that the Franco-German experts' report on the Reform and Enlargement of the Union proposed the establishment of a mixed chamber (echoing an idea voiced in 2020 in the wake of the Weiss case by Joseph Weiler and Daniel Sarmiento). The CJEU has certainly been an important factor in the process of empowerment of the SSM, as also recently shown by the landmark opinion and judgment in *Credit Lyonnais*,[6] which has confirmed the latitude of the ECB margin of technical appreciation in supervisory matters. However, legal challenges are still many in this ecosystem and have their toll of instability. Suffice to mention here the surprising General Court judgment in *Corneli*,[7] currently on appeal, and the opinion of Advocate General Kokott in *Pilatus*[8].

I would like to organize my introductory speech today on where we are with the SSM and what remains to be accomplished in the next future looking at four dimensions: a) legislative; b) supervisory; c) judicial and quasi-judicial and d) political.

2. Where are we with the SSM now: legislative perspective

From a legislative perspective, much has been done and the forthcoming implementation of Basel IV by CRR3 and CRD6, whose legislative train came to the final compromise in July 2023, promises to straighten much of what was still missing. In particular, the inclusion in the Single Rule Book of several tasks and powers which have a prudential scope and yet were so far enshrined in national prudential rules without a clear backing in the Single Rule Book. Starting from the letters to the CEOs of March 2017 the ECB had informed that it considered those tasks and powers as falling into its remit. This was uncertain terrain, though, and their inclusion in the Single Rule Book is the right move forward. The same holds true for fit and proper (which numerically represents the majority of the SSM decisions) where diverging substantive and procedural national requirements contradicted so far the very essence of the SSM, yet could not find a solution in the supervisory practice.

This is not to say that the legal framework of the Banking Union is complete. The third pillar of the Banking Union is still missing after the ill-fated EDIS proposal despite the goodwill shown by the December 2021 Euro Summit. This shows a persistent fear in influential Member States that a common deposit

5 Case T-913/16, ECLI:EU:T:2022:279, on appeal in Case C-512/22 P.

6 Case C-389/21 P, ECLI:EU:C:2023:368.

7 Case T-502/19 ECLI:EU:C:2022:627, currently on appeal in Case C-777/22 P.

8 Cases C-750/21 P and C-256/22 P, ECLI:EU:2023:431.

insurance may translate into an instrument of loss mutualization. In a similar vein, political disagreements have more recently delayed the establishment of the ESM credit line and have made uncertain the fate of at least some proposals within the CMDI. Sometimes, when frustration has its toll, one feels a sense of futility in our European polity. Yet, despite the hurdles, the direction of travel remains clear. CMDI, EDIS and the credit line of the ESM are necessary components of the Banking Union which need to come. The sooner the better. And on top of that the Unidroit works for a global Legislative Guide on liquidation of non-systemically relevant banks (wisely promoted by the Bank of Italy and currently approaching final stage) may further shape the harmonization of banks insolvency laws beyond CMDI. Quoting the famous 1933 inaugural address of President Roosvelt, "the only thing we have to fear is fear itself" to complete the Banking Union.

There are however two other potential legislative initiatives that the next European Commission should rank high in its 2024 agenda to complete the Banking Union (BU).

The first, as I discussed at length elsewhere, is the removal of the legislative barriers that stand in the way of a much deeper interstate consolidation of EU banking groups and EU financial conglomerates. This is in line with past statements of the European Commission[9] and with the ECB 2020 Guide on the supervisory approach to consolidation in the banking sector and would make good use of some insightful preparatory works made at the EBA.[10] Few, well thought amendments to the CRR and the SRMR would nicely do the job, and could comprehensively solve obstacles at all three stages of life of financial conglomerates: **birth and growth**, by simplifying, through a US-like share exchange, the corporate tools for cross-border consolidation and by ensuring an unfettered market for corporate control for EU financial corporates; **adult life**, by putting forward few uniform and directly applicable provisions which would in the end give legal certainty to cross-border group-wide capital and liquidity management in good times, acknowledging the value-enhancing organizational gains embedded in interstate group structures, as already recognized by the CJEU in connection with the objectives of the internal market;[11] **death**, by solving the intricacies of group-wide upstreaming of losses and down-streaming of funds in the resolution context. Once the policy goals are clear, all can be done with simplicity, building on the existing legal framework, with selective, well-thought adjustments.

---

9 Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013, Strasbourg, 18.4.2023, COM(2023) 212 final, 18-19.

10 A. Gardella, M. Rimarchi, D. Stroppa, *Potential Regulatory Obstacles to Cross-border Mergers and Acquisitions in the EU Banking Sector*, EBA Research Paper, No 7, February 2020.

11 C-528/12, *Mömax*, ECLI:EU:C:2014:51, para 21; C-292/16, *A Oy*, ECLI:EU:C:2017:888; C-386/14, *Groupe Steria*, ECLI:EU:C:2015:524; C-524/04, *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161; C-311/08, *Société de Gestion Industrielle*, ECLI:EU:C:2010:26; C-382/16, *Hornbach Baumarkt*, ECLI:EU:C:2018:366. For an insightful discussion, W. Schön, *Organisationsfreiheit und Gruppeninteresse in Europäischen Konzernrecht*, in Zeitschrift für Unternehmens- und Gesellschaftrecht, 2019, 3, 343-378.

The second, not less important, initiative should be **straightforward, bold legislative simplification**, through the codification of a European banking consolidated act. Restructuring, at level I, the current overflowed single rule book into a principles-based, sober Consolidated Act is certainly not an easy task; yet it is necessary, not only to reconsider and fix the very many inconsistencies and collisions dispersed in a legislative framework that is made of more than one thousand Level I rules (which, in turn, delegate to the European Commission the adoption of more than one hundred implementing or regulatory acts), but also to replace as much as possible rules currently enshrined in the directives with principle-based directly applicable and uniform provisions, leveraging more (within the limits allowed by the Treaties) on the legal basis of Article 114 TFEU and taking back the legal basis of Article 53(1) solely to provisions which are *strictu sensu* measures to achieve mutual recognition and right of establishment. It is crystal clear that many prudential requirements, including those on governance and buffers, which are currently in the CRD, would deserve a uniform treatment, to ensure the needed level playing field in the Banking Union.

3. Where are we with the SSM now: supervisory perspective

In the supervisory domain, it is fair to acknowledge that the SSM has been successful in ensuring, through an extraordinary effort in codifying supervisory practices into very detailed internal policies and handbooks, equal treatment in oversight. Sure, supervision implies judgment and thus a margin of technical appreciation in individual cases of complex economic or technical factors which may occasionally lend to frictions with the supervised entities. However, judging from the case-law so far, fundamental disagreements have been episodical and the CJEU has granted more leeway to the ECB than to the European Commission in antitrust cases, where prudential assessments are based on forecasts and hypothetical, future scenarios. In banking the Court has been content with a plausibility test, whereas in antitrust it has sometimes gone further, to require a balance of probability to identify the "most likely" (or "more likely than not") scenario, such as in *Bertelsmann*[12] and more recently in *CK Telecoms.*[13] As a counterbalance, though, the Court, in parallel also with the ABoR practice, has been progressively more exacting as to the requisite standard of the sufficient statement of reasons.[14]

---

12 ECJ 10 July 2008, *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, ECLI:EU:C:2008:392, points 207-208.

13 AG Kokott, 20 October 2022, *European Commission v CK Telecoms UK Investments Ltd.*, C-376/2, ECLI:EU:C:2022:817, points 56-58. Consider in the literature, A. Kalintiri, *Evidence Standards in EU Competition Enforcement – The EU Approach* (Hart Publishing 2019), 78 and J. Mendes (ed), *EU Executive Discretion and the Limits of Law* (Oxford University Press 2019).

14 EGC 23 September 2020, *Landesbank Baden Württenberg v SRB*, T-411/17, ECLI:EU:T:2020:435 and on appeal ECJ 15 July 2021, *European Commission v Landesbank Baden Württenberg*, C-584/20 and C-621/20, ECLI:EU:C:2021:601; EGC 6 October 2021, *Ukrselhosprom Versobank v European Central Bank*, T-351/18 and T-584/18, ECLI:EU:T:2021:669, paras 385-387. As noted in the text, this is also consistent with the ABoR practice, which recently published a statement that disclosed that a recurring element in ABoR opinions has been the need for the ECB to provide adequate reasoning of its decisions.

In its ten years of practice the ECB has also shown the necessary flexibility to adapt its supervisory approach to new risks, to help banks weathering the storm. Good examples, as recently noted by Andrea Enria, are the so called "pragmatic SREP" during the pandemic, the supervisory focus on reputational risks associated with exposure to Russian counterparties and sanctions during the ongoing Russian/Ukrainian conflict and the current special attention to interest rate risk and funding and liquidity risk in the ongoing fast-paced normalisation of the monetary policy environment.[15] But also the supervisory approach to NPLs' normalisation was, in the end, quite flexible, because the ECB insisted for a long time on dialogue and moral suasion and postponed the escalation of supervisory measures (P2R, requiring specific provisioning, and sanctions) thereby granting to the banks the grace period they needed to take action, something that invited harsh criticism from the European Court of Auditors, with its 2023 Special Report[16] and may now invite a reflection on the potential use of periodic penalties. This risk-focused approach[17] is now called to address cyber risk and climate change and their prudential impacts. Two big known economic unknowns, especially at this stage of transition.

4. Where are we with the SSM now: judicial, quasi-judicial and accountability perspectives

It is time to conclude. I will do so briefly touching on the SSM accountability in these ten years with a couple of telegraphic remarks.

As to legal accountability, the balance of the last ten years is not black and white. SSM and SRM related disputes have gained momentum and prominence, in number and economic significance, in the case-law of the CJEU and European courts have delivered some landmark judgments in some pivotal cases. Yet, in more interstitial cases, queuing for long years to have final answers on matters of more minute detail is far from ideal in a highly dynamic environment such as supervision. For less pivotal cases also internal review would make the job.

In the SRM the administrative internal review (the Appeal Panel), despite the limitations in the scope of reviewable acts, has proved an efficient filter for the CJEU and a non-expensive and expeditious expert forum for first instance review, where all safeguards of due process (and fair trial) are granted. This is acknowledged by the incoming reform of Protocol 3 of the Statute of the Court which purports now to limit the review by the Court of Justice also in cases decided by the SRM Appeal Panel and the Joint Board of Appeal of the ESAs. Unlike those review bodies, in the SSM, however, the ABoR opinions are not

[15] A. Enria, *A new stage for European banking supervision*, cit., 3.

[16] *EU supervision of banks' credit risk*, Special Report, No 12, 2023.

[17] A. Enria, *A new stage for European banking supervision*, cit., 6.

binding.[18] This is so although the CJEU in the *Landeskreditbank* case found that the ECB had complied with its duty to state reasons as a result of the arguments discussed by the Administrative Board of Review in its opinion.[19] For this reason it is to be welcomed the recent publication by the ECB of a report casting some light on the ABoR practice. Yet, ABoR advisory rather than quasi-judiciary role does not incentivize its use, and banks often prefer to challenge directly the ECB decision before the CJEU. A solution for this is not easily available, not only due to the special independence of the ECB and of the Governing Council, but also because the fifth paragraph of Article 263 of the Treaty on the Functioning of the European Union ('TFEU') allows the establishment of pre-judicial control mechanisms for Union *agencies, bodies or offices,* but not for Union institutions such as the ECB.[20]

Beyond judicial and quasi-judicial review, political and administrative accountability is also a component of SSM legitimacy. The European Commission has assessed SSM accountability as 'overall effective'.[21] Looking at the interactions between the SSM and the EP ECON Committee (hearings and MEPs' letters), one gets, however, a mixed picture. MEPs are engaged, yet they lack SSM specific, granular information, which remains mostly in the confidential exchanges with the Chair and Vice Chair. The impact of the interplay with the EP looks modest, and only very episodical that with national parliaments (the most visible exception being the Banco Popular case). In turn, administrative accountability can hardly fill the gap, despite the efforts from the European Court of Auditors and the EBA, which could immensely contribute to improve EP gaps in information and expertise, yet is oddly perceived to fall outside the exercise of accountability.

---

18 Compare C. Brescia Morra, *The Administrative and Judicial Review of Decisions of the ECB in the Supervisory Field*, Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, No 81, 2016, 109-132: 109; in the same publication, L. Tomé Feteira, L. Silva Morais, *Judicial Review and the Banking Resolution Regime. The Evolving Landscape and Future Prospects*, 61.

19 Case T-122/15, *Landeskreditbank Baden-Württemberg* v *ECB* [2017] ECLI:EU:T:2017:337, paras 121-132 and Case C-450/17 P, *Landeskreditbank Baden-Württemberg* v *ECB* [2019] ECLI:EU:C:2019:372, paras 87-102.

20 The fifth paragraph of Article 263 TFEU reads as follows: "Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them".

21 Commission Report on the SSM, SWD (2017) 336 final and Commission Staff Working Document accompanying the Report; this finding is supported by authors who highlight that the ECB has become more responsive yet, they also find a lack of 'performance benchmarks', 'expert review' or 'regulatory audit' (Ph. Nicolaides, *Accountability of the ECB's Single Supervisory Mechanism: Evolving and Responsive*, CERiM Online Paper Series, No 10, 2018, 3 and 25-27; F. Amtenbrink, M. Markakis, *Towards a meaningful prudential supervision dialogue in the euro area? A study of the interaction between the European Parliament and the European Central Bank in the single supervisory mechanism*, ADEMU Working Paper Series, No 81, 2017.

5. A conclusion

What is the lesson that we can draw from the ten years of the SSM? The lesson is that bold European ambition, and ingenuity in setting up the SSM at a time of unprecedented economic crisis morphed, using the words of President Roosvelt again, “retreat into advance”. My guess is that the only fear the next Commission should have is fear itself to complete the Banking Union.

The Governance of the Single Supervisory Mechanism and ECB/NCA Relations: Legal Resilience and Operational Innovation

Niamh Moloney[1]

Summary. 1. Introduction – 2. SSM Governance and the ECB/NCA Relationship: Novelties, Ambiguities and Intricacies – 3. The Initial Score Card – 4. Observations on Experience since 2014 – 4.1 Decision Making Governance and ECB/NCA Relations – 4.2 Common Supervisory Culture – 5. Future Stresses – 6. Conclusion: politics and technocracy

This article considers the dynamics of the relationship between the national competent authorities responsible for banking supervision (NCAs) and the European Central Bank (ECB) within Banking Union's Single Supervisory Mechanism (SSM), at the decade or so anniversary of the SSM's establishment and in light of the current legal and operational setting of the SSM. Drawing on evidence from the last decade or so, it considers whether the legal and governance arrangements supporting the SSM, in particular as regards ECB/NCA coordination, have proved effective. It also considers the relevance of the establishment and embedding of a common SSM supervisory culture to ECB/NCA coordination and the evolution of the SSM in this regard.

It concludes that the first decade or so of experience with the SSM as regards ECB/NCA relations constitutes a paradigm example of the technocratic making the political possible. The SSM Regulation articulated a political commitment, forged in the teeth of the existential euro area crisis, to establish centralized supervision, ultimately to support loss mutualization. How this was to be achieved was a compromise, articulated in the coordination system set out in the SSM Regulation. This system has proved broadly effective. But it is the accretion of ECB administrative law and soft law, and of technocratic operational innovations, chief among them the Joint Supervisory Teams (JSTs), that has been critical in bringing the Regulation's arrangements to life, and in equipping the SSM with a workable operating model within which the ECB and NCAs can coordinate and evolve. Strains will, however, be placed on this operating model, including as regards likely supervisory mandate expansion, and will require an agile and flexible response. In this regard, the 2023 adoption of a new Risk Tolerance Framework for ECB supervision of significant institutions, and the flexibility shown within the SSM over the Covid-19 crisis, augur well.

---

[1] London School of Economics and Political Science, Law School, Professor of Financial Markets Law.

1. Introduction

This article considers the dynamics of the relationship between the national competent authorities responsible for banking supervision (NCAs) and the European Central Bank (ECB; in practice, 'ECB Banking Supervision' and hereafter 'ECB') within Banking Union's Single Supervisory Mechanism (SSM), at the decade or so anniversary of the SSM's establishment and in light of the current legal and operational setting of the SSM. The legal framework for the SSM was adopted by the Council in 2013, under the SSM Regulation.[2] The SSM became operational on 4 November 2014 when it assumed its supervisory responsibilities for bank supervision in the Banking Union zone, and following the massive 'comprehensive assessment' exercise which, undertaken by the ECB and NCAs, reviewed the most significant 130 banks in the euro area.[3] Since then, the SSM has developed a series of operating protocols and governance innovations which have 'operationalized' the SSM Regulation. It has, relatedly, been the subject of an extensive, rich, and ever-expanding multi-disciplinary literature.[4]

This article focuses on the dynamics of the ECB/NCA relationship within the SSM's legal and operational setting, considers whether this setting has proved capable of supporting effective ECB/NCA coordination, and reflects on the likely strains on this setting in the future.

2. SSM Governance and the ECB/NCA Relationship: Novelties, Ambiguities and Intricacies

That the governance framework underpinning the SSM represented at the time, and continues to represent, a novel and distinct form of governance for the EU financial system remains a modest but not a trivial observation.

---

2 Council Regulation (EU) No 1024/2013 [2013] OJ L287/13.

3 The comprehensive assessment, which included a review of banks' asset quality and of their capital requirements, was a critical step in the SSM becoming operational. See further ECB, *Aggregate Report on the Comprehensive Assessment. Summary* (2014).

4 A significant literature considers the origins and operation of Banking Union and the SSM and the implications for financial integration in Europe. For recent collections of legal analyses see, e.g., T. Beuckers, D. Fromage, G. Monti (eds), *The New European Central Bank: Taking Stock and Looking Ahead* (Oxford University Press 2022); D. Busch, G. Ferrarini (eds), *European Banking Union*, 2nd ed. (Oxford University Press 2020); S. Grundmann, H.-W. Micklitz (eds), *The European Banking Union and Constitution: Beacon for Advanced Integration or Death-Knell for Democracy?* (Bloomsbury 2020); and the bi-annual proceedings of the ECB Legal Conference (e.g., ECB, *Building Bridges: central banking law in an interconnected world* (2019)). The political economy literature was initially focused on the dynamics of Banking Union's establishment (see, e.g., D. Howarth, L. Quaglia, *Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary union*, (2013) Journal of Common Market Studies 51, 103), but is increasingly turning to the operation in practice of the SSM. See, e.g., the 2023 special edition of the Journal of European Integration (2023) on *Banking on Europe: Reinforcing the Unstable Pillars of European Banking Union at Ten* (vol 45:1).

Different forms of intra-NCA coordination and of coordination between NCAs and supranational authorities of varying design have long been a feature of EU financial system governance. The arc of institutional innovation bends from the informal Contact Committees through which national supervisors engaged with the Commission, primarily on regulatory governance, under the first generation of financial services measures in the 1980s; to the more structured institutional coordination through the coordinating '3L3 Committees' of (national) supervisors set up under the Lamfalussy model in 2001; and on to the current formal institutional arrangements, established in 2011 in the wake of the financial crisis, through which NCA supervision of regulated financial actors is overseen and coordinated, and convergence in supervisory practices driven, within the European System of Financial Supervision (ESFS) and its three sector-specific European Supervisory Authorities (ESAs) for banking, securities markets, and insurance/occupational pensions (EBA, ESMA, and EIOPA, respectively). Innovation and experimentation in institutional design as regards NCA supervisory coordination is a recurring and dynamic feature of EU financial services regulation.[5]

Nonetheless, the SSM coordination arrangements remain, a decade or so on from the close of the financial-crisis-era reforms, distinct. On the adoption of the SSM Regulation in 2013, the SSM arrangements for ECB/NCA coordination as regards bank (formally, 'credit institution'[6] and hereafter 'bank') supervision in Banking Union represented a new form of governance for the EU financial system: this was because the ECB was conferred with operational, discretionary, and fiscally significant supervisory and enforcement powers, of a binding nature, over in-scope banks within the SSM; the ECB was also conferred with binding powers over NCA operation within the SSM. While somewhat otiose, it bears repeating at the decade punctuation point that the scale on which the ECB exercises binding powers over in-scope banks within its scope of operation, and the binding nature of its powers to direct NCAs, in both cases within the SSM, remain unprecedented in EU financial governance. Similarly novel is the conferral on the ECB of power to, *de facto*, exercise (in effect, direct the exercise of) powers set out in national law and conferred on NCAs, where necessary and relevant.[7] The institutional innovation this regime represents is, of course, a function of the political will, over the financial crisis period, to establish a

---

5 On the history of institutional innovation in EU financial services regulation, including as regards NCA coordination arrangements, see, e.g., G.P. Teixeira, *The Legal History of the European Banking Union* (Bloomsbury 2020), J. Payne, *The Institutional Design of Financial Supervision and Financial Stability*, in F. Amtenbrink, C. Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), 565 and N. Moloney, *The Age of ESMA* (Bloomsbury 2018), 4-33.

6 Credit institutions are defined under the Capital Requirements Regulation (Regulation (EU) No 575/2013 [2013] OJ L176/1 (as revised)) (CRR) as undertakings whose business is to receive deposits or other repayable funds from the public and to grant credits for their own account, as well as, following reforms in 2019, investment firms engaging in own account dealing, underwriting, or placing activities, and with consolidated assets in excess of €30 billion: Article 4(1)(1).

7 SSM Regulation Article 9(1). Where necessary to carry out the tasks conferred by the Regulation, the ECB may require, by way of instruction, national authorities (NCAs) to make use of their powers (in accordance with national law) where the Regulation does not confer such powers on the ECB.

centralised supervisory system to support loss mutualization under the Single Resolution Mechanism and through the European Stability Mechanism. But it also is a function of the legal setting: as an EU institution established under the Treaties, the ECB could be conferred with discretionary and fiscally significant supervisory powers under Article 127(6) TFEU. The *Meroni* constraints on agency powers,[8] which have shaped the legal setting and operating model of the ESAs, do not apply.[9] By contrast, a decade or so after their financial-crisis-era establishment, the ESAs remain, for the most part, soft law actors, primarily concerned with coordination and convergence, albeit that they are transitioning to becoming actors with harder, binding powers. Nonetheless, conferrals of direct binding power on the ESAs remain, and reflecting political interests as well as the *Meroni* constraints, parsimonious, subject to heavy conditionality, and *ad hoc*.[10]

The novelty of the binding powers exercised by the ECB, including over NCAs, within the SSM sits somewhat uneasily with the unsteady legal status of the SSM. The SSM – a 'mechanism' – was established, in effect, as a network arrangement. The SSM is not, and by contrast with the ESAs which take the form of agencies, a separate institution under its constitutive primary legislation (the 2013 SSM Regulation). It does not have legal personality or, relatedly, decision-making power. It is a network, heavily based on information exchange and supported by an intricate attribution of competences, tasks, and powers across the ECB and the NCAs which are the decision-making entities in the SSM.[11] The SSM Regulation characterizes the SSM broadly and obliquely as 'a system of financial supervision' (Article 2(9)). Relatedly, the term SSM has, reflecting its institutional ambiguity, been well-described as a 'synthetic' designation which seeks to capture what is in effect a complex coordinating system which manages NCA and ECB competences and their interaction and coordination under the SSM Regulation.[12]

In this 'mechanism', the governance novelty primarily lies in the legally superior status of the ECB as regards NCAs. Within the SSM, the ECB has exclusive supervisory competence, supported by enumerated binding powers,

---

8 Case 9-56 *Meroni v High Authority* (ECLI:EU:C:1958:7).

9 e.g. M. Busuioc, *Rulemaking by the European Financial Supervisory Authorities: walking a tight rope*, (2013) European Law Journal 19, 111 and M. Chamon, *EU Agencies Between Meroni and Romano or the Devil and the Deep Blue Sea*, (2011) Common Market Law Review 48, 1055.

10 See further N. Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press 2023), 32-38.

11 Accordingly, the SSM regulatory framework 'distributes the exercise of financial supervisory tasks between a multiplicity of national, EU and mixed bodies': E. Chiti, F. Recine, *The Single Supervisory Mechanism in Action: Institutional Adjustment and the Reinforcement of the ECB Position*, (2018) European Public Law 24, 103. On tasks and powers and how they are related to the attribution of competence in the SSM see R. D'Ambrosio, *The SSM: Allocation of Tasks and Powers between the ECB and NCAs and Organisational Issue*, Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, No 88, 2020, 28.

12 C. Brescia Morra, *The Interplay Between the ECB and NCAs In The "Common Procedures" Under the SSM Regulation: Are There Gaps In Legal Protection?*, Quaderni di Ricerca Giuridica della Consulenza Legale della Banca d'Italia, No 84, 2018, 79.

and governed by the totemic and much-examined Article 4 and Article 6 of the SSM Regulation which address ECB/NCA relations as regards the exercise of micro-prudential supervisory powers.[13] Article 4 and Article 6 in effect form a competence (and related decision-making) allocation scheme as regards bank supervision, and so sit at the heart of SSM operation. In the intervening decade or so since the SSM's establishment, the precise location of decision-making within the SSM, and under Articles 4 and 6, has been subject to close scrutiny, as has where judicial review attaches. On the face of it, decision-making power within the SSM rests with the ECB (formally, with the Governing Council) for 'Significant Institutions' (SIs) (Article 4(1)); with NCAs for 'Less Significant Institutions' (LSIs) (Article 6); and with the ECB again in the case of the Article 4 'common procedures' which the ECB is responsible for as regards all Banking Union banks (for example, bank authorizations), although NCAs play a preparatory role. But this superficially clear attribution hid, at least initially, a host of ambiguities as regards where competence lay, and with respect to the exact role of NCAs and whether they held residual supervisory competences within the SSM. Related scholarship grappled with what the SSM was and where competences lay, including as to whether the SSM operated under, for example, a hub and spokes model or a supervisor of supervisors model, with competence shared between the ECB and NCAs.[14]

The seminal if controversial 2017 *Landeskreditbank* (*L-Bank*) ruling, however, now frames the SSM legal setting.[15] The Court of Justice, in a tersely-reasoned ruling, clarified that Article 4 of the SSM Regulation provides that, within the framework of Article 6, the ECB is exclusively competent to carry out the Article 4(1) prudential supervision tasks in relation to all in-scope credit institutions, without drawing a distinction between SIs and LSIs; and that NCAs were, as regards their LSI tasks (Article 6) carrying out a 'decentralized implementation' of ECB tasks.[16] The ECB was accordingly confirmed as the location of exclusive supervisory competence under the SSM Regulation, a competence which is exercised in accordance with the coordination arrangements

---

13 Macro prudential action is addressed under SSM Regulation Article 5.

14 From the related literature see, e.g., F. Annunziata, *European Banking Supervision in the Age of the ECB. Landeskreditbank Baden-Wüttenburg v ECB*, Bocconi Legal Studies Research Paper Series, 2018; K. Alexander, *European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism*, (2015) European Law Review 40, 154; N. Moloney, *European Banking Union: Assessing its Risks and Resilience*, (2014) Common Market Law Review 51, 1609; E. Wymeersch, *The Single Supervisory Mechanism or 'SSM': Part One of the Banking Union*, ECGI Law Working Paper 240/2014; and E. Ferran, V. Babis, *The European Single Supervisory Mechanism*, (2013) Journal of Corporate Law Studies 13, 255.

15 Case C-450/17 *Landeskreditbank Baden-Württemberg - Förderbank v ECB and Commission* (ECLI:EU:C:2019:372). From the extensive analyses of the ruling (including of the first instance General Court ruling) see, e.g., P. Schammo, *Institutional Change in the Banking Union: The Case of the Single Supervisory Mechanism*, in *Yearbook of European Law* (Oxford University Press 2021), 265 and F. Annunziata, *Fostering Centralization of EU Banking Supervision through Case-Law. The European Court of Justice and the Role of the European Central Bank*, Bocconi Legal Studies Research Paper Series, 2019.

16 N. 15, paras 41 and 37.

established under the SSM as regards specific tasks and powers. SSM operation, and specifically ECB/NCA relations, has, therefore, been placed within a more secure legal hierarchy. Similarly, the 2018 *Berlusconi* case on the judicial review jurisdiction of the Court of Justice over the ECB's exercise of its 'common procedures' competences (as regards which NCAs engage in preparatory work to support ECB decision-making), confirmed the exclusive competence of the ECB as regards these common procedures notwithstanding the preparatory role of NCAs, as well as, relatedly, the exclusive, unitary judicial review jurisdiction of the Court.[17]

The ambiguities associated with ECB and NCA relations within the SSM, over the last decade or so, have, however, have extended beyond the formalities and implications of the legal setting. Legal scholarship has examined the SSM's design and operation as, *inter alia*, a form of dynamic, differentiated integration and as a multi-layered administration.[18] The SSM has also drawn attention from political scientists and regulatory governance specialists who have similarly characterized the SSM,[19] as well as, for example, as an expression of iterative, recursive experimentalist governance.[20] This literature examines the SSM as a structure which is not, in practice, hierarchically clear-cut in its operation, and in which, instead, the superior position of the ECB as regards NCAs is less obvious, notwithstanding the SSM Regulation and its interpretation by the *L-Bank* ruling. Further, the legal literature, in mapping how, for example, the ECB works through joint supervisory teams (JSTs, discussed ahead, which include NCA supervisors) in supervising SIs, how the ECB applies national implementing law (where Directives apply) when supervising SIs, how NCAs support the ECB in its Article 4 tasks for SIs, including through exercising 'national powers' under ECB instructions, and how the ECB cannot instruct an NCA directly regarding LSI supervision – to take only a few examples of the intricate relationships that can arise under Articles 4 and 6 – shows that, in law and in practice, the SSM is far from being a monolithic structure governed by the ECB with NCAs as highly

17 Case C-219/17 *Berlusconi and Fininvest v Banca d'Italia and IVASS* (ECLI:EU:C:2018:1023). The Court ruled that draft NCA decisions (supporting final ECB decisions) on common procedures, in this case as regards the approval of a qualifying holding, are subject to a single judicial review by the Court of Justice of the ECB's final decision, and so fall outside the judicial review jurisdiction of national courts. On the unitary nature of common procedures, notwithstanding the preparatory role of NCAs, see C. Brescia Morra, *The Interplay Between the ECB and NCAs In The "Common Procedures" Under the SSM Regulation*, cit.

18 See, e.g., P. Schammo, *Institutional Change in the Banking Union*, cit. and F. Allemand, *The ECB, the SSM Differentiated Integration: The Legal Triangle of Incompatibility*, in *From Monetary Union to Banking Union, on the Way to Capital Markets Union. New Opportunities for European Integration*, ECB Legal Conference 2015, 305.

19 See, e.g., C.A. Petit, *Differentiated Governance in the Banking Union: Single Mechanisms, Joint Teams, and Opting Ins*, in S. Baroncelli *et al.* (eds), *Differentiated Governance in a Europe in Crisis*, (2022) European Papers 7.

20 See, e.g., J. Zeitlin, *EU experimentalist governance in times of crisis*, (2016) West European Politics 39, 1073.

constrained agents or administrative outposts.[21] A disjunction between the formal legal setting and the related attribution of competences, and functional analysis of the SSM and how it manages the relationship between the ECB and NCAs, can be identified as a feature of SSM operation.

It is, however, clear that 'law matters' to the modalities of the ECB/NCA relationship. The management of the SSM network, and the articulation of the ECB's privileged position, is achieved through the intricate governance arrangements set out in the constitutive 2013 SSM Regulation, in the administrative 2014 SSM Framework Regulation,[22] and the guard-rails provided by judicial review by the Court of Justice.[23]

At the core of these inter-laced arrangements is Article 4 of the SSM Regulation. It provides that the ECB is conferred with exclusive competence (as confirmed by *L-Bank)* over specified micro-prudential supervision tasks, carried out by it directly for SIs and, as provided for in Article 6, carried out indirectly, through 'decentralized implementation', by NCAs, who are responsible for and carry out these tasks, for LSIs. The ECB also carries out directly the 'common procedures' – chiefly, authorization of all SSM-scope banks and approval of significant ('qualifying') acquisitions and disposals by such banks, although the ECB is supported in this regard by NCAs' preparatory work. The specified micro-prudential tasks cover the spectrum of bank supervision, including ensuring compliance with the prudential rulebook (including carrying out the 'fit and proper' assessment required of certain office holders); carrying out the annual supervisory review and evaluation process (SREP) review of banks (the main vector across which compliance with the banking rulebook is supervised, as noted ahead); early intervention planning; and acting as 'host' supervisor for non-SSM banks passporting into SSM area from home EU Member States. Article 4(3) specifies the rules the ECB is subject to in its exercise of its exclusive competence, and in accordance with Articles 4 and 6, identifying EU legislation, administrative rules, and EBA soft law. The ECB is also subject to relevant Directives as implemented in the Member States.

Article 4 is supported by the coordinating arrangements set out in the SSM Regulation which are designed to ensure the SSM, and its foundational ECB/NCA network, operates effectively as a system. Chief among these arrangements are: Article 6(1) which establishes a hierarchy within the SSM, with the ECB charged with ensuring the 'effective and consistent functioning' of the SSM; Article 6(2) which imposes a general cooperation obligation on NCAs to cooperate with the ECB and provides for information exchange; Article 6(3) which requires NCAs to assist the ECB in its Article 4 tasks; Article 6(4), a foundational operational

---

21 On the legal and operational intricacies of the ECB/NCA relationship see F. Della Negra, G. Lo Schiavo, *The Relationship between the ECB and the National Competent Authorities in the Single Supervisory Mechanism. Problems and Perspectives*, in T. Beuckers, D. Fromage, G. Monti (eds), *The New European Central Bank*, cit., 184.

22 Regulation (EU) No 468/2014 [2014] OJ L141/1.

23 For a compendium of cases see the online resources maintained by the European Banking Institute.

support which sets out the classification modalities for characterizing banks as SIs or LSIs; Article 6(5) which empowers the ECB to issue general instructions to NCAs and which also empowers the ECB to take back LSI supervision from NCAs; and Article 6(6) which requires NCAs to carry out, and provides that they are responsible for, LSI supervisory tasks. Alongside, Articles 4(3) and 6(7) specify the ECB's general rule-making powers as regards the SSM, and in particular direct it to adopt a framework governing the practical operation of the SSM and of decision-making. Ancillary supports include Article 31 which provides for staff exchanges across the SSM, a somewhat humdrum provision but which, in practice, is important for welding together the ECB and NCAs and for supporting the embedding of a common supervisory culture.

The SSM Regulation also governs SSM decision-making, and reflects in this regard the ECB's situation within the Treaties. In particular, the Treaty-required split of monetary and supervisory (SSM) functions within the ECB, given the need to secure the ECB's independence as regards its monetary competences, required the establishment of the ECB Supervisory Board for SSM purposes (Articles 25 and 26). Charged with acting in the interests of the EU as a whole, the Board is composed of the Chair, Vice Chair, four ECB representatives, and the NCAs of all Member States participating in Banking Union.[24] As all ECB decisions must be made by the Governing Council (in accordance with Article 129 TFEU) a 'silent assent' (or non-objection) procedure applies, whereby ECB Supervisory Board draft decisions are deemed approved by the Governing Council after a specified time, unless objections are raised (Article 26(8)). A Mediation Panel is designed to resolve differences between NCAs and the Governing Council (Article 25).

This framework governance regime for managing ECB and NCA relations is supported by a dense layer of administrative rules adopted by the ECB, and which has been thickened over the decade or so since the establishment of the SSM. The operational modalities of SSM governance are set out in 2014 SSM Framework Regulation, adopted by the ECB, which covers, *inter alia*: SI supervision and the JSTs for SIs, composed of ECB and local NCA supervisors and which are headed by an ECB coordinator; consolidated supervision; information exchange; language regime; decision-making and due process, including the duty to give reasons; the classification system for SIs and LSIs and the modalities governing the ECB's exercise of supervisory power; the common procedures and their operation; the supervisory process for SIs, including the 'fit and proper' review process; the supervisory process for LSIs, including related NCA reporting obligations; enforcement; and access to information, investigations, and onsite inspections. Alongside, an extensive range of ECB Decisions covers specific issues, including as regards access to documents and the delegation framework for decision-making.[25]

---

24 21: the 20 Euro Area Member States and Bulgaria, which participates under a close cooperation arrangement, as noted ahead.

25 The current list of ECB-adopted measures is available here.

How the SSM operates in practice is also a function of the massive banking rulebook, at the heart of which is the CRD/CRR regime,[26] and the related behemoth soft law 'rulebook', including the pivotal EBA SREP Guidelines which govern how banking supervision is carried out in practice.[27] The SREP, required under the CRD/CRR regime, and operationalized through the EBA SREP Guidelines, is the process through which supervisors annually assess banks' capital, liquidity, governance, and business models.[28] It is the main vector across which banking supervision is carried and drives the production of much of the banking rulebook's amplifying soft law. [29]

A thick set of binding and soft law rulebooks accordingly apply to ECB and NCA relations and to how the practical business of supervision is carried out. These arrangements are dynamic. Aside from the continual refinement and revision of the banking rulebook and related soft law (including the SREP Guidelines), ECB Decisions and other measures have continually amplified the arrangements through which ECB and NCA coordination is managed within the SSM.[30] The constitutive 2013 SSM Regulation, however, has not been revised – in stark contrast with the state of almost permanent reform that now attends the single rulebook more generally.[31] This is a less a function of the durability of the Regulation – although in practice it has proved workable – and more a reflection of the political constraints posed by the Treaty competence under which it was adopted. Article 127(6) TFEU, the competence for the SSM Regulation, requires Council unanimity, making revision of the SSM Regulation a not straightforward prospect. By contrast, the measures that constitute the single rulebook are typically adopted under Article 114 TFEU (the general single market competence) or Article 53 TFEU (measures in support of the freedom to establish), both of which are subject to qualified majority voting in Council. Notably, the pivotal 2019 revision of the SSM system to bring the largest and most systemic investment banks within its scope was achieved by

---

26 Directive 2013/36/EU [2013] OJ L176/338 (Capital Requirements Directive IV) and CRR (see n. 6). On the banking rulebook see recently B. Joosen, M. Lamandini, T. Tröger (eds), *Capital and Liquidity Requirements for European Banks* (Oxford University Press 2022) and K. Alexander, *Principles of Banking Regulation* (Cambridge University Press 2019).

27 EBA, Guidelines for Common Procedures and Methodologies for the Supervisory Review and Evaluation Process (SREP) and Supervisory Stress Testing (2022). Alongside, a host of soft law measures address different aspects of the SREP, including firms' internal capital and liquidity assessment processes (the ICAAP and ILAAP), and the treatment of particular risks under the SREP.

28 The SREP addresses banks' business models, internal governance and risk management, capital, and liquidity and is based on supervisors determining a risk assessment score for these elements, as well as an overall SREP score, and identifying related mitigating actions to be taken by banks (through the 'SREP letter'). It can also lead to the imposition on banks of additional capital requirements in the form of 'Pillar 2 Add Ons'.

29 Alongside the SREP, the ECB engages in related supervisory activities, including authorization, 'fit and proper' assessments of relevant bank office holders, on-site thematic inspections, internal model validations, stress tests and enforcement action.

30 Since 2014, over 50 different measures (including Decisions, Interinstitutional Agreements, and Guidelines) have been adopted by the ECB to support SSM functioning.

31 On the related risks see N. Moloney, *EU Securities and Financial Markets Regulation*, cit., 56-57.

means of a technical, if acutely material, change to the definition of a 'credit institution.' This key definition for setting the scope of the SSM is contained in the CRD/CRR regime, so what was, in practice, a foundational change to the design of the SSM was achieved by revisions to the CRD/CRR definition (under qualified majority voting arrangements and the Council/Parliament co-decision/ordinary legislative procedure)[32] and, relatedly, by the new regime governing the prudential regulation of investment firms, the 2019 Investment Firm Directive and Regulation.[33]

3. The Initial Score Card

The design of the SSM, and the governance arrangements that support ECB/NCA coordination, are accordingly novel, intricate, and can be ambiguous. They reflect, however, a series of practical and political dictates. The former include that the SSM arrangement, and the 'decentralization' of administration to NCAs in certain respects (including for LSIs in particular), avoided undue operational stress and reputational risk being placed on the ECB as a nascent supervisor; accommodated the infusion of national experience and expertize; and facilitated some degree of constructive challenge and tension in the ECB/NCA relationship. They also reflected what was politically feasible at the time, as regards in particular which banks should be supervised directly by the ECB.

Scholarship at the time of the SSM's establishment was, however, somewhat doubtful, often suggesting that the SSM was inherently unstable. Among the risks identified by the 'first generation' scholarship were the SSM's operational complexity; the decision-making risks associated with 'silent assent' and with the large Supervisory Board; potential coordination risks where ECB and NCA incentives and interests diverged, both as regards LSIs and, as regards the operation of JSTs, SIs; and 'grey zones' (including where conduct risks (conduct regulation falls outside the SSM) generated prudential risks).[34] Alongside, however, a recurring theme of the initial scholarship was that the supporting legal arrangements were highly specified and that the enumeration of powers and tasks, and of cooperation obligations, acted as mitigants, alongside the incentives of the ECB and NCA to establish the SSM as a robust system.[35]

---

32 See n. 6.

33 Investment Firm Directive (EU) 2019/2034 [2019] OJ L314/64 and Investment Firm Regulation (EU) 2019/2033 [2019] OJ L314/1 (IFD/IFR).

34 See, e.g., G. Ferrarini, *Single Supervision and the Governance of Banking Markets: Will the SSM Deliver the Expected Benefits*, (2015) European Business Organization Law Review 16, 513; and M. Nieto, *Banking on Single Supervision in the Eurozone: Scepticism and a Reform Proposal*, (2015) European Business Organization Law Review 16, 539.

35 See ibidem and the references at n. 14.

4. Observations on Experience since 2014

It is hazardous to draw broad conclusions as to the efficacy of the arrangements supporting ECB/NCA relations within the SSM without the necessary granular evidence on the quality of bank supervision by the SSM which is outside the scope of this discussion.[36] At the least, however, it can reasonably be proposed that experience over the last decade or so (evidenced even minimally by a review of the ECB's Annual Reports since 2015 and as outlined further ahead) suggests that in practice SSM governance, and relatedly the ECB/NCA network, are operationally resilient in that they have proved capable of supporting ECB decision-making in relation to some 113 SIs[37] as well as ECB oversight of NCA supervision of some 2,000 LSIs;[38] of facilitating coordination between the ECB and NCAs; and also of enhancing the decision-making apparatus as the SSM network has evolved.

Further, external reviews have been broadly supportive. The December 2022 report by the European Court of Auditors on credit risk, for example, made a series of recommendations as regards the modalities of the supervisory process (including with respect to the timeliness of the SREP, resources, and how the ECB benchmarks its supervisory practices), but did not make specific recommendations on governance and decision-making and the management of the ECB/NCA relationship. Most recently, the extensive April 2023 external review of the ECB SREP for SIs concluded that its supervisory approach had proved effective.[39] Its findings on SREP governance were similarly supportive. It came to the significant conclusion that the ECB's processes were now sufficiently robust and mature to allow the SREP to evolve towards a 'simpler and leaner process', and 'reduce touchpoints with the Supervisory Board'.[40]

---

36 For recent supportive analysis of the ECB's approach to supervision over the Covid-19 crisis see L. Quaglia, A. Verdun, *The European Central Bank, the Single Supervisory Mechanism and the COVID-19 related economic crisis: a neofunctionalist analysis*, (2023) Journal of European Integration 45, 139 and, finding that the Supervisory Board responded 'promptly and robustly' over the Covid-19 crisis, A.-L. Högenauer, D. Howarth, L. Quaglia, *Introduction to the special issue: the persistent challenges to European Banking Union*, (2023) Journal of European Integration 45, 1. For a similarly supportive review, specifically of the ECB's transparency as a supervisor, see A.-L. Högenauer, *The ECB as a banking supervisor: transparent compared to what?*, (2023) Journal of European Integration 45, 121. As regards market impact, and examining initial positive evidence based on bank share price performance, see F. Loipersberger, The effect of supranational banking supervision on the financial sector: event study evidence from Europe, (2018) Journal of Banking & Finance 91, 34.

37 As of 1 November 2023.

38 The LSI population was 2,089 in 2022, representing some 18% of bank assets in Europe: ECB Banking Supervision, LSI Supervision Report 2022, Executive Summary.

39 The review, commissioned by the ECB, reported that 'through the implementation of a common SREP, the ECB has promoted risk-based, consistent, and effective supervision and capital adequacy' which had helped to 'enhance the resilience of banks': Assessment of the European Central Bank's Supervisory Review and Evaluation Process. A Report by the Expert Group to the Chair of the Supervisory Board of the ECB (2023), 14.

40 See n. 39, 6 and 16.

Internally, the Supervisory Board's second Chair, Andrea Enria, noted in March 2023 that the codification, within the SSM, of supervisory practices, often through the development of internal manuals, which overcame national differences, supported the creation of a common supervisory culture across the SSM. This in turn supported significant initial supervisory achievements, identified by Chair Enria as the initial (2014) comprehensive assessment of SIs; the supervisory focus on reducing non-performing loans (which dropped to their lowest level since 2015 in 2022 (to under €230 billion, from around €1 trillion)); and the targeted review of banks' internal models (launched in 2016 and completed in 2021) designed to ensure greater consistency in the assessment of risk-weighted assets (and so capital requirements).[41]

The evolution of the ECB's approach to SI supervision within the SSM also augurs well. The transition of the ECB towards a more risk-based approach to supervision (under its new Risk Tolerance Framework[42] and the related Multi-Year Assessment approach to the SREP[43]), supported by enhanced quality assurance within the ECB of supervisory practices, is significant. So too is the greater emphasis being placed on the qualitative dimension of supervision (such as the effectiveness of bank governance, data aggregation, and risk management arrangements).[44] Supervisory Board Chair Enria characterized this shift in terms of supervision moving from being 'predominantly rules-based and heavily-codified, to one that is more risk-focused and adaptable to rapidly changing economic circumstances;' and noted that this shiftmwould involve the concentration of supervisory resources on the most material risks and allow greater supervisory discretion.[45] This transition suggests an institutional confidence within the SSM more widely as to the resilience of the network and of ECB/NCA relations and,

---

41 Speech by ECB Supervisory Board Chair A. Enria, *A New Stage for European Banking Supervision*, 28 March 2023. Chair Enria characterized these three exercises as 'an exercise in supranational regulatory governance on a scale never attempted before'.

42 In 2023, the ECB adopted a new Risk Tolerance Framework, designed to embed agility and a risk-focused approach to supervision. The new framework is designed to empower supervisors to make full use of the flexibility available within the supervisory toolkit to focus on the most essential tasks, and is designed to 'pave the way to a supervisory culture that becomes less and less "tick box" … this supervisory culture also encourages supervisors to discuss openly about potential mistakes and to learn from them': ECB Banking Supervision, Supervision Newsletter, *Supervisors' risk tolerance: focusing on what matters most*, 16 August 2023.

43 The new Multi Year approach to the SREP is designed to allow supervisors to plan SREP activities over a medium-term horizon.

44 The outcomes of the 2023 SREP and the related 2024 SSM supervisory priorities signal an enhanced focus on governance, risk management and culture, risk data aggregation and reporting, and operational resilience, including digital transformation: ECB Banking Supervision, Results of its Supervisory Review and Evaluation process for 2023; and ECB Banking Supervision, *SSM Supervisory Priorities for the Years 2023-25*, December 2023. The emphasis on more qualitative measures and outcomes has been well-signalled. See, e.g., Speech by Supervisory Board Member E. McCaul, noting that while capital requirements are the 'sharpest swords' available to supervisors, they are not always the most effective to effect change in governance and risk management, and highlighting the importance of qualitative supervision: Speech on *Rising to the challenge: the role of boards in effective bank governance*, 17 April 2023.

45 A. Enria, *A New Stage for European Banking Supervision*, cit.

relatedly, as to the technical and institutional capacity of the network to engage in optimal supervision, and related decision-making, in a more flexible manner.

The following discussion further explores this claim as to successful SSM operation and ECB/NCA coordination by considering how decision-making by the Supervisory Board within the SSM has evolved, using examples of potential points of strain. While specific to the ECB's tasks and powers within the SSM (in particular the supervision of SIs under Article 4), Supervisory Board decision-making matters to the effectiveness of the ECB/NCA relationship generally, and to related coordination, within the SSM more widely. Frictions, inefficiencies, and blockages in Supervisory Board decision-making could disrupt ECB/NCA relations on the Supervisory Board, and have prejudicial spillover effects on ECB/NCA and on NCA/NCA relationships more generally within the SSM, particularly where the capacity of the Board to develop protocols and practices that secure an effective SSM supervisory culture is disrupted.

The discussion also considers the extent to which the SSM has developed an effective supervisory culture (supported by related Supervisory Board decision-making) which embeds common practices and priorities across the SSM and so mitigates against frictions in the ECB/NCA relationship.

4.1 Decision Making Governance and ECB/NCA Relations

The establishment of the SSM generated concern at the time as to whether the size of the Supervisory Board (which proposes draft decisions to the Governing Council), composed of the ECB and NCA representatives, would lead to decision-making frictions. In practice, and taking a simple, functional perspective, the volume of ECB decisions suggest that it operates effectively. The Supervisory Board typically operates by consensus, although Chair Enria underlined the importance of the Board's majority voting arrangements (SSM Regulation Article 26(6)) in supporting the establishing of an EU-wide perspective.[46] The majority voting protocols are supported by the requirement that all members of the Board act in the interests of the EU as a whole (SSM Regulation Article 26(1)).

The greater risk to effective SSM operation arose, from the outset, from the 'silent assent' (or non-objection) procedure supporting Governing Council decision-making on banking supervision (based on draft Supervisory Board decision). The risks of procedural blockages associated with the silent assent process do not, however, appear to have crystallized in practice. Certainly, the volume of supervisory decisions adopted by the ECB is considerable. It has expanded from 1,500 decisions in 2015 (the SSM's first full operational year)[47] to 2,582 by 2022[48] (decision-making spiked in 2020 to 2,643, which can be related to the additional decision-making related to the supervisory forbearance the

---

46 Speech on *The Banking Union – a personal view on its past, present and future*, 30 October 2019.

47 ECB Banking Supervision, Annual Report 2015, 12.

48 ECB Banking Supervision, Annual Report 2022, section 5.6.1.

ECB applied to supervision in response to the strains imposed by the Covid-19 pandemic). What appears to be a relatively smooth decision-making process can be related in large part to the delegation procedure adopted by the ECB in 2017. Most of the decisions adopted by the ECB as regards SIs relate to the CRD-required 'fit and proper' assessment of certain bank officers (in the region of 40%-50% of decisions); these common procedure decisions are technical, specific to individuals, and rarely necessitate Governing Council review and adoption. In its first annual report (2015), the ECB had already identified strain from the volume of technical decisions requiring adoption by the Governing Council.[49] The cumbersome nature of the process was also highlighted at an early stage by, inter alia, the Commission[50] and the European Court of Auditors.[51] A delegation review by the ECB followed over 2016 and led to the adoption of the important framework Delegation Decision 2017/933[52] which reflects Court of Justice rulings confirming that institutions can provide for delegation of decisions.[53] Operational efficiency is the concern: Decision 2017/933 notes that the conferral of supervisory tasks on the ECB 'represents a challenge for the effectiveness and efficiency of the ECB's decision-making process, given the high number of decisions required in relation to the ECB's banking supervision tasks' (recital 1). The Decision accordingly provides for the delegation of decisions from the Governing Council in specific areas, each to be identified in subsidiary Decisions, which Decisions are to set out in detail the scope of the matter to be delegated and the conditions on the basis of which such powers may be exercised (Article 4). The delegation is to Heads of Units (the ECB Executive Board must nominate the Heads of Units that receive a delegation (Article 5)[54]). This scheme is designed to support the delegation of decisions that are of a routine nature and involve limited discretion, taking into account the materiality and impact of the decision. Decisions relating to the 'fit and proper' assessment, for example, must move to the silent asset procedure, and so to Governing Council decision-making, where, inter alia, they relate to the most material of SIs (as specified, and including where the relevant entity is at the highest level of consolidation within a significant supervised group), the proposed decision is a negative one,

---

49 ECB Banking Supervision, Annual Report 2015, 11-12.

50 Commission, Report on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013 COM(2017) 591, noting that, 'given the high number of decisions and their varied typology, the involvement of the Supervisory Board and Governing Council in every decision appears to be an important [resource] strain' (at 6).

51 European Court of Auditors, Special Report No 29/2016, Single Supervisory Mechanism. Good start but further improvements needed (2016), 28.

52 Decision (EU) 2017/933 [2017] OJ L141/14. On the delegation mechanism see J. Gren, *The Eurosystem and the Single Supervisory Mechanism: Institutional continuity under constitutional constraints*, ECB Legal Working Paper Series, No 17, July 2018.

53 e.g., Case C-5/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission* (ECLI:EU:C:1986:328).

54 For example, ECB Decision (EU) 2020/1331 [2020] OJ L312/34, nominating heads of units (on an ex-officio basis) to adopt delegated fit and proper decision. While the Governing Council delegates decision-making authority, the identification of the delegate is by the Executive Board as it is responsible for ECB organization, internal structures, and staff: J. Gren, *The Eurosystem and the Single Supervisory Mechanism*, cit., 25.

or the complexity of the assessment or the sensitivity of the issue at hand requires that the silent assent procedure is used.[55] Originally, the scheme covered 'fit and proper' decisions (2017)[56] and determinations as to the 'significant' status or otherwise of a bank (2017).[57] It has since been expanded to cover, inter alia, own funds (capital) decisions (2018);[58] passporting, qualifying holding approval and the withdrawal of authorization (2019);[59] the adoption of national power decisions (decisions relating to the ECB's exercise of its supervisory powers granted under national law and not expressly provided in EU law) (2019);[60] internal models (2021);[61] and onsite inspections and internal model investigation (2023).[62] The reform has had a substantial effect. By 2022 of the 2,582 decisions taken by the ECB within the SSM, only half (1,222) were adopted by the Governing Council under the silent assent procedure.[63]

In many respects, the delegation reform was functionally entirely predictable and sensible. Nonetheless, it has a wider significance for SSM governance and, relatedly, the network's capacity to manage decision-making and so to ensure strong coordination between the ECB and NCAs. The silent assent/Governing Council decision-making procedure goes to the heart of the intricacies of SSM governance. It reflects the constitutional complexities associated with combining, within the ECB, the SSM Regulation's supervisory tasks, governed by legislation and administrative rules, and the monetary competences, governed by distinct Treaty requirements, including as regards ECB independence and the primacy and independence of the Governing Council, conferred on the ECB by the Treaties. Constitutionally, the Governing Council must, as the ECB decision-maker, be the decision-maker as regards the ECB's competences within the SSM, whatever the consequent frictions and inefficiencies as regards practical supervisory decision-making. Nonetheless, the SSM proved capable of finding a solution, using well-tried delegation mechanisms (which have resonances with the conditionality placed on the powers given to the ESAs under EU financial regulation) and reflecting Court of Justice jurisprudence relating to delegation. In addition, the delegation reform was driven by the Supervisory Board (albeit necessarily adopted by the Governing Council), and so suggests a productive working relationship and mutual trust between NCAs and the ECB, given that NCAs thereby weakened their capacity to shape decision-making (by means of direct Supervisory Board representation and also indirect Governing Council representation). Further, the scope of the delegation regime has been repeatedly expanded since 2017, notably as regards own funds and internal model supervisory

---

55 ECB Decision (EU) 2017/935 [2017] OJ L141/21, Article 3.

56 ECB Decision (EU) 2017/935 [2017] OJ L141/2.

57 ECB Decision (EU) 2017/934 [2017] OJ L141/18.

58 ECB Decision (EU) 2018/546 [2018] OJ L90/105.

59 ECB Decision (EU) 2019/1376 [2019] OJ L224/1.

60 ECB Decision (EU) 2019/322 [2019] OJ L55/7.

61 ECB Decision (EU 2021/1442 [2021] OJ L314/22.

62 ECB Decision (EU) 2023/672 [2023] OJ L/84/18.

63 ECB Banking Supervision, Annual Report (2022), section 5.6.1.

decisions which, while technical, are highly impactful on bank operation and resilience.[64] This suggests that while the network arrangements that coordinate the ECB and NCAs may look intricate and potentially fragile, the Supervisory Board – which drives expansion of the delegation regime – has shown the capacity to take and embed key governance reforms.

Relatedly on decision-making, the governance arrangements to support the SSM Regulation Article 25 monetary/supervision split within the ECB have proved stable. ECB Decision 2014/723 governs the protocols which are used to ensure that monetary and supervisory decision-making operates independently of each other throughout the ECB and at the Governing Council, and is primarily concerned with organizational matters and information exchange (it tasks the Executive Board with managing any conflicts of interest).[65] In practice, ECB Annual Reports typically record that Article 25 issues usually engage internal information access requests, and that these are managed without difficulties,[66] again suggesting an institutional capacity to manage constrains and complexity which suggests wider institutional resilience within the SSM network.

More generally, decision-making appears to be relatively nimble in practice, given the evidence from times of strain, in particular over the Covid-19 pandemic when the ECB adopted a series of measures designed to support the banking sector.[67] For example, the Supervisory Board appears to have reached agreement relatively easily (at least, quickly), and in coordination with EBA and ESMA, on the treatment of the 'payment breaks' being given by banks, at scale, to borrowers. At issue was whether loans subject to such breaks were to be classified as 'non-performing' (in accordance with financial reporting standard IFRS 9: a crisis-era reform designed to drive early recognition of potential losses), and relatedly to be subject to additional (and potentially credit-constraining) capital requirements, at a time of crisis when banks were key supports to the economy and to the provision of credit.[68] Notwithstanding the intricate institutional setting (which includes the IFRS Foundation, the international standard-setter which adopts IFRS), the

---

64 Conditions apply, however, to the delegations. These include, in the case of the internal models decisions, that these decisions cannot be adopted by means of a delegated decision where the complexity of the assessment or the sensitivity of the matter requires that they be adopted under the silent assent procedure: Decision 2021/1442 [2021] OJ L314/22, Article 3.

65 ECB Decision (EU) 2014/723 [2014] OJ L300/57.

66 The 2022 Banking Supervision Annual Report, e.g., reported that the Article 25 arrangements were mainly used as regards information exchange between different policy areas, and that such exchanges were subject to, in accordance with Decision 2014/723, 'need-to-know' conditions. In most cases, the request was granted and intervention by the Executive Board to resolve any potential conflicts of interest was not necessary, albeit that Executive Board involvement was required in a 'few instances' to allow the exchange of non-anonymized information on individual banks. Overall, 'separation at the decision-making level did not raise concerns, and not intervention by the Mediation Panel was required': section 5.8.

67 These included allowing banks to use their capital and liquidity buffers: ECB Banking Supervision provides temporary capital and operation relief in reaction to coronavirus. Press release 12 March 2020.

68 The difficulties related to how such payment breaks were to be treated under IFRS 9 (which *inter alia* governs how banks measure loan losses) and whether additional capital would be required by banks as a result (which would have impaired their ability to support creditors).

complexities associated with IFRS 9 and its loan 'staging' requirements, and the prevailing conditions of acute market and economic stress, the ECB (with ESMA and EBA) adopted a position facilitating payment break action.[69] Similarly, the adoption, as part of a suite of Covid-19 forbearance actions, of the 'Pragmatic SREP' as a means for alleviating the pressure on banks[70] points to an agile and responsive decision-making setting, and, relatedly, to effective ECB and NCA cooperation and coordination.

In a final example, experience with the 'close cooperation' system further suggests that the SSM decision-making process can cope with intricate legal relationships and accommodate institutional complexity, and that ECB/NCA relations are similarly resilient. A non-euro area Member State can request to join the SSM under a 'close cooperation' arrangement, and so become a 'participating Member State' and, very broadly, operate under the same arrangements in the SSM as euro area Member States and their NCAs. The close cooperation regime is governed by Article 7 of the SSM Regulation. Its procedural modalities are set out in the SSM Framework Regulation and the 2014 Close Cooperation Decision.[71] In essence, under close cooperation, the ECB enjoys the same supervisory powers over NCAs and supervised entities as it does as regards euro area NCAs. But close cooperation NCAs have a distinct interaction with the SSM, institutionally, in two respects. First, the ECB cannot impose its powers on non-euro area Member States and so does not have direct legal authority over NCAs and supervised entities, including SIs. This is compensated for by a system of intermediated legal authority, through which the ECB 'instructs' NCAs as regards supervised entities (including SIs), so that the relationship is comparable to the ECB relation with euro area NCAs. Second, the close cooperation Member States are not represented on the ECB's Governing Council. Relatedly, the SSM Regulation provides a mechanism for close cooperation Member States to leave the SSM.

Close cooperation is accordingly a peculiar animal institutionally. The lack of direct legal authority and the cascade of instructions through which the ECB/

---

69 ECB Banking Supervision, FAQs on ECB Supervisory Measures in Reaction to the Coronavirus, 3 April 2020; EBA, Statement on the Application of the Prudential Framework regarding Default, Forbearance, and IFRS 9 in light of Covid-19 Measures, 25 March 2020; and ESMA, Public Statement (Accounting Implications of Covid-19), 25 March 2020. See further N. Moloney, P.H. Conac, *EU Financial Market Governance and the Covid-19 Crisis*, (2020) European Company and Financial Law Review, 363.

70 The 'pragmatic SREP' was designed to ensure 'an efficient yet structured assessment of the significant banks directly supervised by the ECB, while reducing resource intensity compared with normal SREP cycles': ECB Banking Supervision, Supervision Newsletter, 14 May 2020. NCAs were encouraged to take 'a similarly pragmatic approach when assessing the less significant institutions.' Chair Enria described it as showing flexibility in adjusting timetables, processes, and deadlines and allowing supervisors to focus on risk control systems, capital planning capabilities, and distribution plans: A. Enria, *A New Stage for European Banking Supervision*, cit. For further detail on the Pragmatic SREP see Introductory Statement by A. Enria, Chair of the Supervisory Board, press conference on the results of the 2020 SREP Cycle, 28 January 2021.

71 Decision (EU) 2014/434 [2014] OJ L198/7.

NCA relationship operates raises potential effectiveness risks for the SSM network generally. An ECB instruction could be disregarded, in times of political/market uncertainty, with related risk to the institutional and cultural alignment between close cooperation NCAs and the ECB and with potential spillover effects on coordination within the SSM as whole. Threats to SSM effectiveness, and so to ECB/NCA coordination also flow from the legitimation risks arising from the ECB's somewhat muddy legal authority under close cooperation: institutional legitimation, particularly where there are potential distributional implications (as with supervision), depends on a clear mandate and authority. The absence of close cooperation Member State representation on the Governing Council further increases these legitimacy risks. The risks have, however, been mitigated, including through extensive legal due diligence *ex ante*, prior to entry into a close cooperation arrangement, which includes undertakings being given by the relevant NCA and Member State to follow instructions, and the ECB's related review of relevant draft national legislation. Bulgaria and Croatia entered into these arrangements in 2020 (Croatia subsequently joined the euro area in 2023), which were based on extensive advance legal due diligence. In practice, the close cooperation system appears to have worked (Croatia) and to be working (Bulgaria) well, notwithstanding the risks of the associated intermediated legal authority.[72] The distinct modalities of close cooperation seem to have resulted in some institutional inefficiencies, however, in particular with respect to complex parallel ECB and NCA governance arrangements as regards reporting and decision-making.[73]

These examples of how potential decision-making strain has not arisen or been mitigated represent only a small sub-set of the different settings in which ECB decision-making for the SSM, and related ECB/NCA relations, can be examined. Frictions clearly and inevitably still can arise. Nonetheless, it is not unreasonable to suggest that the decision-making apparatus is proving effective in supporting decision-making and, relatedly, coordination between the ECB and NCAs in the SSM.

4.2 Common Supervisory Culture

The notion of a common institutional supervisory culture, which can be related to a regulator's goals, purpose and values, is a key determinant of regulatory effectiveness and of how regulatory action can be explained and examined.[74]

---

72 For a positive analysis see the Report for the European Parliament ECON Committee: Z. Darvsa, C. Martins, *Close cooperation for bank supervision: the cases of Bulgaria and Croatia* (2022). On the intermediated nature of the ECB's authority in close cooperation see further R. Lastra, *Close Cooperation in the SSM*, in ECB, *Building Bridges*, cit., 283 and N. Moloney, *Close cooperation: the SSM institutional framework and lessons from the ESAs*, *ibidem*, 296.

73 M. Božina Beroš, *Developing Banking Union's common supervisory culture: a look into the 'black box' of joint supervisory teams*, (2023) *Journal of European Integration* 45, 103.

74 On the determinants of regulatory systems and of how they respond and adapt, and the related centrality of goals, purpose and values, see J. Black, J, *Regulation*, forthcoming in R. Bellamy, J. King, *The Cambridge Handbook on Constitutional Theory* (Cambridge University Press 2024).

While potentially elusive to capture, and engaging, for example, supervisory mandates, supervisory styles, legal settings, institutional arrangements, and resource capacity,[75] it can be associated with the institutional embedding of common understandings as to what the regulator is trying to achieve and how it goes about this, at all levels of the institution. In the ESFS context, for example, EIOPA characterizes a common supervisory culture as 'a common understanding of the way supervisors think, behave and work within their community. The culture manifests itself in processes and procedures but also in behaviour'.[76] Supervisory culture can be described as a type of institutional glue, welding together supervisors to achieve a common purpose through widely accepted and understood behaviours and practices. It can therefore mitigate the effectiveness risks which can arise within what are often large, technocratic and expertise-driven, operationally and organizationally complex, governance-heavy, risk-averse, potentially silo-ed, and process-driven institutions in which simple, high-level mandates and messages can risk getting overlooked. It can likewise strengthen regulators' capacity to react to change and disruption. It is acutely relevant to the effectiveness in practice of the SSM, given the decentralized distribution of tasks and powers in practice under Articles 4 and 6 and the driving need for effective ECB/NCA coordination, and also the importance of ensuring equal supervisory treatment of banks across Banking Union (as mandated under the SSM Regulation (Article 1)).

In consequence, one of the most frequent observations made before the establishment of the SSM, and since, has been the importance to its effectiveness, and to ECB/NCA coordination within the SSM, of a common supervisory culture being established for the SSM – both as regards the ECB's supervision of SIs and also as regards how NCAs within the SSM supervise LSIs.[77] Similarly, it is uncontroversial in the literature that building a common supervisory culture across originally 19 and now 20 NCAs (and the Bulgarian NCA within close cooperation) within the SSM, each with different cultures, practices, resources, and approaches (NCAs can, for example, weight the relative importance of metrics and qualitative factors in supervision in different ways and use on-site and desk-based supervision to different degrees), built up over years and reflecting

[75] For a pre-financial-crisis view on supervisory culture, related to identifying differences in regulatory approaches internationally, and linking supervisory culture to scope of supervision (and mandates) and to styles of supervision (i.e. principles- or rules-based; the balance between reactive and proactive action; use of risk-based approaches; and nature of relationship with supervised sector, including frequency of contact) see Joint Forum (Base Committee, IOSCO, and IAIS), *Regulatory and Market Differences: issues and observations* (2006), 11-12.

[76] EIOPA, *A Common Supervisory Culture* (2023), 3.

[77] The importance of a common SSM supervisory culture has, e.g., been repeatedly referenced in speeches by ECB Supervisory Board members. Board Member Lautenschlager, e.g., underlined the importance of a unified legal basis, harmonized administrative practices, and time and cooperation so that NCAs leave their 'cultural comfort zone' and align how they 'think, assess, and act': Speech on *European banking supervision – towards a common culture*, 6 September 2018.

distinct institutional and political contexts, is foundational to the success of the SSM. [78]

The SSM's governance and legal setting, however, is reticent on supervisory culture. There is only one express reference in the SSM Regulation (a recital reference to the importance of the staff exchange arrangements (provided for in Article 31) to common supervisory culture (recital 79)). By contrast, the importance of, and the need to achieve, a common supervisory culture is deeply embedded in ESA governance. Contributing to a common supervisory culture is, for example, listed in the ESAs' constitutive Regulations as one of the tasks of the ESAs and its achievement is included in their powers.[79] Similarly, the injunction to the ESAs to produce 'Single Supervisory Handbooks' and to adopt two EU supervisory priorities for NCAs, is related to promoting a common supervisory culture (these priorities are reflected in practice in the annual 'European Supervisory Examination Programme' that EBA adopts to drive supervisory convergence[80]).[81] The ESAs are, of course, distinct in that they are coordinating, soft law actors, with an express mandate to promote supervisory convergence across their member NCAs. Nonetheless, while the SSM is based on a scheme whereby the ECB holds exclusive competence and NCAs act as decentralized administrators, supervisory culture is similarly critical to its supervisory effectiveness given the need to ensure coordination across the decentralized elements of the SSM (NCAs) but also within the ECB as a supervisor – whether as regards JST operation but also more generally within the ECB and its different horizontal functions and divisions that support supervision.

Law matters, clearly, to supervisory culture. The massive banking rulebook shapes the supervisory process and so has supported the embedding of a common supervisory culture over the last decade, at least as regards protocols, practices, and processes, within the ECB and across the SSM. In effect, the single market's massive CRD/CRR regime, its administrative rulebook, the related amplifying soft law 'rulebook' (including the EBA SREP Guidance and the associated

[78] On the different approaches prevailing across NCAs and how these were welded in a common operating model see J. Zeitlin, *Hierarchy, polyarchy, and experimentalism in EU banking regulation*, (2023) Journal of European Integration 45, 79.

[79] Using the EBA example, e.g., EBA Regulation (Regulation (EU) No 1093/2010 [2010] OJ L331/12): EBA is to actively foster supervisory convergence across the EU with the aim of establishing a common supervisory culture (Recital 40); is tasked with contributing to a common supervisory culture (Article 8(1)(b)); and is to play an active role in building a common EU supervisory culture, including through a series of activities, including opinions to NCAs, establishing EU supervisory priorities, information exchange, supervisory standards, and training and exchanges and the construction of a supervisory handbook (Article 29).

[80] See, e.g., EBA, *European Supervisory Examination Programme for 2024* (2023).

[81] e.g., EBA Regulation Article 29a (requiring the adoption of two EU supervisory priorities for a three-year period); and Articles 8(1)(aa) and 29(2) (the adoption of an up-to-date supervisory handbook, taking into account the nature, scale and complexity of risks, business practices, business models, and size of financial institutions and markets). The handbook includes, e.g., the EBA Supervisory Handbook on the Validation of Rating Systems under the Internal Ratings Based Approach (2023).

and large-scale reporting requirements and protocols[82]), now form something of a supervisory manual which in turn drives supervisory culture. Alongside, the explicit injunction to EBA to develop a Single Supervisory Handbook is being met by means of the now dense EBA 'operating manual,' as it were, which, while of a necessarily soft and informal character, is designed to steer how supervision is carried out;[83] and by the adoption of common supervisory priorities for NCAs through the annual EBA European Supervisory Examination Programme. Further, an ever-expanding suite of internal ECB soft law, including its 'supervisory guides' (including on its approach to qualifying holdings review; the fit and proper assessment; climate risks; and internal models approvals[84]) has come to 'operationalize', as it were, the single banking rulebook for the SSM, as have the highly detailed methodologies and processes for the SI SREP,[85] as well as the lighter, if still impactful, SREP methodology for LSIs.[86] All this is supported by increasingly sophisticated SSM systems (including 'SSMnet'[87]), as well as by ECB (and NCA) internal review and quality assurances systems which act as a 'second line of defence'[88] on the quality of supervision.[89]

Procedural rights and, relatedly, the judicial review process, have also served to shape and embed SSM supervisory culture over the last decade or so. In particular, the ECB is subject to the duty to give reasons when making decisions[90]

---

82 Chief among them the massive FINREP (financial reporting) and COREP (reporting under the CRD, including as regards capital, leverage, large exposures, and liquidity) schemes which are amplified by extensive administrative rules.

83 The EBA single supervisory handbook has been characterized as being of a 'steering character' and providing NCAs with a 'set of best practices, methodologies, processes and metrics' (by contrast with formal Guidelines (adopted under EBA Regulation Article 16) which are interpretative in nature): Z.J. Giotaki, P. de la Bouillerie, R.N. Seguí, *The Characteristics and the Legal Nature of the Supervisory and Resolution Handbook of the EBA*, EBA Staff Paper Series No 15, 07/2023.

84 The guides are available here.

85 The 2023 SREP Review reported that, in its early years, the ECB allocated significant resources to the development of detailed methodologies and processes to ensure coordination and a consistent supervisory approach to SIs. It also related this process to the need to knit together a wide variety of cultures and supervisory philosophies and processes: n. 39, 14 and 17. The methodologies now include the SREP methodologies for market risk, business model risk, credit risk, and internal governance and risk management (IGRM). The process is explained in the SREP Methodology (2023), available here.

86 ECB Banking Supervision, SSM LSI SREP Methodology (2020).

87 Launched in 2021, SSMnet is a digital, intranet platform that supports SSM supervisors in interacting and coordinating their activities and in tracking supervisory projects and agendas. It also supports education and training.

88 Quality assurance on bank operations and compliance with regulation is traditionally organized as first line of defence (business units), second line of defence (internal governance oversight, including by risk and compliance functions), and third line of defence (internal audit functions).

89 The assurance process is based on review by the ECB Supervisory Quality Division and Internal Audit Committee. For an overview see Speech by Supervisory Board Member P. Hakkarainen on *Quality assurance in European banking supervision – facilitating consistent improvement by measuring success*, 12 December 2018.

90 e.g., SSM Regulation, Articles 5 (macroprudential decisions), 7 (the close cooperation context), 15 (authorization decisions), and 22 (supervisory decisions generally). The procedural framework is amplified by the SSM Framework Regulation (i.e. Article 33 on the duty to give reasons (the ECB must provide a statement of reasons covering material facts and legal reasons)) and related Decisions.

and this duty can be subject to review where action is taken by an affected party to the Administrative Board of Review (set up under SSM Regulation Article 24). The process of articulating reasons, and also the subsequent challenge to, and publication of, such reasoning, can serve as an additional means through which a cultural approach to supervision is justified and embedded. The decisions taken by the Administrative Board of Review are not public. They can, however, be folded into any subsequent review by the Court of Justice and so become partially transparent,[91] and the related emerging jurisprudence suggests that operating principles as regards, for example, how proportionality assessments are made, are being developed and tested and thereby supporting the embedding of a common supervisory culture.[92]

Alongside, technocratic practice has supported the development of a common SSM supervisory culture. The establishment of the JSTs for the supervision by the ECB of SIs is a totemic development in this regard.[93] The 2014 SSM Framework Regulation provides for JSTs (headed up by an ECB JST coordinator who proposes related supervisory decisions, but including NCA members) for the supervision of SIs under Article 4. JSTs have, in practice, proven to be one of the main vectors across which a common supervisory culture is being embedded across the SSM, given their blended ECB/NCA composition, despite the Article 4 hierarchy which centralizes SI supervision with the ECB.[94] JSTs were seen as critical to operation of the SSM from the outset. In its fourth and final SSM Quarterly Report in 2014 on the establishment of the SSM, the ECB reported that JSTs would be the main operational structure for supervision,[95] and by the time of the publication of the initial 2015 ECB Annual Report on banking supervision JSTs had become the ‘cornerstone in the implementation of the SSM model of supervision.’[96] A decade or so later, the JSTs’ key role in carrying out the annual SI SREP places them at the heart of the annual supervisory cycle. In effect, JSTs have become the spine of the SSM, welding together ECB and NCA supervisors into an SSM operating framework, although they supervise only the SIs that are within the exclusive administrative purview of the ECB under the SSM

---

91 The Court has ruled that, where a contested ECB decision conforms with the reasoning of the Administrative Board of Review, it becomes part of the Board’s opinion and so the reasoning in the opinion becomes part of the reasoning of the original decision: *L-Bank*, n. 14.

92 The Board has published a synthesis of its rulings, including on the duty to give reasons, insofar as such rulings have been addressed by the Court of Justice: Administrative Board of Review: Eight Years of Experience Reviewing ECB Supervisory Decisions (2022).

93 On the JSTs as an ‘ingenious attempt’ to govern the allocation of power within the SSM see E. Chiti, F. Recine, *The Single Supervisory Mechanism in Action*, cit.

94 JSTs have, e.g., been characterized as ‘remote administrative units’, not ECB working units (with the NCA JST members being based in the Member State): J. Gren, *The Eurosystem and the Single Supervisory Mechanism*, cit., 30. Similarly, they have been described as ‘composite, multilevel administrative units composed of NCA and ECB officials’: M. Božina Beroš, *Developing Banking Union’s common supervisory culture*, cit.

95 SSM Quarterly Report 2014/4, 4.

96 ECB Banking Supervision, Annual Report (2015), 30.

Regulation. While they clearly support a common supervisory culture for SI supervision, because they integrate ECB and NCA supervisors they also serve to drive supervisory culture across the SSM generally and as regards LSIs. The precise modalities of JST operation are not publicly transparent, but they have recently become regarded in the literature as a new and successful form of EU multi-level governance. The influential 'experimentalist governance' strand of regulatory studies, for example, sees JSTs as a classic form of experimentalist governance. JSTs do not, in other words, constitute a fully centralized hierarchy (notwithstanding their support of Article 4 ECB direct supervision of SIs and also of the *L-Bank* ruling), but represent an iterative means of multilevel governance through which national experience is fed into EU-level decision-making through a process of continual experimentation, feedback, and review.[97] This literature, often drawing on interview evidence, paints a picture of responsive collaboration, vast volumes of highly sensitive information exchange, agility, mutual learning, the management of complexity (institutionally, as regards information-exchange, and on specific supervisory issues), and, overall, the embedding of a distinct SSM culture.[98] Relatedly, the JSTs and their related support of a common supervisory culture can be associated with a new form of Europeanization,' or the process through which EU law gets diffused, beyond the courts.[99]

While the JSTs constitute a form of technocratic innovation, the SSM's legal setting (including the delegation scheme[100]) matters to their operation and their effectiveness in coordinating ECB/NCA relations in the SSM. The operating framework for JSTs a function of administrative law and is set out in 2014 SSM Framework Regulation.[101] It addresses the JSTs' mandate (in effect, performing the SREP (Article 3)[102]); composition (ECB and NCA members (the latter appointed by NCAs) (Articles 3 and 4[103]); the role of JST coordinators (an ECB supervisor under whose coordination the JST operates (Article 3) – all JST members must follow the JST coordinator's instructions as regards their tasks in the JST (Article 6)); and the role of NCA sub-coordinators (appointed by

---

97 For two recent major contributions see J. Zeitlin, *Hierarchy, polyarchy, and experimentalism in EU banking regulation*, cit. and M. Božina Beroš, *Developing Banking Union's common supervisory culture*, cit.

98 See, e.g., n. 77.

99 On 'Europeanization' see T. Tridimas, *The general principles of EU law and the Europeanisation of national law*, (2020) Review of European Administrative Law 13, 5.

100 JSTs do not exercise decision-making authority, which is reserved to the Governing Council, although a delegation arrangement to an ECB Head of Unit may be in place (i.e., as noted above as regards model approval).

101 A JST is defined under the Framework Regulation as a team of supervisors in charge of the supervision of a significant supervised entity or a significant supervised group: Article 2(6).

102 And the Supervisory Examination Programme (SEP). An SEP is prepared for each SI which sets out the main supervisory tasks and activities for the year ahead, the schedule to be followed, objectives, and any on-site inspections and internal model investigations.

103 The ECB is in charge of the establishment and composition of JSTs but the appointment of staff members from NCAs to JSTs is made by the respective NCA, although the ECB may require an NCA to modify an appointment if appropriate for the purpose of the composition of a JST.

NCAs and who assist the JST coordinator (Article 6)). Further administrative decisions have followed, notably ECB Decision 2019/976 which sets out a uniform process for defining JST objectives and sharing feedback.[104] This uniform process is designed to ensure the effective functioning of JSTs, support better collaboration and dialogue, and build trust and openness in JSTs. While operationally important to the embedding of a common supervisory culture, Decision 2019/976 also exemplifies the sensitivities which the establishment of a common supervisory culture across the SSM must navigate. The Decision states, for example, that NCAs are responsible for the appraisal of their JST staff and the ECB for its JST staff, but that the procedures are set out in the Decision are designed to support objective setting and appraisal consistently.

Beyond the JSTs, operational experience over the last decade or so further suggests that technocratic innovation has become key to ensuring the embedding of a common supervisory culture. A survey of the ECB's Annual Reports on banking supervision suggests an agile, responsive, and iterative approach to ensuring SSM integration, and relatedly to embedding a common supervisory culture, that is, in effect, giving life to the legal and governance framework set out in the SSM Regulation. The first (2015) Annual Report reported, for example, on the implementation of the SSM model of supervision and the development of the delegation regime. The 2016 Annual Report reported, *inter alia*, on the design of the delegation framework, the bedding in of the JSTs, the SSM training curriculum, and JST workshops; the 2017 Annual Report considered the operation of the delegation framework; and the 2018 Annual Report reported on simplifying decision-making and Supervisory Board functioning, including through an extension of the delegation framework and the establishment of a Supervisory Quality Assurance Division to work with the network of NCA quality assurance functions as a 'second line of defence' for supervisory quality.[105] 2019 saw the ECB report on the efforts being made to increase the cross-border dimension of supervisory cooperation and on the adoption of a harmonized methodology to ensure mission quality and also sufficient supervisory capacity to respond to local issues. Over 2020-2022 the Annual Reports noted a new organizational structure, along with a related Change Agents Group to support better collaboration with NCAs and to simplify processes. Significantly, 2022 saw the launch of the SSM Integration Project which is designed to foster a common supervisory culture and SSM career paths, enhancing planning integration, further developing SSM tools for collaboration, and introducing common technologies for supervision and training. Alongside, the ECB supervisory planning process has been revised to provide for stronger links with NCAs, 'SSMnet' has been enhanced, intra-SSM mobility of supervisors has been facilitated through a new swap programme, a new platform for cooperation (the SSM Hub on securitization) came into operation, and two new centres of competence have been piloted (for business

---

104 ECB Decision (EU) 2019/976 [2019] OJ L157/61.

105 The 'second line of defence' function was subsequently established in 2020.

models and for interest rate risk in the banking book (reflecting the risks exposed by the 2023 Silicon Valley Bank failure)) in order to enhance ECB and NCA cooperation.

The SSM Regulation and related administrative rules, the banking rulebook and its soft law, procedural rights and judicial review, and technocratic innovations can all be regarded as together supporting the development of a distinct and common SSM supervisory culture. Whether or this culture is effective is ultimately a function of the quality of bank supervision, a large-scale question outside the scope of this discussion. A related question can, however, be asked: how can the SSM assure itself that it has the optimal supervisory culture, particularly as it seeks to become more risk-based and qualitatively-oriented in its approach to supervision, and as the risk landscape changes? A distinct culture can be difficult to identify and challenging to embed:[106] in the regulated sector, the challenges posed by the embedding of an optimal bank culture have been a focus of supervisors since the financial crisis, and recently the subject of legislative reform under the CRD VI reforms.[107] The SSM-specific challenges were addressed in the 2023 SREP Review which suggested that a greater formalization of what an SSM supervisory culture meant was needed, alongside a related Risk Tolerance Framework. The Report acknowledged that there was a 'widely accepted notion' of supervisory culture in the SSM relating to shared values and behaviours, but called for a more structured definition of supervisory culture to prepare the SSM for the years ahead.[108] It also called for a recalibration of the SREP, including as regards the balance between quantitative and qualitative tools, so that the 'quest for consistency' in supervising SIs does not compromise efficiency, transparency, and sufficient risk sensitivity.[109] A new Risk Tolerance Framework was adopted in 2023 which promises a more agile and flexible approach to supervision and so greater capacity to respond to banks' idiosyncratic risks.[110] While its impact in practice remains to be seen, it represents an important evolution in the SSM's operating arrangements and suggests, as previously noted, an institutional confidence in the SSM's coordinating capacity and in its supervisory culture.

---

106 An extensive scholarly and policy literature examines the notion of culture and how it can be used to support good supervisory outcomes. See, e.g., K. Alexander, *Regulating Risk Culture in Banks* (2019), available here. For a recent SSM assessment see Speech by Supervisory Board Member F. Elderson, *Treading Softly Yet Boldy: How Culture Drives risks in Banks and What Supervisors Can Do About It*, 19 September 2023.

107 Political agreement on the CRD VI reform package, which includes reform to the CRD board governance regime and to the 'fit and proper' requirement, was reached by the Council and Parliament in September 2023.

108 N. 39, 17-18 and 23. The Review recommended that the evolution of the ECB's supervisory processes towards a more risk-based approach be supported by a 'well-established supervisory culture,' finding that SSM supervisory culture was not yet sufficiently formalized. Recommendation 1.1 called on the ECB to further develop the target supervisory culture and the risk tolerance framework and Recommendation 1.2 called for an embedding of the risk tolerance framework in day-to-day supervision.

109 N. 39, 14.

110 See n. 42 above.

5. Future Stresses

Experience over the decade or so since the establishment of the SSM therefore suggests that there is much that is positive as regards ECB/NCA coordination within the SSM, and that the intricacy of the SSM's governance arrangements have not disrupted decision-making, even if the development of a common SSM supervisory culture is still a work-in-progress. The effectiveness of SSM decision-making procedures and of its culture can, however, be expected to be tested over the short and medium term.

From a range of developing and potential stresses, the increasing dependence on data and, relatedly, the growing influence of AI (including through the use of 'regtech' and 'suptech' tools which harness technological innovation to support firm compliance as well as supervision)[111] is likely to become a greater source of strain on the operational business of supervision and potentially on ECB/NCA coordination. The SSM has recently launched new suptech tools, including the 'Athena' tool for text analysis.[112] Such tools may come to place pressure on SSM governance, particularly as regards the legitimation of suptech-driven decisions (who is accountable for such decisions?[113]), in particular as regards the delegation system. Other strains are likely. 'Project Olympus' is designed to set the foundations for a shared and integrated IT landscape across the SSM.[114] While there is much to be said for greater integration of IT resources, careful attention will need to be given to the governance of such arrangements, in terms of accountability, while resource-sharing arrangements may disrupt incentives and interests across NCAs and the ECB and generate potentially unhelpful frictions. These risks can, of course, be mitigated and managed, but they will nonetheless constitute additional sources of strain.

Further, it remains to be seen whether the SSM's current governance arrangements have sufficient capacity to manage the supervisory mandate expansion which cannot be ruled out. A degree of informal mandate creep is inevitable in response to market developments, as is underlined by the expansion of the SSM's sphere of operation to include climate risks within its SREP supervision of banks. But formal expansion can also occur. The extension of the SSM's mandate to include the largest and most complex investment banks in the euro area (recharacterized as 'credit institutions' under the 2019 IFD/IFR and related reforms to the CRD IV/CRR regime) was, at least in principle, a significant change to SSM operations (in practice, only twenty

---

111 The Bank for International Settlements, e.g., has investigated how technology can support supervision, including through 'Project Ellipse' which is exploring how AI can help to identify risks: BIS, *Project Ellipse. An Integrated Regulatory Data and Analytics Platform* (2022).

112 Fourteen suptech tools, including Athena, were launched in 2022: ECB Banking Supervision, Annual Report (2022), section 5.5.

113 On the challenges AI poses to regulatory design, including as regards legitimation, see, e.g., S. Deakin, C. Markou, *Is Law Computable?* (Bloomsbury 2020) and M. Hildebrandt, *Smart Technologies and the End(s) of Law* (Edward Elgar 2016).

114 See, e.g., ECB Banking Supervision, Supervision Newsletter, Scaling up suptech, 17 November 2022.

investment firms were expected to require authorization as credit institutions and only a handful have been classified as SIs[115]). The change to the ECB's mandate was nonetheless significant, notwithstanding the strong logic to placing the prudential supervision of the largest and most complex investment firms in Banking Union within the ECB's supervisory remit, given the risks such firms pose to financial stability. But it remains to be seen whether conduct supervision (which remains with NCAs[116]) will become a transmission channel for new ECB/NCA strains, given the importance of conduct risk management to the stability of major investment banks. Certainly, the expanded mandate brings with it delicate operational and co-ordination challenges. The prudential supervision of the most complex investment firms, which pose the greatest risk to financial stability, has not only been placed withing the ECB and the SSM, but also within a wider and complex institutional setting in which the ECB, EBA, ESMA, and relevant NCAs all have different but related supervisory, supervisory convergence, and supervisory co-ordination competences under CRD IV/CRR and as well as under MiFID II/MiFIR.[117] The inclusion of investment firms within the SSM may yet pose a significant test of the efficacy of intra-SSM but also intra-ESFS institutional co-ordination arrangements. Certainly, experience with the close co-operation regime suggests that the ECB is now well-versed in navigating institutional complexity, as does the January 2023 Memorandum of Understanding entered into with non-participating NCAs.[118] Nonetheless, mandate creep poses challenges for supervisors globally, and the SSM is unlikely to be immune.

Finally, soft law remains pivotal to the workings of the SSM, welding the ECB and NCAs together and supporting a common supervisory culture, whether in the form of the EBA SREP Guidelines, the vast suite of other soft law adopted under the banking rulebook, or the ECB's now extensive SSM soft law. Soft law is s a critically important SSM operational tool, bearing much of the technocratic weight required to ensure that the SSM is operationally equipped, through effective ECB/NCA coordination, to deliver the objectives set for it politically by the SSM Regulation. It is also, however, a troublesome tool, not least given its potential distributional effects,[119] and in particular as regards legal certainty. The 2021 *FBF* ruling shows that the Court of Justice is sympathetic to the use of

---

115 ECB Banking Supervision, Annual Report (2021), 58. The 2022 Annual Report reported that four investment firms were licensed as SIs and so under direct ECB Supervision (para 2.1.1.1).

116 The SSM Regulation makes clear that the SSM only addresses prudential supervision and does not engage with conduct-related and other supervision (Article 1). There are, however, several grey zones where prudential and conduct regulation meet and where the related institutional complexities may be significant.

117 Markets in Financial Instruments Directive II 2014/65/EU [2014] OJ L173/349 (MiFID II) and Markets in Financial Instruments Regulation EU (No) 600/2014 [2014] OJ L173/84 (MiFIR).

118 Memorandum of Understanding Between the ECB and the Competent Authorities of Non-Participating European Union Member States for the Performance of their Supervisory Tasks, November 2022.

119 Which can be associated with, e.g., the non-performing loan guidance: ECB Banking Supervision, *Guidance to Banks on Non-Performing Loans* (2017).

soft law (in this case by EBA),[120] but the risks to legitimation remain significant, not least as soft law continues to sit outside the Article 263 judicial review annulment action, although it can be the subject of an Article 267 preliminary reference.

6. Conclusion: politics and technocracy

How then to conclude on this survey of a decade or so of experience with ECB/NCA coordination under the SSM Regulation and in light of SSM practice?

Given that much depends on a granular assessment of whether or not banking supervision has been effective, which is outside the scope of this discussion, this review offers instead a modest, institutional observation: the first decade or so of experience with SSM governance as regards ECB/NCA relations, constitutes a paradigm example of the technocratic making the political possible. The SSM Regulation articulated a political commitment, forged in the teeth of the existential euro area crisis, to establish centralized supervision, ultimately to support loss mutualization. How this was to be achieved was a compromise, set out in Articles 4 and 6 of the SSM Regulation which allocated tasks as between the ECB and NCAs and which framed the SSM network. This network arrangement was associated with significant risks on its establishment, in particular as it was not set up as an incremental, 'learning-by-doing', convergence-based model – by contrast with the ESAs which represent a more sedimentary process of Europeanization. The SSM was, from the outset, based on the ECB exercising significant and direct binding powers over banks and NCAs, within a somewhat brittle network arrangement.

The decision-making model set up under the SSM Regulation has proved more-or-less workable. But it is the accretion of ECB administrative law and soft law, and of technocratic operational innovations, chief among them the JSTs, that has been critical in bringing the Regulation's arrangements to life and in equipping the SSM with a workable operating model within which the ECB and NCAs can coordinate and evolve. This positive diagnosis can be explained in part in terms of the dynamics and incentives of the SSM as an epistemic community of peer experts, reinforced by considerable institutional capacity and authority and facing significant risks were the SSM to fail or falter, to make the network work. But law has mattered here, particularly in the form of the ECB Decisions and soft law that have allowed for delegation, reinforced the JSTs, and provided an operating manual for the SSM in practice, and which are supporting the development and embedding of a common SSM supervisory

---

120 Case C-911/19 *FBF v ACPR* (ECLI:EU:C:2021:599). On the implications of FBF see M. Chamon, N. de Arriba-Sellier, *FBF: On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies*, (2023) European Constitutional LR 18, 286 and H. Marjosola, M. van Rigsbergen, M. Scholten, *How to exhort and to persuade with(out) legal force: challenging soft law after FBF*, (2022) Common Market Law Review 59, 1523.

culture. The resilience of this operating model and of its supporting and evolving supervisory culture, and its capacity to respond to change, can be expected soon to be tested, although the agility shown by the SSM over the Covid-19 crisis, and recent innovations, in particular the adoption in 2023 of a new Risk Tolerance Framework, augur well.

Judicial review of the SSM by the CJEU*

Lucia Serena Rossi [1]

Summary. 1. Introduction – 2. The systemic relevance of effective judicial protection in the SSM – 3. Judicial review of SSM complex procedures – 4. The scope of judicial review of SSM acts – 5. The negligible impact of the reform of the EU judiciary on the judicial review in the SSM

1. Introduction

This contribution will deal with judicial review by the Court of Justice of the European Union ('CJEU') as an institution, encompassing the Court of Justice (the 'Court') and the General Court ('GC'), in the Single Supervisory Mechanism ('SSM').

It will focus on three main issues. First, the contribution will deal with judicial review of complex procedures in the SSM, from the point of view both of the division of jurisdiction between EU and national courts and of the instruments through which the CJEU exercises such review, in particular when faced with the application or interpretation of national law. Second, it will tackle the scope and intensity of the judicial review exercised by the CJEU over European Central Bank ('ECB') decisions adopted in the exercise of its discretionary powers within the framework of the SSM. Third, it will explore the possible impact of the ongoing reform of the EU judiciary on judicial review of the SSM.

Before addressing these issues, some introductory remarks will be devoted to the systemic relevance of the right to effective judicial protection in the context of the Banking Union and the SSM in particular.

2. The systemic relevance of effective judicial protection in the SSM

Ten years have passed since the establishment of a banking union, founded on the two pillars of the SSM and the Single Resolution Mechanism ('SRM').[2] These pillars provide for the intervention of several administrative and judicial authorities, operating both at the EU and at the national level.[3] However, the

---

* A previous and partially different version of the present contribution will be published in the proceedings of the ECB Legal Conference 2023, held in Frankfurt on 4 and 5 September 2023.

1 Judge at the Court of Justice of the European Union. All opinions hereby expressed are personal and do not bind the institution in any way.

2 Regulations No 1024/2013 ('SSM Regulation') and No 806/2014 ('SRM Regulation'). A third pillar that should complete the banking union, the European Deposit Insurance Scheme (EDIS), has not yet been established (see, https://www.consilium.europa.eu/en/policies/banking-union/#pillars).

3 See e.g., recitals 13, 15, 28, 60, 60, 67, and 71 and Articles 4, 6 and 24, of the SSM Regulation.

banking Union is based on the fundamental principle that the supervisory and resolution mechanisms shall be, as their names suggest, single.[4]

EU and national authorities shall therefore cooperate in the exercise of their respective tasks and powers.[5] In the recent judgment *Versobank v ECB*,[6] while stressing that the ECB has exclusive competence to withdraw authorisation for all credit institutions, irrespective of their size, the Court explained how cooperation between the ECB and the National Competent Authorities works in the frame of the SSM regulation. Such cooperation entails, on the one hand, an obligation for the ECB to consult national authorities before withdrawing authorisation of a non-significant bank on its own initiative, and on the other, the possibility for those authorities to propose such a withdrawal.

EU and national authorities must also follow common rules (the so-called single rulebook) and respect common principles, such as the principles of loyal cooperation,[7] non-discrimination – notably between depositors and shareholders of significant and non-significant banks – and effective judicial protection.

In particular, the principle of effective judicial protection – in its dual dimensions as fundamental right, granted by Article 47 of the Charter of Fundamental Rights of the European Union ('Charter'), and as general principle of EU law, stemming from both the constitutional traditions common to the Member States and from Article 6 of the European Convention on Human Rights ('ECHR') – plays an essential role in the development of the case-law of the Court on the banking union.

As the *Trasta* judgment shows,[8] this principle applies not only to EU institutions and bodies when they exercise their supervisory and resolution powers, but also to national competent authorities when they act in this area and implement EU law within the meaning of Article 51(1) of the Charter.

It is interesting to note that the effective judicial review provided by the CJEU in the banking union field is guaranteed not only by way of direct actions, and, notably, actions for annulment brought before the GC, but also through preliminary references on interpretation and on validity brought before the Court.

---

4 See, to this effect, Article 6(1) of the SSM Regulation: "The ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities. The ECB shall be responsible for the effective and consistent functioning of the SSM".

5 See SSM Regulation, recitals 29 and 47 and, above all, Article 6(2) ("Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information").

6 Judgment of 7 September 2023, Versobank v ECB, C-803/21 P, not published, EU:C:2023:630, paras 139-141.

7 See e.g. Judgment of 19 December 2018, Berlusconi and Fininvest, C-219/17, EU:C:2018:102, para 47.

8 Judgment of 5 November 2019, ECB and Others v Trasta Komercbanka and Others, C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, para 59.

Indeed, as *FBF* shows,[9] individuals can also bring to the Court, through a preliminary ruling requested by national judges, cases concerning non-binding acts that are not of direct concern to them. In this case, the Court held, in essence, that, despite the fact that the European Banking Authority's ('EBA') guidelines do not produce binding legal effects and, therefore, cannot be subject to an action for annulment under Article 263 TFEU, their validity can nonetheless be assessed under Article 267 TFEU.[10]

This judgment is particularly important in that it allows the Court to extend its jurisdiction to acts adopted by EU agencies (notably the EBA), which, in most cases, are non-binding acts, and therefore fall outside the scope of Article 263 TFEU. However, by complementing and clarifying the single rulebook applicable to all credit institutions, non-binding acts adopted by EBA are essential to ensure the unity and effectiveness of banking supervision and resolution, and, at the same time, non-discrimination between shareholders and depositors.

The possibility for national and legal persons to challenge such acts and the competence of the CJEU to examine their validity is therefore essential not only to ensure effective legal protection in the banking Union field, but also to ensure uniform application of the common rules that constitute the foundation of the Banking Union.

3. Judicial review of SSM complex procedures

A distinctive feature of the Banking Union procedures is their complexity. A procedure is 'complex' when it involves multiple authorities. Complex procedures are inherent to the banking union, and may take two different forms. On the one hand, when both European institutions/agencies and national authorities are involved in the adoption of an EU legal act, they are engaged in vertical complex procedures. On the other hand, when various European authorities participate in the procedure leading to the adoption of an EU legal act, they are engaged in horizontal complex procedures.[11] This contribution will focus on the former, i.e. vertical complex procedures, which are those relevant to the SSM pillar.

Judicial review of complex vertical procedures raises two essential issues. First, which acts can be subject to judicial review, and consequently before which court is such review to be exercised (i.e. the distribution of jurisdiction among EU and national judges)? Second, what are the legal instruments that can be used by the CJEU in the context of such judicial review?

Indeed, the preparatory or definitive nature of the national act adopted in the context of a complex procedure determines not only the ability to review its

---

9 Judgment of 15 July 2021, FBF, C-911/19, EU:C:2021:599.

10 See *ibidem*, paras 39 to 50 and paras 52 to 55 respectively.

11 See, as to these procedures, the recent judgment of 18 June 2024, Commission v SRB, C-551/22 P, EU:C:2024:520.

legality but also the court (EU or national) competent to do so. Both these issues were addressed by the Court in the seminal *Berlusconi and Fininvest* ruling.[12]

Building upon its previous case law, the Court clarified that, in the context of complex procedures involving EU and national authorities, the fundamental criterion is whether the decision-making power of the EU authority is exclusive. This is measured by the discretionary power of the EU authority adopting the final EU act with respect to the national preparatory act.

Where the EU authority exercises, alone, final decision-making power without being bound by the preparatory acts or proposals of the national authorities, and the national act is therefore merely preparatory, then the CJEU has exclusive jurisdiction.

Hence, the CJEU is competent not only to review the legality of the final Union act but also to examine any defects vitiating the preparatory acts or proposals of national authorities that would be such as to affect the validity of that final decision. Correspondingly, national courts are deprived of any jurisdiction, with respect not only to the final act,[13] but also to the national preparatory acts.[14]

A single judicial review is necessary to guarantee the unity and exclusivity of judicial control, symmetrical to the unity and exclusivity of the decision-making power of the EU authority at stake:

"48. Where the EU legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between the EU institution and the national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of the EU institution.

49. In order for such a decision-making process to be effective, there must necessarily be a single judicial review, which is conducted, by the EU Courts alone, only once the decision of the EU institution bringing the administrative procedure to an end has been adopted, a decision which is, alone, capable of

---

12 Judgment of 19 December 2018, Berlusconi and Fininvest, C-219/17, EU:C:2018:1023.

13 Judgment of 22 October 1987, Foto-Frost, 314/85, EU:C:1987:452, para 17.

14 Judgment of 19 December 2018, Berlusconi and Fininvest, C-219/17, EU:C:2018:1023, paras 43, 44 and 47, respectively. On the contrary, as the Court had already clarified in the judgment of 3 December 1992, Oleificio Borelli v Commission , C-97/91, EU:C:1992:491, paras 9 to 13, where *i)* the complex procedure provides for a division of powers between national and European authorities, and *ii)* the act adopted by the national authority is a necessary stage of a procedure for adopting an EU act in which the EU institutions have only limited or no discretion, so that the national act is binding on the EU institution – that is, when the national act is preliminary and distinct from the final act, not merely preparatory to it –, it is up to the national judges to exercise judicial review over the national preliminary act, on the same terms on which they review any definitive measure adopted by that national authority; see also, to this effect, Judgment of 19 December 2018, Berlusconi and Fininvest, C-219/17, cit., paras 46-47.

producing binding legal effects such as to affect the applicant's interests by bringing about a distinct change in his legal position.

50. If national remedies against preparatory acts or proposals of Member State authorities in this type of procedure were to exist […], the risk of divergent assessments in one and the same procedure would not be ruled out and, therefore, the Court's exclusive jurisdiction to rule on the legality of that final decision could be compromised […]."

Insofar as the complex vertical procedures established in the framework of the SSM are concerned, the Court then held that national authority acts concerning significant banks are merely preparatory to the ECB's decisions. The ECB is not bound by the proposals of national authorities, and alone has the competence to exercise the powers conferred by the SSM Regulation.[15]

The Court therefore ruled that the CJEU has exclusive jurisdiction over ECB decisions, which extends to determining whether the preparatory national acts are vitiated by defects, such as to affect the validity of the ECB's decision, and that national courts are precluded from doing so, including when national decisions allegedly disregard national judicial decisions:

"57. Consequently, it must be held that the EU Courts alone have jurisdiction to determine, as an incidental matter, whether the legality of the ECB's decision […] is affected by any defects rendering unlawful the acts preparatory to that decision that were adopted by the Bank of Italy. That jurisdiction excludes any jurisdiction of national courts in respect of those acts […].

58. […] the ECB's exclusive competence to decide […] and the corresponding exclusive jurisdiction of the EU Courts to review the validity of such a decision and, as an incidental matter, to determine whether the preparatory national acts are vitiated by defects such as to affect the validity of the ECB's decision, preclude a national court from being able to hear an action […].

59. […] it is immaterial in that regard that a specific action for a declaration of invalidity on the ground of alleged disregard of the force of res judicata attaching to a national judicial decision has been brought before a national court."

It should be noted that, shortly afterwards, in *Iccrea Banca*,[16] the Court transposed the conclusions regarding the SSM to the other pillar of the banking Union, i.e. the SRM. Recalling almost verbatim the reasoning developed in *Berlusconi* and *Fininvest*, the Court affirmed the exclusive jurisdiction of the CJEU over the Single Resolution Board ('SRB') acts and national preparatory acts.

---

15 Judgment of 19 December 2018, Berlusconi and Fininvest, C-219/17, EU:C:2018:1023, paras 53-55.

16 Judgment of 3 December 2019, Iccrea Banca, C-414/18, EU:C:2019:1036, paras 37-48.

Given that the CJEU has exclusive jurisdiction over final acts adopted in the framework of the banking union but also, incidentally, over preparatory acts, and that these acts may also include national acts, this raises the question of what kind of legal tools should the CJEU use for the purpose of reviewing the legality of these acts. More particularly, when the CJEU is confronted with national law, whether it is a question of incidentally reviewing national preparatory acts or of controlling the way in which the ECB has applied national law transposing EU directives,[17] to what extent should the CJEU employ the preliminary ruling procedure "toolbox" (i.e. consistent interpretation and setting aside of conflicting national law)?

The answer will probably come from the appeal in the *Corneli* case,[18] which is still pending before the Court. This case concerns a decision of the ECB to place a bank under temporary administration, based on a provision of national law. The applicant maintains that the GC erred in law in applying that national provision to a situation that did not expressly fall within its scope of application.

When checking the legality of the contested ECB decision, the GC treated the ECB as a national judge. The GC considered that, when the ECB acts as the competent supervisory authority and is confronted with a situation governed by a directive, it is obliged to apply (only) national legislation transposing that directive. In so doing, the ECB is – much like a national court – under an obligation to interpret national law in conformity with EU law. However, this obligation cannot serve as the basis for an interpretation of national law *contra legem*.

According to the GC, when adopting the contested decision, the ECB went beyond a consistent interpretation of national provisions in the light of directive 2014/59 and against the letter of the applicable national provision. The GC concluded that the ECB erred in law and annulled the decision. Moreover, mentioning the horizontal effect that the directive would have had, the GC implicitly excluded that the ECB could set aside the national law.

In the appeal, the Court will therefore be called to decide not only whether the ECB can be assimilated to a national authority (be it judicial or administrative) when exercising supervisory powers on the basis of national law, but also how the ECB must apply national law in this context. In particular, on the one hand, the Court shall determine whether the national law "incorporated" by EU law sets the same limits to the obligation of consistent interpretation. On the other hand, the Court will likely be called to judge whether the ECB is subject to the

[17] Article 4(3) of the SSM Regulation provides in particular that, to carry out its supervisory tasks, the ECB should apply "all relevant EU law". When it consists of Directives, the ECB should also apply the national transposing legislation. Similarly, when Regulations grant options for the Member States (MS), the ECB should apply the national legislation exercising such options.

[18] Joined cases C-777/22 P and C-789/22 P; the appeals have been brought, respectively by the ECB and the Commission, against the Judgment of 12 October 2022, Corneli v ECB, T-502/19, EU:T:2022:627.

same limits as the national authorities with respect to the setting aside of this "incorporated" national law, when it conflicts with Union law.

In my personal view, when applying national law transposing EU law, the ECB should not be compared to a jurisdiction, but rather to an administrative authority. Thus, it should follow the principles that the Court has established for national administrative authorities since *Costanzo.*[19] The ECB should therefore not only interpret the applicable national law as far as possible in conformity with EU law, but also set aside the national law when this proves impossible.

In this latter respect however, it remains to be seen whether the obligation to set aside conflicting national law is conditional upon the direct effect of the EU law provision at stake. In this regard, the possible impact of the "incorporation" of national law by EU law on the applicability of the *Popławski II* case law should be carefully assessed.[20] To this end, the Court may need to consider whether, in this particular context, the principle of primacy and its corollaries, including the obligation to set aside conflicting national law, could take precedence over that of direct effect.

4. The scope of judicial review of SSM acts

Judicial review of complex procedures is based on the exclusive jurisdiction of the CJEU with respect to the final act that concludes this procedure. In turn, the qualification of a given act as final depends on whether it is adopted in the exercise of an exclusive and discretionary power. Preparatory acts, be they national or European, are excluded as such from review, without prejudice to the possibility of asserting their defects in the context of an action laid down against the final act. However, if both the preparatory and final acts are the product of a discretionary power, to what extent will the EU courts be able to review their legality?

It must be recalled that the Court has granted a wide margin of discretion to the EU institutions, notably the Commission, when dealing with complex technical issues, be they economic or scientific.[21] This has translated to a certain judicial deference towards the exercise of this discretionary power, whereby judicial review is confined to a mere extrinsic control of legality, limited to verifying whether the contested decision "contains a manifest error or constitutes

---

19 Judgment of 22 June 1989, Costanzo, 103/88, EU:C:1989:256.

20 Judgment of 24 June 2019, Popławski, C 573/17, EU:C:2019:530; see also judgment of 18 January 2022, Thelen Technopark Berlin, C-261/20, EU:C:2022:33.

21 See judgment of 16 June 2015, Gauweiler and Others, C-62/14, EU:C:2015:400, para 68 and order of 4 September 2014, Rütgers Germany and Others v ECHA, C-290/13 P, not published, EU:C:2014:2174, para 25.

a misuse of power or whether the authority did not clearly exceed the bounds of its discretion."[22]

To what extent should this settled case law apply to the Banking Union field?

Insofar as the ECB and the SSM pillar are concerned, the question is, in essence, whether the abovementioned case-law of the Court on the limited review of technical discretion offers a fair balance between the protection of the prerogatives of the ECB under the treaties and the effectiveness of the guarantees offered to individuals by Article 47 of the Charter. It should in fact be recalled that the ECB has a peculiar legal status under Article 282(3) TFEU, in that it benefits from a fully-fledged institutional independence, extending beyond that of the members of its governing bodies. However, the ECB is nonetheless subject to the same standard of judicial control as other EU institutions under the treaty.

This issue was addressed by the Court in the recent *Crédit Lyonnais v ECB* judgment.[23]

The case arose from an appeal brought by the ECB against a judgment in which the GC upheld an action for annulment against an ECB decision.[24] According to the ECB, the GC disregarded the limits on the exercise of its judicial review, by substituting its own assessment for that made by the ECB.

The Court set aside the GC judgment and dismissed the action at first instance. To this effect, the Court first reaffirmed the broad discretion of the ECB in the field of banking supervision and the correspondingly limited judicial review that the CJEU shall carry out.

"55. As the General Court pointed out, in essence, in paragraph 98 of the judgment under appeal, in so far as the ECB has a broad discretion in deciding whether or not to apply Article 429(14) of Regulation No 575/2013, the judicial review which the Courts of the European Union must carry out of the merits of the grounds of a decision such as the decision at issue must not lead it to substitute its own assessment for that of the ECB, but seeks to ascertain that that decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers […]."

Based on its previous case law, the Court then clarified the scope and intensity of this limited judicial review:

"56. In that regard, it is settled case-law that the Courts of the European Union must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess

22 See, inter alia, judgments of 25 January 1979, Racke, 98/78, EU:C:1979:14, para 5 and of 11 December 2018, Weiss and Others, C-493/17, EU:C:2018:1000, para 24.

23 Judgment of 4 May 2023, ECB v Crédit lyonnais, C-389/21 P, EU:C:2023:368.

24 Judgment of 14 April 2021, Crédit lyonnais v ECB, T-504/19, EU:T:2021:185.

a complex situation and whether it is capable of substantiating the conclusions drawn from it."

In this context, the Court recalled, by referring, in particular, to its *Weiss* judgment, the importance, for institutions vested with discretionary powers, to respect the procedural and substantive aspects of the duty to state reasons.[25]

Hence, when carrying out the judicial review of an ECB decision the CJEU will check, first, the material accuracy, reliability and consistency of the factors taken into account in that decision; second, the completeness of these factors, with respect to the set of relevant information which had to be taken into consideration by the ECB in the present case; and third, whether the assessment made by the ECB was manifestly incorrect.

To this end, the CJEU will only be called to assess that the option chosen by the ECB is not manifestly incorrect, that is, it is *prima facie* correct. The CJEU will therefore not be called upon to evaluate whether this option is more correct than the other possible decisions which the ECB could have taken on the basis of the (exhaustive and accurate) factors taken into consideration. Once the ECB has complied with its duty to state reasons, the burden of proof thereafter falls on the appellant.[26]

Finally, it should also be recalled that, as the *Weiss* judgment shows, this inquiry into the existence of manifest errors of assessment might fall within the scope of a broader proportionality check to the effect that the contested decision does not go manifestly beyond what is necessary to achieve its objective.[27]

5. The negligible impact of the reform of the EU judiciary on the judicial review in the SSM

On 30 November 2022, the Court presented a draft amendment of Protocol No 3 on the Statute of the CJEU, based on Article 281(2) TFEU.[28] The proposal had two goals. It aimed, first, to extend the material scope of the so-called filtering mechanism for appeals established in 2019,[29] and, second, to confer jurisdiction

---

25 *Ibidem*, para 57.

26 Judgment of 4 May 2023, ECB v Crédit lyonnais, C-389/21 P, EU:C:2023:368, paras 70-73.

27 Judgments of 11 December 2018, Weiss and Others, C-493/17, EU:C:2018:1000, paras 78 and 79.

28 See Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union, https://curia.europa.eu/jcms/jcms/p1_3866197/en/.

29 The last amendments of the Statute, entered into force on 1 May 2019, and introduced a filtering mechanism applicable to appeals brought against decisions of the GC concerning decisions of the independent boards of appeal of four offices and agencies of the Union (Article 58a of the Statute). The filter is based on the principle (Article 58a(3) of the Statute) that an appeal will not be allowed to proceed, wholly or in part, unless it raises an issue that is significant with respect to the unity, consistency, or development of Union law. The practice has shown that appeals are very rarely allowed to proceed.

to hear and determine questions referred for a preliminary ruling under Article 267 TFEU to the GC in six specific areas.

The reform – which was recently adopted by the European Parliament and the Council on 11 April 2024, and will soon enter into force – will have only a very limited, if not negligible, impact on judicial review in the SSM field.

On the one hand, as to the devolution of preliminary jurisdiction to the GC, none of the specific areas affected by the transfer of jurisdiction concerns directly or indirectly the banking union. The future transfer to the GC of other "specific areas" within the meaning of Article 256(3) TFEU, including the banking union, certainly cannot be ruled out. However, it should be noted that one of the criteria used by the Court and the legislators to identify the areas of preliminary ruling jurisdiction to be transferred to the GC is the existence of a "substantial body of case-law of the Court" in the field concerned.

This suggests that, even if the transfer of jurisdiction to hear references for preliminary rulings to the GC proves successful, it is unlikely that such a jurisdiction in the banking union field will be transferred to the GC in the future. Indeed, the case-law of the Court in this area is far from being consolidated, and the Court will still be called upon to clarify the guiding principles for interpreting EU banking law. The particular sensitivity of this field of law in any case suggests preserving, for both direct actions and references for preliminary ruling, the full "constitutional" role of the Court.

On the other hand, as to the extension of the filtering mechanism for appeals,[30] it is true that decisions adopted by EU agencies operating in the context of the banking union, and most notably EBA, will now fall within the scope of the filtering mechanism. However, this extension of the filtering mechanism is unlikely to affect judicial review in the SSM.

Symmetrically to what has been observed with respect to the procedure for adopting ECB supervisory decisions, the procedure for reviewing these decisions is also structured as a complex administrative procedure.[31] To begin with, the decisions adopted by the Supervisory Board of the ECB (its internal body responsible for exercising the supervisory powers conferred to the ECB by the SSM regulation) can be challenged before an Administrative Board of Review ('ABoR'). The ABoR does not make a decision, but rather issues a non-binding opinion. Then, this opinion is submitted to the Supervisory Board of the ECB, which adopts a draft decision. This draft decision (which will replace the initial contested decision) is deemed adopted, unless the ECB Governing Council

---

30 The reform provides for the extension of the filtering mechanism to all the 10 agencies that are endowed with decision-making powers and therefore with a BoA. Along with the 4 agencies that are currently listed in Article 58a(1) of the Statute (EUIPO, CPVO, ECHA and EASA), the proposal lists the BoAs of ACER, SRB, EBA, ESMA, EIOPA, and ERA.

31 See Article 24 of the SSM Regulation.

objects. Lastly, this decision can be subject to judicial review before the EU Courts.

The ABoR certainly has some similarities with the Boards of Appeal ('BoAs') of other EU agencies that are currently, and possibly will be, covered by the filtering mechanism for appeal, particularly in that it carries out the same form of internal administrative review through an adversarial procedure.[32] However, it differs significantly from other BoAs: not only because it has a facultative "jurisdiction", since the addressees of ECB supervisory decisions can always decide to bring proceedings before the EU courts instead, but also and above all because the ABoR adopts non-binding opinions.[33] Indeed, unlike the other BoAs, the internal administrative review procedure does not end with a binding decision adopted by the ABoR, which can then be autonomously challenged before the GC, but with a decision by the ECB. It will be the latter decision that will eventually be the subject of an action for annulment before the GC.

This is why not only does the ABoR not figure among the BoAs that will now be included in the appeals filtering mechanism, but it could never figure among them. Interestingly enough, if this implies that the decisions taken by the ECB in the exercise of its supervisory powers will not benefit from a "full review" by the ABoR in the context of a fully-fledged quasi-judicial control before a BoA,[34] it also means that the Court will always have the last word on their legality.

32 See Article 24 of the SSM Regulation, and Decision ECB/2014/16 of 14 April 2014, concerning the establishment of an Administrative Board of Appeal and its Operating Rules.

33 Article 24 (7 and 11) of the SSM regulation and Articles 16 and 19 of the Decision ECB/2014/16.

34 See, to this effect, judgment of 9 March 2023, ACER v Aquind, C-46/21 P, EU:C:2023:182, paras 55-73.

The place of the SSM in the EU legal order

Bruno De Witte[1]

Summary. 1. Legal nature of the SSM – 2. An adjusted institutional balance – 3. A special case of shared administration – 4. A special case of differentiated integration – 5. Original accountability arrangements

This brief contribution proposes some reflections on the way in which the EU's Single Supervision Mechanism (hereafter: SSM) is embedded within the EU legal order. After ten years of existence, the SSM has become a stable element in the EU's institutional landscape. It is also a very idiosyncratic element, as it combines a number of original features which I will recollect under five headings: the legal nature of the SSM, the effect it has on the EU's institutional balance, its being a special case of shared administration and of differentiation integration and its accountability arrangements. This contribution leaves aside the question of judicial review of SSM acts which also raises some unusual questions from a general EU law perspective, but which is covered by another contribution to this paper.

1. Legal nature of the SSM

Within EU law, the term 'mechanism' has no fixed meaning. It has been used to describe a variety of things: a funding scheme (as in the European Financial Stabilization Mechanism[2]), a mixed regulatory-and-funding scheme (as in the Union Civil Protection Mechanism[3]) and even a separate international organization (as in the European Stability Mechanism[4]). The SSM is a mechanism that is unlike those three. It can be described as a regulatory framework of European public law.[5] Unlike, say, the Single Resolution Board, it is not an EU agency: the decision-making powers within the SSM are attributed to an EU institution (the ECB) rather than to an agency. The 'Meroni doctrine', whereby discretionary powers cannot be delegated to an agency, would have made it difficult, short of a Treaty change, to attribute effective supervision

1 Maastricht University, Professor of European Union law.

2 Regulation 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism, OJ 2020, L 118/1.

3 Decision 1313/2013 of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ 2013, L 347/924.

4 Treaty establishing the European Stability Mechanism, Brussels, 2 February 2012.

5 The description 'regulatory framework' is used by Edoardo Chiti and Fabio Recine, *The Single Supervisory Mechanism in action: institutional adjustment and the reinforcement of the ECB position*, (2018) *European Public Law*, 101-124, 103.

powers to the European Banking Authority.[6] The constraints of the Meroni doctrine simply do not apply to a fully-fledged EU institution like the ECB.

The commonly used expressions that 'the SSM does X' or 'decided Y' are legally inaccurate. The SSM cannot act, legally speaking, since it does not have legal personality. The legal acts taken in the framework of the SSM are adopted either by the ECB or by one of the national competent authorities (hereafter: NCA). Note however the somewhat anomalous membership rules of the Basel Committee on Banking Supervision where 'ECB' and 'ECB-Single Supervisory Mechanism' are listed as separate member institutions, although in practice this means that the ECB wears two hats at the Basel meetings.

2. An adjusted institutional balance

The principle of institutional balance, as expressed in Article 13(2) TEU, states that 'Each institution shall act within the limits of the powers conferred on it in the Treaties.' However, the powers exercised by the ECB in the framework of the SSM have not been conferred by the Treaties directly but by a subsequent act of the Council based on Article 127(6) TFEU. The ECB thus saw a significant expansion of its powers, based not on the text of the Treaties but on an act of secondary EU law. In that act, namely Regulation 1024/2013 establishing the SSM, the Council laid down very detailed rules on how the ECB should operate when exercising banking supervision tasks (creation of a Supervisory Board and a Mediation Panel, creation of an Administrative Board of Review, separation of staff between monetary and supervisory tasks, etc.). This is exceptional, as normally the detailed mode of operation of each institution is determined by its own Rules of Procedure, and not by another institution. The ECB's organizational autonomy is therefore more constrained than that of other EU institutions. Indeed, the Council made its mode of operation in banking supervision matters 'radically different'[7] from what it is in monetary matters. That being said, the ECB could, within the framework set by the SSM Regulation, give more detailed shape to its supervisory decision-making by organizing a delegation system which is not expressly foreseen in the regulation.[8]

---

6 Note, however, that the exact degree to which the Meroni doctrine acts as a constraint to the delegation of power to agencies is a very controversial matter. See the detailed discussion of this question by Merijn Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016), 183 ff.

7 This term is used by Diane Fromage, *Assessing and (re-)situating today's ECB in the EU's institutional landscape*, in T. Beuckers, D. Fromage, G. Monti (eds), *The New European Central Bank: Taking Stock and Looking Ahead* (Oxford University Press 2022), 318-339, 336.

8 See C.A. Petit, *The SSM and the ECB decision-making governance*, in G. Lo Schiavo (ed), *The European Banking Union and the Role of Law* (Edward Elgar 2019), 108-129, 117-123.

3. A special case of shared administration

There are, in the EU, many cases of shared or composite administration, whereby an EU institution or body works closely together with member state administrative authorities to implement a given EU policy. They include, for example, the European Competition Network and the European Data Protection Network. The SSM is an example of shared administration that is distinctive from others by a number of characteristics. Without entering into the intricate details of the relationship between the ECB and the NCAs,[9] one could point to the following characteristics that make this a unique form of shared administration: i) the fact that the supranational element of the system is not the Commission or an EU agency, but the ECB; ii) the fact that the supranational element can decide to take over the tasks of the national administration in specific instances; iii) the uniquely important role of the joint supervisory teams, which means that shared administration is a day-to-day routine matter in the SSM; and (iv) the fact that the applicable norms are not only EU law norms but include national banking supervision law adopted to implement EU directives. The latter characteristic was a real novelty within the EU legal order. Some authors claimed that this feature of the SSM is incompatible with national constitutional law and even with the democratic principles of EU primary law.[10] It also raises the unprecedented question of whether the ECB could, in its supervisory role, decide to disapply national law if it considers it incompatible with the underlying EU directive. Indeed, 'is it imaginable that a Union institution should be bound to apply a rule which is in breach of Union law?'[11] However, it was pointed out that, if the ECB were indeed to ignore a rule of national law because it considers it incompatible with an EU banking directive, that would mean giving direct effect to a directive to the detriment of private legal persons (namely the bank that is subject to ECB supervision), which would run counter to the Court of Justice's long-established view excluding the horizontal direct effect of directives.[12]

4. A special case of differentiated integration

Most cases of differentiated integration in the European Union are either organized in Treaty protocols (the euro area in monetary policy, and the opt-outs for

---

9 This is, naturally, a subject dealt with by much of the literature on the SSM. See, among many others: F. Della Negra, G. Lo Schiavo, *The relationship between the ECB and the national competent authorities in the Single Supervisory Mechanism: problems and perspective*, in T. Beuckers, D. Fromage, G. Monti (eds), *The New European Central Bank*, cit., 184-208.

10 See, for instance, E. Peuker, *Die Anwendung nationaler Rechtsvorschriften durch Unionsorgane – ein Konstruktionsfehler der europäischen Bankenaufsicht*, (2014) *Juristenzeitung*, 764-771.

11 K. Banks, *Incorrect implementation of EU directives: what effects for the ECB and the CJEU, and what mechanisms for rectification?*, in *Building Bridges: Central Banking Law in an Interconnected World – ECB Legal Conference 2019* (European Central Bank 2019), 121-128, 121.

12 See the arguments on this point of Fabian Amtenbrink, *The application of national law by the European Central Bank: challenging European legal doctrine?*, in *Building Bridges*, cit., 136-151, 139-142.

Denmark and Ireland in Justice and Home Affairs) or by decisions implementing the enhanced cooperation mechanism provided by the Treaties (Articles 326 to 334 TFEU). In the case of the SSM, differentiated integration results from a 'normal' act of secondary law adopted by the Council in its full composition (so, not a decision taken in enhanced cooperation mode). This unorthodox approach was justified by the legal basis of the SSM Regulation in Article 127(6) TFEU: as this Treaty provision allows for supervisory tasks to be conferred on the ECB, and as the ECB's jurisdiction is limited to the eurozone, the SSM had to be constructed as applying directly only to the eurozone countries. In this way, the variable geometry of the eurozone gave rise to a form of differentiated integration that extends beyond the field of monetary policy[13] and that overlaps with the (undifferentiated) regulation of the internal market for financial services.

In order to address this awkward situation, the Council, when adopting the SSM Regulation, invented a 'purpose-made' system of close cooperation that allows the supervisory authorities of other states to participate to some extent in the SSM.[14] The general reference to close cooperation, in Article 7 of the SSM Regulation, was further spelled out by the ECB in an implementing act.[15] One could describe this as a new form of differentiated integration created through secondary law, as a spillover from an earlier Treaty-based system of differentiated integration (namely, the monetary policy part of EMU). This invention should not be seen as bypassing or undermining the Treaty-based mechanism of enhanced cooperation, since close cooperation in SSM is not established between member states but between an EU institution and the supervision authority of the non-eurozone state, and it can be terminated by the ECB.[16]

5. Original accountability arrangements

When conducting its monetary policy, the ECB has quite limited accountability duties, mostly in the form of reporting commitments,[17] whereas for its supervisory tasks it is described by the SSM Regulation as being 'accountable'[18] to both Council and European Parliament. The ECB concluded a memorandum of

---

13 A. de Gregorio Merino, *The Banking Union in EU law: an EU institutional law perspective*, in G. Lo Schiavo (ed), *The European Banking Union and the Role of Law*, cit., 29-48, 36.

14 On the functioning of this system of close cooperation, see the contributions by A. Enria, R.M. Lastra, N. Moloney and J.-H. Binder in *Building Bridges*, cit., 277-330.

15 Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5), OJ 2014 L 198/7.

16 On this point, see Francesco Martucci, *Union bancaire, la méthode du "cadre": du discours à la réalité*, in Id. (ed), *L'Union bancaire* (Bruylant 2016), 11-47, 24.

17 Article 15 ECB Statute.

18 Article 20 SSM Regulation.

understanding with the Council,[19] and a more formal interinstitutional agreement with the EP[20] to spell out the accountability arrangements. The latter is an original instrument within EU institutional law, as Article 295 TFEU foresees the conclusion of interinstitutional agreements only by Commission, Council and EP, and not by the ECB. The SSM Regulation also created an 'internal' accountability tool in the form of the Administrative Board of Review, inspired by precedents in the legal regime of EU agencies. Underlying these accountability structures is the constitutional question whether the independence guarantee for the ECB, contained in the text of the Treaties (Article 282(3) TFEU), should apply to that institution's supervisory tasks in the same way as to its monetary policy tasks.[21]

---

19 Memorandum of Understanding between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM), Doc. MOU (2013) 12111, December 2013.

20 Interinstitutional agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ 2013, L 320/1 of 30 November 2013. On the practice of this parliamentary oversight, see D. Fromage, R. Ibrido, *Accountability and democratic oversight in the European Banking Union*, in G. Lo Schiavo (ed), *The European Banking Union and the Role of Law*, cit., 66-86.

21 See, on this point, C. Ohler, *Banking supervision*, in F. Amtenbrink, C. Herrmann (eds), assisted by R. Repasi, *The EU Law of Economic and Monetary Union* (Oxford University Press 2020), 1103-1144, 1132-1133.

Afternoon session

The visionary project of a Single Supervisory Mechanism: where do we stand after 10 years?

Alessandra Perrazzelli[1]

It is a distinct honour to celebrate a remarkable milestone in the European financial landscape – the first ten years of the SSM Regulation. This occasion represents a significant chapter in our financial history, and it is with great pride and enthusiasm that we come together to reflect on the journey, acknowledge our achievements, and chart the course for the future.

From its very inception, the Single Supervisory Mechanism was a visionary initiative that forever changed the paradigm of financial supervision in Europe. The path to establishing the SSM was far from simple, as it marked a profound shift from highly fragmented national banking supervision systems, charged with safeguarding their domestic financial institutions, to a unified European approach with a broader perspective. Over the past decade, we experienced a remarkable evolution in our approach, with the goal of crafting a truly European spirit.

In fact, the fragmentation of supervisory powers was not fully adequate when it came to addressing cross-border financial challenges and crises. As we have witnessed in recent years, these challenges can take various forms, such as the COVID-19 pandemic, the Russia-Ukraine conflict or the impact of rising interest rates. Had we still been left to address these challenges separately, we would have likely found our financial system less resilient and less able to adapt to rapidly changing circumstances.

Today, I would like to focus on the main achievements and challenges that lie ahead in the field of banking supervision.

Achievements…

First and foremost, the supervisory framework has undergone a profound maturation process. One key point worth highlighting is that the European supervisory framework has emerged as a synthesis of the best national practices. The creation of the SSM allowed us to establish a new standard in supervisory activities, creating a comprehensive framework that ensures fairness, transparency, and accountability.

Fairness, as a guiding principle, guarantees that all supervised entities are on a level playing field; this has been achieved by leveraging a powerful

---

[1] Bank of Italy, Deputy Governor.

benchmarking approach, meaning that each institution is subject to the same rigorous standards thereby preventing any undue advantages or disadvantages.

Moreover, the SSM places a strong emphasis on transparency and accountability. It is essential that both the market and the entities under supervision have a clear view of our policy stances and of our supervisory process and its results. This is not only a good practice for financial authorities, it is the backbone of mutual trust and confidence.

The SSM has integrated our voices and efforts, in the pursuit of the ‘one team spirit’, enabling us to leverage different supervisory cultures and diverse operational experiences under a unified SSM methodology. Thus, the SSM has capitalized on the histories of the national supervisory authorities, guided by a shared European vision. However, as we reflect on our accomplishments, we must not rest on our laurels. The global financial landscape is continually evolving, and our European framework must evolve with it.

As we chart our path forward, there are specific aspects that warrant our continuous attention and effort.

First, there are the differences in national regulatory regimes: while the SSM has made significant strides in harmonizing supervisory practices across Europe, we must remain committed to working on the progressive reduction of disparities between national regulatory regimes in several areas. By the same token, we are still awaiting the completion of the third pillar, the European Deposit Insurance Scheme (EDIS). The puzzle is not yet complete, but we remain confident that we will ultimately get there.

Second, the sense of belonging to a single system for our resources: this is an issue that has been at the forefront of discussions, particularly with the initiation of the SSM Integration project.

… and challenges ahead

While we take pride in our achievements, it is equally important that we address the challenges and potential vulnerabilities affecting the financial industry, calling for changes in our supervisory approach. One of the critical areas of concern pertains to the SSM’s primary focus on supervising banking groups, which constitute just one facet of the broader financial landscape. However, non-bank financial intermediation, encompassing entities such as financial intermediaries, asset management firms, investment funds and payment service providers, has seen significant growth over the past decade and is strongly interconnected with the banking system. While this evolution is a positive development in terms of fostering financial integration and bolstering economic growth, it also introduces heightened risks to the financial system. Increasing competition and potential spill-over effects cannot be disregarded from a supervisory point of view.

Another significant challenge is that non-bank financial intermediation, in particular the most innovative ones, often fall outside the traditional regulatory perimeter. This regulatory gap can create a blind spot for supervisors, as non-bank financial entities may engage in activities that could pose systemic risks without adequate oversight. It is vital that we strike a balance between regulating non-bank entities to mitigate risks and allowing them to innovate and provide essential financial services.

In this regard, the rise of FinTech companies adds another layer of complexity to this interconnected landscape. FinTech firms often collaborate with banks to offer innovative financial services. Their rapid growth and evolution present regulatory challenges, as they can bridge the gap between traditional banking and non-bank financial intermediation, transforming traditional risks into new or different ones, that are harder to grasp.

Therefore, recognizing and addressing these interconnections and the related risks is crucial. However, we cannot wait for the regulatory framework to address this issue. While we recognize the importance of a thorough legislative process in crafting robust and lasting rules, banking supervision often requires proactive measures to stay ahead of evolving market dynamics, as we are presently witnessing.

Thus, as we await the establishment of a clearly defined regulatory framework, as supervisors, we are compelled to address the challenge of ensuring thorough and efficient supervision across these interrelated sectors. This responsibility becomes even more critical as we gear up for the implementation of the MiCAR and DORA regulations, which will introduce new dynamics in the financial landscape. The SSM is then tasked with fostering collaboration and information-sharing with other relevant authorities, to ensure a coordinated response and consistent oversight across the financial spectrum.

This process will entail adaptability, proactive issue identification and resource allocation to address priorities. It will be crucial to follow the risks wherever they may arise. This will indeed pose a significant challenge for the SSM and the Supervisory Board.

In this context, continuing the dialogue with the market will be crucial. The Bank of Italy initiated this process some years ago, developing three integrated channels of dialogue with the market: Milano Hub, the Regulatory Sandbox and the Fintech Channel.

It is clear that as we celebrate the first ten years of the SSM Regulation, we stand at a crossroads. In a continuous learning-by-doing process, we are still open to discussing further improvements in our supervisory review and evaluation process, as the last Strategic Retreat meeting held in Rome demonstrated.

It is therefore essential that we adapt to these changes, anticipate new challenges while supporting financial innovation, addressing the grey areas of the regulatory/supervisory framework.

What's next? The outer reach of AI

Currently, banks and supervisors are in the midst of a digital transformation process, a significant shift that has brought about not only heightened traditional risks but also the emergence of entirely new challenges.

Amid this ongoing transformation, one topic has particularly captured the spotlight in the realm of innovative tools, and that is Artificial Intelligence. European regulators are actively engaging with the advent of AI, recognizing its far-reaching implications across numerous sectors, including supervised entities and authorities.

In particular, the use of technology and artificial intelligence for banks and supervisors is already a strategic issue. Banks could make use of AI in several ways to improve efficiency, such as in credit scoring models, fraud detection, risk management or predictive customer behaviour. As well, AI also has potential application in the realm of banking supervision. AI could help supervisors in assessing banks' compliance with regulatory requirements by analysing vast amounts of data and helping build early warning systems for identifying emerging threats or vulnerabilities. It is imperative that we strategically enhance our competencies, approaches and tools to stay aligned with the rapid evolution of technology and AI.

Nevertheless, banks and supervisory bodies must not disregard the ethical considerations posed by AI adoption. AI models have the potential to produce biased decisions and result in discriminatory bank lending. Furthermore, given that banks and supervisors deal with sensitive data, it is imperative that the use of AI aligns with stringent data privacy regulations to mitigate the risk of misuse in the event of data breaches. In conclusion, the advent of artificial intelligence offers substantial opportunities and an expanded toolkit for banks, provided they can effectively manage associated risks. As we embrace the potential of AI, we must be vigilant in our approach to risk management. These new horizons, while promising, also introduce complexities that demand our close attention. We need to safeguard against the appeal of automation and ensure that the role of human expertise remains central in our decision-making processes. We must remember that, no matter how sophisticated and powerful the technology becomes, the ultimate responsibility for decisions cannot be transferred to automated processes. AI can complement and assist, but it cannot replace the judgment and experience of supervisory authorities and a good banker.

Conclusions

We must be proud of what we have achieved with the SSM. It was indeed a very ambitious undertaking, but we have achieved, in a relatively short span of time, many significant milestones through a common effort aimed at integrating diverse supervisory traditions and incorporating the best national practices into a unified SSM approach.

At the same time, we should acknowledge that there is still a long road ahead. Three concepts must remain our guiding stars: a rigorous approach, cooperation and openness to innovation.

The art and science of good supervision

Elizabeth McCaul[1]

Introduction

I am deeply honoured and excited to participate in this conference to celebrate the tenth anniversary of the Single Supervisory Mechanism (SSM) Regulation.

I remember distinctly the overwhelming sense of awe I felt when I attended my first Supervisory Board meeting in 2019 after being appointed ECB Representative to the Supervisory Board. Even though the SSM was then only a few years old, it had already achieved a remarkable level of sophisticated supervisory prowess. In just a few short years, the SSM had not only bundled oversight of its complex portfolio of supervised institutions within an elaborate governance framework. It had also become one of the largest and most respected supervisors in the world.

And believe me: this is no small feat. I would even argue that the establishment of the banking union and along with it the arrival of European banking supervision was the greatest step in European integration since the Maastricht Treaty and the creation of the euro.

Now that we are celebrating ten years of the SSM Regulation, I would like to take stock of what has been achieved and look at the journey ahead, because of course there is always more we can do to make our supervision even more effective.

I will focus less on the legal framework and more on the evolution of our supervisory approach, especially in the current complex environment.

Some would say that supervision is not a science but an art. It is fitting here in Rome, home of countless unparalleled artworks, that I thought I would ask you to think about supervision as art. However, even the great Renaissance masters like Michelangelo, Raphael or Da Vinci knew to combine art with maths and science to achieve improbably perfect masterpieces like the Sistine Chapel frescoes, the "School of Athens" or "The Last Supper".

Of course, I would not dare compare the SSM to the Sistine Chapel, but still: let us for a moment imagine the SSM as a work of art.

A supervisor, just like a painter, must choose the right tool or brush to do the best possible job. Capital is an effective tool, but qualitative measures and remediation and enforcement actions are often more suited to bringing about

[1] European Central Bank, Member of the Supervisory Board.

targeted and effective change in banks. Sometimes the painter needs to pay special attention to the finer brushstrokes, to make sure that the details and the perspective are accurate.

However, choosing the right tool also depends on the material we are working with, be it the regulatory and institutional framework in which we supervise banks, or the canvas or type of surface on which we paint.

Over these ten years, the SSM has created a firm foundation to build on. Banks' balance sheets are much more resilient than a decade ago and trust in the European banking sector has been re-established. No less important is the supervisory culture and trust we have built within the system, among the various national competent authorities coming together in the Supervisory Board.

We can now put our next brush strokes on the foundation of trust that has been established across European banking supervision. We can afford to encourage the use of more supervisory judgement to dive deep where it matters: becoming more agile, more risk-sensitive and more effective as supervisors.

This does not mean that we should lose the consistency and the methodological rigour that we have achieved. But we do need a cultural shift towards further use of risk-based supervision and requiring banks to remedy weaknesses in a timely and effective manner. It is not enough to identify the cracks; we also need to mend them. Or rather: we need to put the full weight behind our efforts to make sure that the banks mend them. And mend them properly by correcting the root causes in a sustainable fashion and avoiding temporary fixes that do not address the heart of the problem.

Finally, we have to understand the wider context to depict the correct perspective in our artwork.

Good supervision is not only about bringing about effective change in banks' risk management. It is also about understanding the wider landscape in which banks operate to maintain a clear view of the relevant risks.

The context in which we supervisors must do our work is that of a structural transformation of the financial sector. First, there is a massive shift of historically traditional banking services to sectors outside the remit of banking supervision, like credit intermediation, leading to exponential growth of the non-bank financial intermediation (NBFI) sector. Second, we are seeing a digital revolution with new players in the banking market, a reconfiguration of the banking value chain and rapid technological progress in fields such as generative artificial intelligence. And third, we are facing unprecedented macroeconomic and geopolitical uncertainty.

These are seismic changes. To remain effective, supervisors will need to keep a steady hand while holding the metaphorical paintbrush. Looking towards the next ten years, I see two themes that must be reflected on the canvas of supervision: first, how we can most effectively deploy and calibrate our supervisory tools in each individual institution, and second, how we can do so amid the seismic changes taking place around us.

The tools of good supervision

Let me look now at the question of how we can make our supervision more effective.

In April, we published the report[2] of an external high-level expert group which had been tasked with assessing our Supervisory Review and Evaluation Process (SREP) and how it interacts with our other supervisory activities.

The report concluded that we are now sufficiently mature "to reallocate resources from procedural tasks to more risk-based, in-depth supervisory assessments, which can contribute more effectively to promote banks' resilience".

This was also the message of a recent speech by our Chair Andrea Enria:[3] we are moving towards a new stage in the evolution of European banking supervision, focusing on its effectiveness. The first stage was about harmonising the rules and practice of the game and creating trust in the system, also given the wide diversity in the exercise of national supervision in the past. Having created a foundation of trust, we can now build on it to achieve the most effective outcomes.

Make no mistake: this does not mean less supervision, or a "light touch" approach; what we are looking for is more focused and impactful supervision targeting the most material risks. Good supervision is not about doing everything but about doing the right things: the recently introduced risk tolerance framework and the multi-year assessment for the SREP allow for that flexibility and agility.

To date, European banking supervision has correctly focused on strengthening the capital stack and using capital to induce banks to significantly improve their balance sheets. Take, for example, the successful reduction of non-performing loans (NPLs) from around €1 trillion in 2014 to €343 billion in the second quarter of 2023, largely thanks to capital add-ons for NPLs.

Compared with the United States,[4] I think European banking supervision can further improve the way it uses qualitative measures to make them enforceable and legally binding. We need to be upfront about supervisory standards so banks know exactly what to fix. Where banks are too slow to remediate their weaknesses, we will apply supervisory measures with clearly defined objectives and timelines, focused on root causes, rather than on symptoms. We will make

---

2 ECB (2023), *Assessment of the European Central Bank's Supervisory Review and Evaluation Process*, April.

3 Enria, A. (2023), *A new stage for European banking supervision*, keynote speech at the 22nd Handelsblatt Annual Conference on Banking Supervision.

4 McCaul, E. (2022), "Is the water bluer on the other side of the pond?", Revue bancaire et financière.

full use of the available measures, remediation tools and enforcement actions, including, if necessary, sanctions for severe or long-standing issues.

These changes will neither increase nor decrease capital requirements. We have simply attained the level of maturity in our supervision to recognise that capital alone cannot address all risks. To exercise the most effective and impactful supervision, supervisors need to make full use of their toolkit, including capital charges, to trigger changes that will improve banks' ability to hold and manage risk.

Following the global financial crisis, the International Monetary Fund (IMF) published a landmark paper[5] highlighting that "supervisors must be willing and empowered to take timely and effective action, to intrude on decision-making, to question common wisdom, and to take unpopular decisions". I think these lessons are as relevant now as they were then. Recently, the IMF reflected on the lessons learnt from the bank failures of March 2023 and found that "structural transformations add to the mandate and complexity of banking supervision".[6] Indeed, our job has not become easier.

This brings me to my next topic: the growth of non-bank financial intermediation and the associated risks to the financial sector.

The broader context – understanding the risk landscape

I recently rewatched the film "Hank: 5 Years from the Brink", which ends with a warning by former US Treasury Secretary Hank Paulson of the risks emanating from the shadow banking, or NBFI sector, particularly given its rapid growth and insufficient regulation. Ten years on from the film's airing in 2013, I think these concerns are even more valid: to wit, we have not paid sufficient heed to the warning to date and the sector has now expanded. We need to close the data gaps and strengthen the regulatory and supervisory oversight of the NBFI sector, especially in a cross-border context.

The numbers are truly staggering. By one measure, the NBFI sector in the euro area has doubled since the global financial crisis, up from €15 trillion in 2008 to €31 trillion today.[7] It now accounts for half of the financial sector.

I would like to highlight three types of risks emanating from this growth: leverage, liquidity and counterparty credit risk.

---

5 International Monetary Fund (2010), "The Making of Good Supervision: Learning to Say 'No'", IMF staff position note, May.

6 International Monetary Fund (2023), *Good Supervision: Lessons from the Field*, Working Papers series, September.

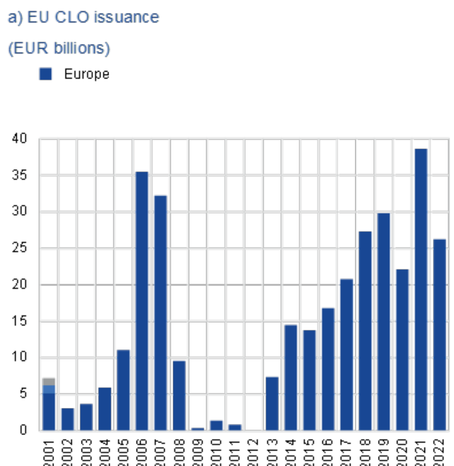
7 Under a broad measure of the NBFI sector, which includes other financial institutions (OFIs), also referred to as the "OFI residual", the numbers would be even higher: €25 trillion in 2009 and €49 trillion in the last quarter of 2022.

First, the build-up of financial and synthetic leverage which can propagate risks across the entire financial system and lead to major disruptions. Many of you may remember the collapse of Long-Term Capital Management in 1998. More recently, the default of Archegos Capital Management in March 2021 due to losses from leveraged equity trades was another stark reminder of the inherent risks of leverage, which also showed that Hank Paulson's warning has been paid little heed.

Take, for example, the leveraged finance market.[8] Non-banks now hold a substantial amount of leveraged loans, which are also often syndicated and sold, serving as collateral in collateralised loan obligations (CLOs).

The European market for CLOs has grown markedly over the past few years and, more worryingly, the CLOs are mainly backed by covenant-lite loans – the refinancing of which during the coming maturity wall in the next few years in a higher-rate environment could entail significant issues. CLOs could be further restricted in participating in refinancing due to internal rating mechanisms, etc. Another dimension would be the private credit markets which have grown exponentially and where losses could also be materialising in the system. On top of this, we see banks that took severe losses on the pipeline of leverage finance, and we see indications that they are less willing to syndicate loans than they were in the past.

EU CLO market doubled in four years, driven by new issuance – Chart 1



Sources: S&P LCD, Bloomberg, JP Morgan, AFME and ESRB.
Note: Figures are based on institutional leveraged loans.

The CLO market for commercial real estate deserves particular attention in this regard in view of the turning of the real estate cycle.[9] More generally,

8 McCaul, E. (2022), "Supervising leveraged lending", speech at AFME's 17th Annual European Leveraged Finance Conference, 20 September.

9 ESRB (2023), "EU Non-bank Financial Intermediation Risk Monitor 2023", June.

the common exposures of banks and non-banks can be a source of systemic risk. For example, euro area real estate investment funds have a large market footprint in several euro area countries where the commercial real estate outlook has deteriorated sharply. As recently highlighted by the Chairman of the Federal Deposit Insurance Corporation (FDIC) Martin J. Gruenberg, CLOs have not been tested by a prolonged economic downturn and the opaque interconnected exposures between banks and non-banks deserve our undivided attention.[10]

Thus, as also recently stressed by the IMF and the Financial Stability Board (FSB), the data gaps preventing a proper assessment of the vulnerabilities associated with NBFI leverage need to be reduced.[11] To make the market more transparent, we should further harmonise, enhance and expand reporting requirements and facilitate information sharing between authorities. I am not convinced that this can be done just by looking at bank exposures to NBFIs: we would need stronger separate reporting frameworks for substantial NBFI sectors. I am also very interested in an initiative by the Bank for International Settlements and the Hong Kong Monetary Authority to combine data from diverse sources, including granular supervisory data, to produce an integrated framework for NBFI monitoring, including early warning indicators.[12]

The second risk concerns liquidity. As we saw in the United Kingdom in September 2022, liquidity stress in the NBFI sector can easily spill into the broader financial sector. Pension funds and investment funds using liability-driven investment (LDI) strategies faced large collateral requests in repo transactions and margin calls in interest rate derivatives, resulting in fire sales until the Bank of England intervened. Within the European Union, most LDI investment funds are domiciled in Luxembourg and Ireland. Following the events in the United Kingdom, the Central Bank of Ireland and the Commission de Surveillance du Secteur Financier asked LDI fund managers to maintain an appropriate level of resilience to absorb potential market shocks.[13] More should be done to harmonise and improve oversight of this sector, including strengthening governance and adherence to risk limits for illiquid assets, especially given the growth vis-à-vis GDP[14] and the interconnectedness to the banking sector through a variety of financing vehicles and funding management.

---

10 Gruenberg, M.J. (2023), "Remarks at the Exchequer Club on the Financial Stability Risks of Nonbank Financial Institutions", 20 September.

11 IMF (2023), "Global Financial Stability Report Chapter 2: Nonbank Financial Intermediaries: Vulnerabilities amid Tighter Financial Conditions", April; FSB (2023), "The Financial Stability Implications of Leverage in Non-Bank Financial Intermediation", 6 September.

12 Cheng, K., Liu, Z., Pezzini, S. and Yu, L. (2023), "Building an integrated surveillance framework for highly leveraged NBFIs – lessons from the HKMA", BIS Papers, No 137, August.

13 ESMA (2022), *ESMA welcomes NCAs' work to maintain resilience of liability driven investment funds*, November.

14 The market-based finance sector in Ireland is the largest component of the financial system, with total assets at almost 15 times gross domestic product. See IMF (2022), *Ireland: Financial System Stability Assessment*; IMF Country Report No. 22/215; June.

More generally, liquidity mismatches remain a significant structural vulnerability in the NBFI sector. Open-ended investment funds may hold relatively illiquid assets while still allowing investors to redeem shares on a daily basis. Such liquidity mismatches make these funds vulnerable to runs as investors have an incentive to redeem ahead of others.

From the banking sector's perspective, there is a risk that stress in the NBFI sector could lead to banks receiving less funding from NBFI entities via deposits or repos. Indeed, such funding is the most likely and strongest spillover channel from NBFIs to banks.[15]

Third are counterparty risks created by banks' derivative exposures to NBFIs. Following on our targeted review of counterparty credit risk (CCR) last year and a number of on-site missions, we presented our report on CCR governance and management[16] for a public consultation, which ended on 14 July. The report highlights the good practices we observed in the market as well as areas for improvement, such as customer due diligence, the definition of risk appetite, default management processes and stress-testing frameworks. It notes that there is still room for improvement in how, on a firm-wide basis, CCR is mitigated, monitored and managed when a counterparty is in trouble or defaults.

By assessing and managing the risks of non-banks, banks can play a pivotal role in shedding light on the less-regulated financial sector and helping to mitigate systemic risk.[17]

Conclusion

We all know that it is difficult to make predictions – especially about the future! So I will not attempt to predict from where the next crisis will come.

Still, as good supervisors we need to be forward-looking: intrusive in our approach and comprehensive in our understanding. We supervisors need to survey the ground we walk on to make sure we have a solid footing, while at the same time keeping an eye on the horizon to appreciate the wider perspective.

In the end, good supervision is an art. Like the great artists of the Renaissance, supervisors master their art by embracing the rigours of maths and science while carefully choosing the right brushes for the right circumstances.

Thank you very much for your attention.

---

15 Franceschi, E., Grodzicki, M., Kagerer, B., Kaufmann, C., Lenoci, F., Mingarelli, L., Pancaro, C. and Senner, R. (2023), "Key linkages between banks and the non-bank financial sector", Financial Stability Review, ECB, May.

16 ECB (2023), *Sound practices in counterparty credit risk governance and management*, June.

17 Enria, A. (2023) "The role of banks in mitigating systemic risks arising in the non-bank financial sector", speech at the ECB conference on Counterparty Credit Risk, 20 June.

From a single banking rulebook to a single supervisor, and beyond

Francois-Louis Michaud[1]

Ladies and Gentlemen,

I am very happy and honored to be with you today. Let me warmly thank Concetta Brescia Morra and Banca d'Italia, especially Alessandra Perrazzelli, for their invitation.

I believe this event marks the start of a series of SSM 10-year celebrations, and I find it very fitting that it takes place in Rome, which has played such an important role in the European construction – two treaties were signed here – to which the Banking Union and its Single Supervisory Mechanism (SSM) bring a new key milestone. The SSM has greatly benefited from prominent Italian figures, such as Tommaso Padoa-Schioppa and many others. I vividly remember a thought-provoking piece from Lorenzo Bini Smaghi I had to brief my superiors about in… 1997 which was already arguing for the European Central Bank (ECB) to take on direct banking supervision in the Economic and Monetary Union (EMU)! I would also like to pay tribute to the many Italian colleagues involved in the preparations and launch of the SSM, to Banca d'Italia and the ECB. Today, I am not coming from Paris where the European Banking Authority is now located, nor from Frankfurt, the SSM headquarters where I used to work before, but from London where I attended an EU-UK dialogue yesterday. Very clearly, all roads lead to Rome!

We have just heard Elisabeth McCaul from the SSM making the analogy of arts and painting. Other previous speakers commented on the recent success of the word "mechanism". I would like myself to reflect for a moment on "architecture", for which Rome is also an excellent source of inspiration.

Let me first share with you a trip down memory lane and start with a quick retrospective.

As we know, the SSM is a massive achievement. It was launched in record time and has greatly benefited from the ECB which was both its incubator (it was itself born from the Bank for International Settlements (BIS)) and its new home. But it is fair to remember that this could also be done thanks to the efforts of many in the preceding decades. In fact, it has been a much longer – and at times bumpy – road to EU banking regulation and supervision since the first banking directive of the Council in December 1977.

[1] European Banking Authority, Executive Director.

Do not worry, I am not planning to cover 45 years of financial integration. Let me just take you back to 2001 and the Lamfalussy report, which was a key step in this journey to the European financial architecture as we know it today. This report proposed regulatory reforms to make the regulatory process faster and more efficient. It recommended a wider use of regulations as they are directly applicable in all Member States compared to directives (still a modern debate as we have seen more recently with the discussions about anti-money laundering), and proposed a new type of EU bodies, called the 'level 3' committees of national supervisors, including the Committee of European Banking Supervisors (CEBS).

CEBS was established in 2004. Its mandate was to advise the European Commission on EU banking legislation, to contribute to consistent implementation of EU legislation, and to promote convergence of supervisory practices and supervisory cooperation.

This was a very serious step forward in converging supervisory practices. In a nutshell, with a very small staff, it managed, within a few years, to establish a common reporting framework for banks and introduced the role of supervisory colleges – we will see later how useful this proved for the SSM. But only a few years later, in August 2007, a global financial crisis started, culminating with the failure of Lehman Brothers in September 2008. It then became clear that the European supervisory models and approaches were, to a large extent, ill-equipped to keep up with financial globalisation, with integrated and interconnected financial markets linking financial institutions across borders. The crisis exposed weaknesses in the areas of cooperation, coordination, and the consistent application of EU law, and a certain degree of mistrust between national supervisors in times of crisis.

On the other hand, the great financial crisis quickly set in motion a process of reforms which would last for a decade and fundamentally transform our approach to the regulation and supervision of banks. In February 2009, a report prepared by a group of wise men led by Jacques de Larosière recommended a brand-new regulatory agenda, stronger coordinated supervision across financial sectors, and effective crisis management procedures. It highlighted the need to complement micro-supervision with a macro-prudential approach, to develop effective warning mechanisms, and to enhance the cooperation between supervisors with common decision-making processes.

In practice, after solid negotiation, this led to the establishment of the European Systemic Risk Board (ESRB) and the morphing of the three sectoral level-3 committees into fully fledged European Supervisory Authorities (ESAs), including the European Banking Authority (EBA) established in January 2011.

Through the adoption of binding technical standards and guidelines, the EBA was to contribute to the creation of a European Single Rulebook in banking as well as to promote convergence and harmonisation in supervisory practices across the EU. It was to foster supervisory cooperation in going concern and in crisis situations, and to assess risks and vulnerabilities through novel instruments like supervisory stress-tests.

But in 2010-2011, the euro area was already wrestling with a new financial crisis – the sovereign debt crisis – which led to serious disruption and instability in the banking system. In view of this crisis, the EBA conducted a capital stress-test exercise in 2011 to assess banks' capital needs and restore confidence in the markets as part of a broader European stability package. This was, however, not enough; bolder steps were needed. In June 2012, European leaders came together and decided to make faster progress towards completing the EMU. Shortly after, as Governor Visco reminded us, they swiftly agreed to establish a Banking Union relying on a single supervisory mechanism (the SSM), a single resolution mechanism (SRM) and a common deposit insurance framework. The SSM came into being in late 2014.

Since then, the SSM has been responsible for the prudential supervision of the banking sector in the euro area and, later in Bulgaria and Croatia which entered into close cooperation agreements. As previously highlighted, the SSM was a game changer. But it was not exactly a big bang in the sense that it did not come out of nowhere. This somewhat long detour to explain how several preceding initiatives and experiences (including that of the ESAs) have prepared the minds and paved the way to the SSM, contributing to its lightning-quick start between 2012 and 2014. I had the privilege of being involved in a number of these steps, especially the latest ones, from different perspectives: participating in the EBA's working structures as a national authority and then as an ECB representative, contributing to the preparations for the SSM and then joining it at the ECB, and now working at the EBA.

So, let me now share some personal views on how the CEBS and the EBA helped kickstart the SSM, how the SSM helped advance their convergence agenda, and where we stand now.

For its launch, the SSM could immediately draw on a solid contribution from the EBA and its CEBS predecessor.

The SSM preparations were built on four existing building blocks: a Single Rulebook, common reporting, cooperation structures, and a supervisory stress-testing framework.

The Single Rulebook

Since its inception, a key task of the EBA has been to establish a Single Rulebook, that is, a truly uniform and integrated set of rules applicable to all banks operating within the European Union. This consists primarily of technical standards directly applicable in all Member States and is complemented with guidelines in less harmonised areas where direct European rules are not (yet) an option (such as where national company or insolvency laws need to be accommodated). The latter provide another source of convergence as authorities need to declare whether they comply or not. Relying on harmonised rules is indeed critical for a single European supervisor – how could one understand that banks facing similar risks be treated differently just because they happen to have their headquarters in different Member States? I will come back to this.

Still in the context of this Single Rulebook, the EBA introduced a pragmatic approach through a questions and answers (Q&As) tool, by which banking supervisors and financial institutions can ask for clarifications on the applicable EU rules when facing complicated – most often very practical – issues. Finally, the EBA embarked on the drafting of a single supervisory handbook for supporting the day-to-day activities of supervisors, but this proved to be long-lived with the start of the SSM.

Let me pick one example which was of direct relevance for the SSM at its start. As part of its convergence mandate, the EBA was tasked by the Capital Requirements Directive (CRD) to develop guidelines on common procedures and methodologies for the supervisory review and evaluation process (in short, the "SREP Guidelines"). The objective was to have a common language for structuring the assessment of the risk profile of a bank, and to express any additional ("pillar 2") requirements in the form of capital, liquidity, or qualitative measures. This has been a relative slow and difficult process since 2011 due to some reluctance from national supervisors to part ways with their preferred practices – I very well remember as I was involved in these discussions!

In the Autumn of 2012 and beginning of 2013, with the need to be ready for a quick SSM start, the picture changed radically. It was also often the same people who were also involved in the SSM preparations and the immediate benefits of the lengthy SREP Guidelines discussions suddenly became obvious. We could measure the usefulness of the knowledge already accumulated and that of the SREP framework that was surfacing. This allowed to finally reach an agreement in June 2014, and the SREP guidelines were adopted a few months later, in December 2014. They provided a strong foundation on which the SSM could swiftly develop its internal (and much more detailed) SREP methodology for a consistent supervision of the 130 significant institutions coming from 19 different Member States under its direct supervision.

Harmonised supervisory data

A second building block for the SSM was found in the area of data. Besides a single set of rules and supervisory review process, a single supervisor also needs truly comparable and reliable data from the entities it supervises. In December 2005, CEBS issued guidelines establishing a standardised consolidated financial reporting framework – FINREP. Then, in January 2006, it launched a common reporting framework (COREP) for the new solvency ratio to be calculated by credit institutions and investment firms. When the EBA replaced CEBS, it rolled out technical standards for a harmonized FINREP and COREP supervisory reporting, which became directly applicable in all EU Member States in 2014. This provided a standard set of data and benchmarks to supervisors for carrying out their analyses, which came in handy for the SSM at its start.

Cooperation structures

When setting the SSM, EU legislators could also build on supervisory cooperation practices which had been successfully tested in the preceding years. Just as the ESAs are governed by their Boards of Supervisors, the SSM's decision-making body is its Supervisory Board, which also gathers the officials responsible for banking supervision within the SSM countries.

Furthermore, when drafting the SSM supervisory manual, it became immediately clear that the approach of supervisory colleges would form an excellent basis for the future SSM supervisory teams. College members coming from all relevant authorities involved in the supervision of a banking group would meet on a regular basis – typically quarterly – for a large bank, share their risk assessments and prepare a joint decision on the adequacy of the capital of that bank. Promoting an effective and efficient functioning of the EU supervisory colleges has been an important task for the EBA which it had taken over from the CEBS, developing common standards for the joint risk assessments and capital decisions, and promoting best practices.

With this in mind, we coined the concept of the Joint Supervisory Team – or "JST". This would be the equivalent of a college in terms of the authorities involved in the supervision of a given banking group but with a much more functional approach: experts would work together on a day-to-day basis as opposed to meeting from time to time and would be placed under the leadership of ECB staff instead of the staff of the home country authority. The size and composition of the JSTs would be proportionate to that of the banking group and of its various national operations. Important in this was the word "joint", to insist on the necessary close cooperation between the ECB and national competent authority (NCA) parts of the SSM.

There was, however, one further inspiration that was not retained by the SSM. The ESAs were used to develop their work through standing committees which provide a link between the technical work of their experts in subgroups or task forces and their decision-making bodies. We thought that having something similar, involving medium or senior officials from competent authorities one level below the Supervisory Board, could also facilitate the work of the latter and produce further cohesion. We proposed to call this a GRAM – for Group Risk Assessment Meeting. The SSM chose not to adopt this. One day, maybe, they will reconsider!

Stress tests

Supervisory stress-tests were introduced by the US Federal Reserve in 2008 during the global financial crisis as a way of checking systematically for potential areas of risks in banks' balance sheets, to provide transparency and restore confidence. To bring a forward-looking dimension to the SREP and identify the risks banks might be exposed to, the EU CRD also required competent authorities to stress test the institutions under their supervision at least annually. Similarly, the EBA was mandated in its founding regulation to carry out regular EU-wide stress tests to assess the resilience of financial institutions to possible but hypothetical future adverse market and economic developments.

A first EU-wide stress test was carried out by CEBS in 2009 on a sample of 22 major EU cross-border institutions representing 60% of the EU banking sector assets. In 2011, the EBA took over the role and continued to run such exercises on a bi-annual basis. The outcome of the latest stress test exercise was published in July 2023 and covered a sample of 70 banks representing 75% of the EU banking sector assets.

Before its operational start in November 2014, the SSM had to run a comprehensive assessment, which included an asset quality review and a stress-test. Here, the EU-wide stress-test "technology", which had been developed in previous years proved again very helpful. Definitions harmonised by the EBA's Single Rulebook in 2014 in areas like non-performing exposures and debt forbearance could also be used for the asset quality review, which was conducive to reaching comparable outcomes.

As we have just seen, the SSM did benefit from quite substantial convergence and preparatory work when it started. But how did that unfold after it had become operational?

On the whole, the SSM gave a massive boost to the convergence of supervisory practices that is part of EBA's mandate.

Despite some 20 years of harmonisation in banking regulation in the EU, despite the contributions from the CEBS and the EBA, the truth of the matter was that supervisory methods and cultures were still diverse when the SSM started. Various degrees of intrusiveness, of reliance on quantitative vs. qualitative information, different approaches to risk assessment, especially whether it should be bank – or supervisory-led (some supervisors stood for various shades of Internal Capital Adequacy Assessment Process – ICAAP – France preferred its "ORAP", others used combinations!), and whether additional capital requirements should be determined by a holistic or risk-by-risk approach.

The creation of the SSM *de facto* led to a harmonisation (or even unification) within the Banking Union. It allowed for instance to harmonise a very large number of options and discretions which had been conferred to competent authorities by the banking legislation, which the ECB decided to exert itself. On the other hand, there was now the risk of having a 'two-speed' process between those supervisory authorities within the SSM and those outside the SSM. Against this backdrop, the EBA refocused its convergence work aimed at ensuring convergence between these two groups.

Going back to the rulebook, the start of the SSM and the entry into force of the SREP guidelines in 2014 brought mediations between competent authorities on their capital decisions to a halt. Until then, when a joint capital decision could not be agreed within a supervisory college, the EBA could be called to impose a solution if all conciliation attempts had failed – a 'binding mediation' approach which had been controversial during the legislative discussions. Early mediations had set the tone that disputes could not go unresolved. They had tackled ring-fencing issues, highlighted the different domestic risk assessment and calculation methodologies, and reinforced support for a true harmonised decision-making process through colleges following the SREP guidelines. The SSM would internalise most home-host disagreements making mediations unnecessary.

The organisation of banking supervision had also remained rather diverse. This was the case from an institutional point of view, with a whole range of structures including stand-alone, integrated or twin peak supervisors, some of them being integrated within the national central banks and others being separate. There was also a lot of diversity with regards to very practical issues: the size of the supervisory teams, the profiles and career paths of the supervisors, reliance on off-site or on-site supervision, to name a few. While the SSM had little effect on the national institutional set-up, it had a direct impact on the practical organisation of supervision and helped foster a solid common supervisory culture within its members.

Looking at the impact of the SSM on banking reporting and data, despite the harmonisation brought by COREP and FINREP, many national supervisors had kept collecting large amounts of data sets for different – always excellent of course! – purposes. The SSM did not disappoint here: to feed its SREP methodology it first added its own Single Purpose Exercise, which continued as a Short-Term Exercise which has remained in place over the years. It also embarked on other data collections in formal (as shown by the FINREP solo ECB regulation) or less formal ways.

On the other hand, the SSM also did real efforts to streamline the data collections performed by its central teams and those of its national competent authorities. It was a true catalyst to further converge reporting requirements. And single supervision, by applying a harmonised Pillar 2 process, removed the need for maintaining different reporting templates for different competent authorities. Aware that reporting is meaningless if the quality of the data is questionable, the SSM also focused a lot on improving banks' data aggregation and reporting capabilities.

Regarding cooperation structures, the SSM led to a change in the composition and dynamics of supervisory colleges for banking groups operating in the euro area. Many colleges simply ceased to exist in 2014 since all the entities of the banking groups they were supervising were now under the direct supervision of an SSM JST. The total number of supervisory colleges in the EEA thus declined from 95 colleges in 2014 down to 68 colleges in 2015. Colleges of supervisors, however, are still needed for cross-border banking groups with a presence in both SSM and non-SSM countries, and the EBA keeps participating in a number of those.

Finally, when it comes to stress-testing practices, the SSM has been a major contributor to the bi- annual EU-wide EBA stress-tests, which provides supervisors with a starting point for setting additional targets of capital ratios to banks (the "Pillar 2 Guidance", or P2G) and more generally help them identify vulnerabilities at banks using a common yardstick. Backed by the strength of the ECB teams for developing challenger models or performing quality assurance, the SSM helped bring the EU-wide stress-tests to the next level and make them a reference point for all stakeholders.

All in all, the SSM changed the scope of the EBA's convergence work. Thanks to the establishment and action of the SSM, actual convergence in many areas was achieved within a few years for a very significant part of the Union. This was naturally acknowledged in the annual convergence report produced by the EBA. The latter shifted its efforts and focused more on maintaining convergence between the SSM and supervisors from the rest of the Union, relying, for instance, on an annual European Supervisory Examination Programme (ESEP) for all, on peer reviews and on benchmarking exercises.

Where do we stand now? What should be the next steps?

We have now achieved a strong supervisory setup in the Union, and we see regulatory and supervisory actions complementing one and other. Regulation is developed in close cooperation with those who will use it in their day-to-day work. Supervisors can turn to the regulatory body for guidance and interpretation issues about the applicable legislation and rules. This ensures checks and balances. As regulators and supervisors are collaborating in many working structures, they can easily align and reach their respective objectives. There is also a continuum between rulemaking for supervision and resolution matters which converge at the EBA table. The EBA also ensures that there is an ongoing dialogue and cooperation between the integrated SSM supervisor and the supervisory authorities from the other member states.

A second strength of our current overall architecture is that it is quite a modern setup. Both the policy work and the ground supervision are carried out in the context of a truly European approach with multinational teams. True, the nature, composition, and intensity of the work of these teams reflect different needs and paces: while supervision requires large teams working together on an ongoing basis for continuous action, policy development and EU-wide risk analyses are developed through *ad hoc* modular teams gathering at regular intervals through a project approach depending on the urgency. This means that, again, there is complementarity, with quite some good capacity and agility embedded in this architecture.

Is all this enough? Not quite. For two reasons. Firstly, because while it is of course critical to have all the right ingredients and structures available, as we know, regulation and supervision are very much about executing. Arts rather than science? Or a bit of both!

Secondly, there are now new frontiers. Indeed, many topics going beyond and across the traditional boundaries of the financial sector. These include Environmental, Social and Governance issues, ICT transformation, data and reporting integration. Those do not stop at banking, they cut across. And banking activities themselves are not strictly contained within the regulated banking sector ("Rome is not in Rome anymore"). Recent important pieces of EU financial legislation reflect this. This is for instance the case of the Digital Operational Resilience Act (DORA) or the Markets in Crypto-Assets Regulation (MiCAR). The European Commission is also promoting a strategy for integrated reporting in the EU financial sector as a whole. Last but not least, the importance of the non-banking financial sector has taken new proportions since the global financial crisis.

Let me conclude.

Progress is undeniable and should be fully acknowledged. But we cannot declare ourselves satisfied – regulators and supervisors rarely are... The regulatory and supervisory framework that exists today is an amazing achievement compared to the situation in 2007. Recent episodes of financial and non-financial stress could be withstood thanks to the joint efforts from the industry and the public sector. European banks have significantly reduced their risks and strengthened their capital and liquidity positions. These shocks have also confirmed that having a harmonised regulatory framework and a strong supervision is critical. Notwithstanding this, as Jean-Claude Trichet, the former President of the ECB, liked to remind us, one should never get complacent but rather always remain vigilant.

So, now is the time to keep up with our efforts and make the system even more robust and efficient, to complete the goals and ambitions that were so evident 10 or 15 years ago, in the immediate aftermaths of the financial crises. This has to be done considering challenges that cut across and go beyond the financial sector. As a result, one may repeat the famous words of Sir Winston Churchill: "This is not the end. It is not even the beginning of the end. But it is perhaps, the end of the beginning". Thank you for your attention.

Roundtable

Stefano Cappiello[1]

Mission accomplished?

Let me start by thanking for having me in this conference: it is not only an honor but also a pleasure to see so many colleagues and friends with whom I worked so fruitfully and passionately at the Banking Union project, first at the European Banking Authority (EBA), then at the European Commission (EC), and lastly the Single Resolution Board (SRB).

These introductory words reveal how personal and biased are the remarks that I am going to share with you today. However, I do not think that this bias has any distorting role when I assess the Banking Union project as a very successful story. Facts speak for themselves: in only ten years the Banking Union managed to set itself up and build its solid reputation: the SSM and the SRM proved to be a key driver in making the European banking sector more transparent and resilient, and the recent events proved how credibility and trust is paramount for the fate of the financial players under the supervisory umbrella.

As an important example I want to underline how effective was the coordination between the European institutions (the EC, the SSM and the SRB) during the collapse of the Credit Suisse: I think that it is really important to praise how the European institutions were able to communicate rapidly, clearly and in a common fashion to the markets about the treatment of AT1 instruments under our European legal and supervisory framework. I emphasize this because I will elaborate later on how coordination is going to be one of the main challenges coming from the on-going transitions (green and digital) also in the financial sector.

At the same time, I think that we should not be overly complacent with ourselves: the Banking Union is still an incomplete project and in fact did not deliver yet on its end-goal: underpinning the creation of a truly Single Market for banking and financial services. I would dare to say that we are currently in a stalemate with respect to this goal. I will turn to this point at the end of my remarks, elaborating on its main causes, and what I believe that it is missing to accomplish our mission.

Indeed, if I understand well, the goal of this conference is to reflect on the past in order to understand the present, and to try to identify which route we should follow for the future.

Therefore, I would like to start by making a step backwards, and reflect briefly on the main turning points of the long journey to build the current European

[1] Italian Ministry of Economy and Finance, Director General of Regulation and Supervision of the Financial System Directorate.

regulatory and supervisory architecture. I believe that this historical perspective might be of some help in prompting a discussion on what the next milestone could be, in order to overcome the current stalemate we are in as regards the Single Market in banking and financial services, as well as to tackle the new risks coming from digital innovations.

After this historical overview I will then elaborate on the present: on the main factors of strength of the SSM. I mean on the strategic, organizational and operational elements which I believe made the SSM a great story of successful European coordination and cooperation, both "vertically" and "horizontally". Indeed I reckon that it is important to emphasize how the SSM proved that harmonization and integration do not mean "one size fits all" across Europe.

These elements can be of use when we discuss the future steps, among which I believe that the first priority should be to overcome the still pending institutional obstacles to the European integration of the national markets and players.

Is it time for another "soundness test" for the European supervisory architecture?

As we know, the current European regulatory and supervisory architecture is the by-product of a number of regulatory shifts which were prompted by the shortcomings revealed when the regulatory and supervisory system was tested against reality. If we have to schematize and simplify, each time the shift was driven by the empirical evidence collected and analyzed by ad-hoc committee tasked by the European institutions for this purpose: first the disappointing state of play in the implementation of the 1999 Financial Services Action Plan and the ensuing "Lamfalussy Report" in 2001, then the Great Financial Crisis (GFC) and the following "De Larosiere Report" in 2009.

Each of these Reports and ensuing shifts led towards more coordination and integration not only of the regulatory system but also of the supervisory architecture.

The Lamfalussy Report was the ground-breaker in this journey, opening up to the first review of the European regulatory machinery, by making the rule-making process more effective and efficient, and fostering more convergence among national supervisors. However it did not put into question the principle of "minimum harmonization" and the national nature of supervision.

The De Larosiere Report took up from there, and against the evidence of the GFC clearly showed that the principle of "minimum harmonization coupled with home-country control" in fact introduced distortions and perverse incentives towards regulatory arbitrage, not only for market players but even for national supervisors. Nevertheless, the drafters of the Report fell short of finding consensus on suggesting to integrate the national supervisory systems. While paving the way to a new revolutionary regulatory system based on maximum harmonization with the so called “Single Rulebook”, due to lack of political support the Report did not propose to create an integrated European supervisory system, even though it clearly hinted in that direction by identifying the newly established European agencies as the embryo of the future European Supervisors (hence the decision to call them European Supervisory Authorities notwithstanding the fact that they were not granted supervisory powers, with the exception of ESMA).

We had to wait for another crisis to overcome these political obstacles and trigger such revolutionary change: the sovereign-banks crises of 2011-2012 proved the need to build a European safety net to address inevitable spill-overs, and therefore accompany this safety-net with a single, European, supervisory system over the banking sector, to prevent moral hazard and national arbitrages. This time it was the European Commission that took the reign of the initiative, with the decision in September 2012 to propose the establishment of a European supervisory system. The latter was – as I said before – somehow between the lines in the “De Larosiere Report”, but in fact the proposal was not made explicit in the Report, since it was reckoned it wiser to get to it across a gradual development of the ESAs.

However, history does not follow a straight line, and the development of the European regulatory and supervisory architecture is no exception to this rule. Indeed, while in the “original plan” set forth in 2009-2010 the ESAs should have become – when the political time would have come ripe – the European Supervisors, in 2012-2013 the decision was taken to entrust the ECB with this role. While the move was justified on the basis of legal arguments, since the alternative would have required a Treaty change, I believe that it is interesting with hindsight that this decision proved to be a key reason in explaining the success of the SSM from an operational point of view. I will elaborate more on this but I want to anticipate that the I believe that the material and immaterial infrastructure of the ECB, its human capital, its analytical capacity, and the tradition of cooperation among central banks, played an essential role in shaping a supervisory system which proved operationally effective in such little time. At the same time, the decision to entrust the ECB with direct supervisory powers has clearly brought in the regulatory and supervisory framework a new fundamental actor, which has changed the architecture originally envisaged in 2009, both for the Eurozone as well as for the European Union. To mention only one example, think of the fact that, despite the difficulty to draw the line between secondary regulation and supervisory guidance, even within the Banking Union these two functions are assigned to two different supranational institutions, respectively to the EBA and the SSM.

This remark brings me to the main message I want to share with this recollection through the different stages and layers: I believe that the time has come to carry out another “soundness check” of the regulatory and supervisory architecture.

What I mean is that we should not wait for another crisis to come as a trigger for a self-assessment: we should rather start from the evidence that the Brexit, on the one hand, and proliferation in the recent years of European authorities and European powers (such as those set forth by the AML package, the MiCAR, DORA, AI Act) are creating a very complicated nexus of interactions which could prove operationally dysfunctional. Think of the interplay between different national authorities (horizontally) and between the latter and European authorities (vertically), and among the European authorities themselves (again horizontally) in the fields of banking and AML or banking and cyber-risk or again banking and crypto-assets or sustainable finance.

And, as anticipated, think of the need to review the governance and powers of the ESAs, in light of the Brexit and the fact that the roles of the ESAs have differentiated greatly over time, with the EBA being affected by the creation of the SSM (whose scope will overlap with the EU in the long run) and the ESMA gradually being entrusted direct powers in the area of CCPs.

Again, think of the experience we had so far with the regulatory activities of the ESAs, their interplay with the Commission and the Parliament, and the need to test all this experience against certain unduly extensive interpretations of the "Meroni Doctrine".

And last, but not least, think of the fact that the Banking Union project is still largely unfinished (see par. 4).

To conclude on this first point, in light of all of the above factors and the fact that 2024 will be a year of changes for the European Parliament and the EC, I think that the time is ripe for a new European "wise (wo)men group" to frame this complex nexus of interactions, and come up with a possible review of the overall European supervisory architecture to ensure that the latter is operationally adequate to serve a Single Market for banking and financial services, on the one hand (see also par. 4), and to respond to the challenges coming from digital innovations and climate changes, on the other.

The SSM as a successful story of integration and harmonization

If we were to embark in a further "soundness test" as just proposed, I believe that the experience of these ten years of the SSM should be used as a positive lesson to be learned on what successful harmonization and integration means.

First, the SSM proved that integration does not mean centralization only, and can be rather achieved through hub-and-spoke organizational arrangements, where the national specificities and the European view can be blended together – through in-depth and open discussions – in order to achieve well-balanced results. The composition and functioning of the Supervisory Board and of the Joint Supervisory Teams (JSTs) are a clear example of what I mean. I simply mention the JSTs without elaborating further since I know that the topic is covered by another panelist, while on the

Supervisory Board I think that it is important to remark that its governance might be a model to look at if we were ever to review the governance of the ESAs' Board of Supervisors, whose composition is clearly unbalanced with an overrepresentation of national interests, since only national supervisors have voting rights (even though acting on a personal capacity…).

Second, the SSM proved that harmonization does not mean "one size fits all", as much as having a single national jurisdiction does not mean to rule out flexibility and different supervisory responses in light of different situations and settings to be addressed. A clear example can be drawn from the course of action followed with respect to the NPLs: overcoming the risk of promoting a pernicious formally uniform approach (or, even worst, a rigid incremental one where the bigger the issue, the bitterer the medicine), the SSM adopted a flexible and dynamic style to tackle the issue. Thanks to a fruitful cooperation with the national authorities and fair exchanges with the banks involved, seven years later Italian banks' asset quality is featuring in the top layer of the European banking system. And it is worth noticing that this goal was achieved without hampering banks' capacity to continue to provide credit to the economy. This is why I would be cautious in supporting some institutional stakeholders' views, who advocate for a gear shift by the ECB, aimed at adopting a stricter approach in the application of its supervisory powers, to solve issues at once, through a significant, upward alignment of its supervisory practices. This course of action would impoverish the supervisory response and risks being detrimental for the entire system. Eventually, some constrained flexibility is necessary – also from a supervisory point of view – to avoid throwing the baby out with the bathwater. This room for manoeuvre must be preserved and encouraged.

If I must find a weak spot on this front, I could not but notice how – in the past years – the supervisory agenda of the SSM as well as of other European institutional stakeholders has been mainly if not exclusively focused on a subset of risky assets: the NPLs. However, banks' portfolios are made of many different asset classes, including some that are equivalently risky, opaque and hard-to-value, which have been put less under the lens of the supervisor. This is a known debate: the uncertainty associated with hard-to-value assets on bank balance sheets can – in extreme situations – affect their market perception. While I would not venture in saying that this is still an on-going issue, I believe that the restricted focus on the NPL is a very emblematic example of how the supervisory and regulatory agenda should instead aiming at tackling a wider set of risks, without limit from the start the overall ambition.

And this leads me to my third point: over these years the SSM showed also its capacity to review its internal processes and supervisory strategy, to take stock of the past experience and improve its capacity to react to and tackle risks. Along the years, the ECB has ended up precisely doing this, going beyond the traditional approach based exclusively on capital requirements, by identifying the most acute pockets of risk and making their management a supervisory priority. We should continue along this path, bearing in mind, however, that pursuing this goal might be more difficult within a still incomplete European institutional architecture.

Last, but not least, these past years showed how effective cooperation makes the difference. The fruitful coordination established among the ECB/SSM, the SRB/SRM, the EC, the ESAs, and all national authorities has been quite effective along these years, as demonstrated by their capacity to manage the unknown unknowns. The clearest examples can be drawn – again – from the recent crises: effective communication and coordination were at the very core of the prompt European response to the Covid-19 pandemic crisis, and the recent banking turmoil of March 2023.

What next? The priorities

Harmonization and integration are not goals in itself but are rather instrumental to a different goal, which in this specific instance is to foster the creation of a truly integrated Single Market for financial and banking services. As recalled, in the aftermath of the Great Financial Crisis, the European Union set forth an ambitious plan for this purpose. The goal was clear: ensuring the free movement of banking services and clients across the participating Member States in order to provide wider access to financing, at lower costs, and more efficient means to absorb shocks.

This is needed now more than ever: we need an efficient Banking Union (BU) and Capital Markets Union (CMU) to finance the green and digital transition.

Moreover, the BU is a necessary corner stone of the CMU: only through the creation of truly European banks, that for instance could operate as market-maker within an integrated Capital Market Union, we will be able to ensure the liquidity of the EU capital market and, thus, the efficient allocation of financing means and risks across the EU.

However, more than a decade since its establishment, the Banking Union remains incomplete: the banking business is still segmented across national lines, and this affects the overall competitiveness of the European Union and the capacity of European banks to serve their clients' needs in the most effective way. Moreover, since European banks remain mainly national, the so-called sovereign-bank-nexus remains unsolved: it is the lack of a well functioning European safety net, and the lack of geographical diversification that tie the intermediaries inextricably to their home country, for better and for worse, and in turn limit their investment opportunities and capacity to pursue an efficient allocation of risks and resources.

I believe that there are two many reasons behind the still on-going national ring-fencing: 1) the lack of a European safety net for deposits (EDIS); 2) persistent regulatory obstacles which allow the application of ring-fencing measures (on the one hand the possibility to impose additional requirements at national level, and on the other the inability to apply liquidity and capital waivers on a wider scale) as a result of the lack of institutional European mechanisms that would apply to cross-border groups and be legally binding in times of crisis.

This is the moment to address these two points to get out of the current stalemate in the completion of the Banking Union. To achieve it, we can choose to follow a more gradual approach than the one originally envisaged when the three pillars of the BU were set forth. For instance, we could start from a liquidity-only EDIS, before moving – within a clear and predetermined path – towards a fully-fledged EDIS.

By the same token, we should get rid of any possible motivation (or *alibi*) that home and host authorities use to set national liquidity and capital requirements. To do that, we should focus initially on strengthening group recovery and resolution plans (through the establishment of effective intra-group financial support agreements). Once we have reassured the host authorities that their depositors are protected within the cross-border groups (by providing specific safeguards for banking group subsidiaries located in a host Member State), it should be possible to review the capital and liquidity waivers to allow cross-border groups to manage capital and liquidity at the group-wide level in a pool established by the parent company. The final step could even lead to reconsidering the way prudential requirements are applied across groups, to focus exclusively on the consolidated dimension.

To conclude, the SSM and the recent events proved that united we are stronger and more resilient. While praising these achievements, we need to keep the guard high and never stop trying to improve the European system of regulation and supervision, having in mind that a general overhaul of the system is due to various changes which affected this long journey, on the one hand, and new risks and uncertainties which stand at the horizon, on the other.

I hope that these remarks have provided some food for thought for this goal.

Raffaele D'Ambrosio[1]

1. The most relevant case of direct application of national law by a Union supervisory authority is the conferral of supervisory powers on the ECB under Article 4 SSM Regulation and it is on this subject that I want to make some brief remarks.

This comes as no surprise due to the fact that, even where the European financial market watchdogs (the ESAs) are endowed with specific supervisory powers, they are subject to precise rules contained in their founding regulations, which are careful not to refer to external national sources.

The circumstance is explained by the fact that reference to national law may be at odds with the Meroni prohibition insofar as it can leave room for discretion to said authorities. Not by chance the Council's Legal Service warned against this possible circumvention whenever it had to deliver legal opinions on draft Union regulations granting powers to the EU supervisory agencies.

However limited they may be and before turning to address the issue of the application of national law by the ECB, let me to recap what these additional cases of application of national law by EU supervisory agencies are.

Reference to national law is contained in Articles 17(6), second sub-paragraph (breach of Union law) and 19(4), second sub-paragraph (settlement of disagreement between authorities) of the EBA founding regulation in the area of AML/CTF. In both cases in the event of inaction by the national authority, the EBA can act directly by applying EU law and where the latter is composed of directives the national law transposing those directives. Furthermore and more generally, under Article 5(6) of EU draft regulation on AMLA (COM(2021) 421 final),[2] the new EU authority designed to replace the EBA in the AML/CTF tasks, "shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives".

Conversely, regulations concerning the several ESMA's fields of action make no reference to national law but rather provide for comprehensive and self-contained sets of supervisory powers. Similarly, the SRM Regulation does not basically rely on national law transposing BRRD opting to reproduce the main provisions contained in the latter, so as to provide, not only to the SRB, but even to the NRAs a fully harmonised set of rules on resolution action.

---

[1] Bank of Italy, Deputy Head of Legal Services Directorate.

[2] See now Article 5(6) of Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010.

The application of national law by the EBA in the area of AML/CTF is, however, less problematic than it would appear at first sight. Indeed, in light of what underlined by the ECJ in the case concerning the short-selling regulation (ECJ, C-270/12, §§ 41-55), any discretion eventually provided for in the national law transposing directives granting the EBA the relevant powers is severely constrained by the procedural steps provided for in the above mentioned provisions of the EBA's founding regulation.

Quite a different conclusion must be drawn with regard to the general clause empowering AMLA to apply national law, since no procedural arrangements aimed at limiting the authority's discretion in the possible exercise of national powers are envisaged in this case.

But the application of national law by EU agencies also poses an additional problem to that of compatibility with the Meroni prohibition, namely that of the need to ensure the uniformity of supervisory action against intermediaries headquartered in different Member States.

Although for the ECB no Meroni compliance problems arise as an institution of the Union with wide discretionary powers, it is itself faced with this problem of uniformity of supervisory action, as on the one hand it is subject to a patchy regulatory framework and, on the other, it must ensure equal treatment between credit institutions of countries participating in the SSM (recital 30 and Article 1 SSM Regulation) as well as the consistent functioning of the SSM (Article 6(1) SSM Regulation).

The problem cannot be solved by following more or less creative scholarly approaches on the direct applicability of the directives, which can hardly be justified outside the framework within which the case was considered admissible by the CJEU. Nor it can be remedied through ECB's soft law acts that – it just bears mentioning – cannot override national law applicable to a given matter.

The solution can be found only de jure condendo insofar as it is deemed feasible to shape requirements that have hitherto been regarded as functional to the free provision of banking services and as such are covered in the CRD as qualitative prudential requirements functional to the achievement and functioning of the internal market and therefore suitable to be addressed by a Union regulation with its source in Article 114 TFEU. I do not see any better alternatives feasible at the moment considering the process of adoption (and thus possible amendment) of the SSM Regulation.

2. But let us turn now to Article 4(3) SSM Regulation, which stipulates that for the purpose of carrying out the tasks conferred upon it by the SSM Regulation the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives; and that, where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.

Article 4(3) SSM Regualtion makes a mere reference to the national law transposing EU law or exercising options contained in it and only requires that said EU law has to be relevant for the ECB's tasks. A clarification that for the purpose of carrying out its tasks and exercising its supervisory powers, the ECB should apply only the "material" rules relating to the prudential supervision of credit institutions besides being in line with the principle of conferral has to be found in Recital 34 SSM Regulation.

"Material" rules should be understood in the sense of "substantive" rules as opposed to the "procedural" rules. This is confirmed by Article 22 SSM Regulation (in the same vein see also Article 25 SSM Framework Regulation) whereby it applies the due process (procedural) rules to all decisions taken in accordance with Article 4, including those aimed at ensuring compliance with requirements specified in the national law transposing the CRD provisions (such as those on the governance arrangements).

When it comes to the scope of this substantive national law, one may assume that it concerns the prudential requirements of banks and the supervision of compliance therewith, but a further problem here arises as to the exact boundaries of such a law.

Take the example of the anti-money laundering rules. Although these rules are not strictly prudential supervisory rules, they supplement the ones on the withdrawal of the banking licence, which are clearly encompassed in the prudential supervision legal framework. In other words, the anti-money laundering rules complement the prudential ones insofar as they are referred to therein.

Moreover and more generally the substantive banking law, particularly in the domain of qualitative prudential requirements (again, governance arrangments), makes often references to many civil, company and administrative law provisions. A criterion to determine the exact boundaries of the law applicable by the ECB would be to include within the domain of the national substantive banking law only the civil and company law norms, which, in light of the provisions contained in the CRD, are strictly needed in order to clarify the scope of application of an essential element of the prudential precept.

3. It is settled case law of the CJEU that national law has to be interpreted according to the view of the apical national courts (see *Schmit*, C-240/95, para. 14, and *Commission v. Slovakia*, C-433/13, para. 81). As to the ECB, this principle is expressly reiterated in the case *Caisse régionale de crédit agricole mutuel v. ECB* (Joined cases T-133/16 to T-136/16, para. 84).

By the other hand, ECB is expected to interpret national law, as far as possible, in light of the wording and the purpose of the EU law (basically the CRD). With the caveat that the principle of consistent interpretation of national law cannot be applied, if the only way to render national law compatible with EU law leads to a *contra legem* interpretation or puts counter a general principle of law, such as the principle of legal certainty, in jopardy. Needless to add that no consistent interpretation may take place where a directive has not been transposed at all.

Theoretically, one could hypothesise that the ECB relies upon a general principle of EU law, which would be given concrete expression in a EU directive (ECJ, Case C-144/04, Mangold, and C-555/07, Kücükdeveci), in the case at hand the CRD, or that the provisions contained in a directive may be applied by means of an express reference in a EU regulation (Joined Cases C-37/06 and C-58/06, Viamex Agrar Handels and ZVK), in the case at hand Article 4(3) SSM Regulation. Nevertheless, both solutions are to be rejected. The first one because the financial stability or the supervision of credit institutions enshrined in the CRD cannot be considered as an expression of general principles of EU primary law. The second one because Article 4(3) SSM Regulation obliges the ECB to apply national law transposing directives rather than incorporating specific provisions of the CRD.

Another way would be to suppose that the ECB had to apply under Article 4(3) SSM Regulation both the directives and its transposing national law, giving to the '*and*' in the wording of that article a conjunctive and not a disjunctive value. But such a reading is precluded by the last part of the same provision which, where it intended to oblige the ECB to apply both Union law (in this case a regulation) and national law, used the word '*also*'.

The German version of Article 4(3) SSMR sheds light on the correct interpretation of it, where it states that "*Zur Wahrnehmung der ihr durch diese Verordnung übertragenen Aufgaben und mit dem Ziel, hohe Aufsichtsstandards zu gewährleisten, wendet die EZB das einschlägige Unionsrecht an, und wenn dieses Unionsrecht aus Richtlinien besteht, wendet sie die nationalen Rechtsvorschriften an, mit denen diese Richtlinien umgesetzt wurden*". Indeed, by repeating the verb '*applies*' ("*wendet… an*") after the conjunction '*and*' ('*und*'), the German text makes it clear, without a shadow of a doubt, that the ECB in the case of directives only applies the transposing national law.

4. A particular problem arises as to whether in the event that the national law is vitiated by unconstitutionality, the plaintiff may ask the CJEU to raise a question of constitutionality before the national constitutional court. In the famous Berlusconi saga, the Italian *Consiglio di Stato* and the *Corte di cassazione* clarified that there would not in fact be a gap in the protection offered to the addressee of the ECB decision as EU law offers the same guarantees to the latter as those provided for in national constitutional orders.

More to the point, after the ruling of the ECJ (C-219-17), the trial before the national administrative court (*Consiglio di Stato*), Mr Berlusconi and Fininvest asked the Court for a further reference to the Italian Constitutional Court, as in their opinion the ruling of the ECJ violated the Italian constitutional right to an effective judicial review, which can only be granted by means of the national '*ottemperanza*' procedure.

The ruling of the *Consiglio di Stato* (3 May 2019 No. 2890) dismissed the challenge brought by the applicants without any additional reference to the national Constitutional Court, as it found no significant difference in the standard of judicial review before the national and European courts.

The *Consiglio di Stato*'s ruling has been challenged before the *Corte di cassazione.* According to the Joint Chambers (decision No. 10355/21) of the *Corte di cassazione* the limitation to the national jurisdiction does not compromise any constitutional rights granted by the Italian Fundamental Law, because the plaintiffs can find an equivalent standard of legal protection before the European Courts.

The problem, however, still remains for all those flaws in the constitutionality of the national law that do not concern the violation of fundamental rights but rather procedural issues (e.g. the delegated law's failure to comply with the limits provided for in the delegation law).

5. As for the rules on administrative procedure, being the ECB an EU Institution, it shall be subject to the rules on due process and good administration contained in directly applicable EU law and comply with the principles recognised in the Charter of Fundamental Rights of the European Union (see, among others, recitals 58, 63 and 86 SSM Regulation).

Under Article 6(7) SSM Regulation, the SSM Framework Regualtion was expected to provide for a self-contained body of procedural rules, including (see points b) and c)) those on internal and time-limits. The SSM Framework Regualtion has, however, made a different choice by limiting itself to a few rules, essentially those on due process and on internal time-limits for common procedures. As the directly applicable EU law (SSM Regualtion and SSM Framework Regualtion) does not cover all the procedural administrative requirements provided for in the relevant national administrative laws (as it is the case for the rules on the time limit within which a decision has to be taken and notified), gaps are expected to be filled with the general principle of good administration enshrined in Article 47 of the Charter.

Nevertheless, the ECB seems to have adopted a different stance, as one may infer from the "*Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law*" (SSM/2017/0140, 31 March 2017), where under point (iii) ("*Criteria for the assessment of requests and deadlines*"), it clarifies, among others, that "*the ECB will also comply with national law requirements, including also on procedural aspects, connected specifically to this type of supervisory powers*" and that "*this applies in particular to specific publication requirements or specific time-limits for the adoption and* *notification of the decisions, if relevant. If these specific provisions provide that an approval is deemed to be granted after the expiry of the specified deadline, significant institutions may rely on such 'tacit approval' rules*".

The choice leaves much to be desired as it applies different rules of procedure depending on the nationality of the addressee of the relevant ECB's decision. A 'better solution' would instead be to apply national rules on time limits only where these rules relate to the consumption of power and not to endo-procedural steps. Indeed, insofar as they relate to the consumption of power, those rules could be regarded as substantive and not mere procedural rules.

Giorgio Donato[1]

Good afternoon and thank you for having me today. This morning you were presented with outsiders' views on the SSM. This afternoon, I would like to provide you with an insider's view, as I've been dealing with the SSM since its very inception – even earlier than that, actually, having chaired the Quality Assurance stream of the *Comprehensive Assessment* in 2014. After listening to this morning's speakers, nobody would question that the SSM has indeed delivered on its mandate: it is a success story.

As an example, Deputy Governor Alessandra Perrazzelli mentioned the prompt reaction to the challenge posed by the rise in interest rates. Another instance is the March 2023 turmoil kindled by the US bank crisis: EU banks weathered that predicament basically unruffled, the tidal waves that many feared might trigger a global crisis lost momentum moving from one shore to the other of the 'pond', and turned into gentle ripples against a strong European banking system, buttressed by ten years of relentless SSM supervisory action. In short, we stood ready, having focused our attention on the interest rate risk in the banking book since 2021, and having raised the banks' awareness thereof.

But what are the ingredients of this 'recipe'?

The first one – it was mentioned once by Governor Visco and several times by Prof. Moloney this morning – is the JST. JSTs are the pillar, the cornerstone, the heart of the SSM. Without JSTs there would be no SSM. Looking back, what strikes me is how JSTs have changed. In 2014 nobody knew how they would pan out; nobody knew whether this two-headed chimera, featuring two reporting lines – hierarchical towards the National Competent Authorities, and functional, towards the SSM – would actually fly. Like a bumble bee, JSTs defy the laws of physics. An aircraft built like a bumble bee would not fly, because of the shape of its wings. Yet, JSTs, like bumble bees, did fly and still do.

In short, there was no blueprint to guide us and no instruction manual to resort to, no best practices to get JSTs going, and no guarantee that blending so many different supervisory cultures – or just cultures, *tout court* – would actually work. It has not been an easy journey. There were many differences that might have been disruptive. Think of the basic form of communication: language, for one. But also cultural differences, different expectations among the staff of the many institutions involved, possibly a mutual wariness of sorts. There is a very precise German word for the idea I'm trying to convey: *Weltanschauung*. Blending so many different *Weltanaschauungen* was no small feat indeed. It's been a learning-by-doing process, progressing by trial and error.

[1] Bank of Italy, Head of Banking Supervision 1 Directorate.

Today, the functioning of JSTs has made huge headway, improvements have been remarkable; they are now well-oiled machines revolving around smooth processes, thanks to the helpful steps taken (staff exchanges, training, information sharing) that contributed to building and strengthening mutual trust.

Alessandra Perrazzelli mentioned the prompt response to the pandemic. I think that the 'JST mindset' proved invaluable when the pandemic broke out. The 'decentralized' approach to banking supervision, building a 'team spirit' and working 'together', although remotely, for a number of years before 2020 allowed us to move seamlessly to the 'crisis mode' called for by the lockdown. And we can now say – with hindsight – that it worked out fine.

I think that the JST framework has plateaued now, and that little can be gained in term of smoother functioning from a pure organisational standpoint. What makes the difference today across JSTs is the human factor, people. Still, a full integration has not been achieved yet.

A game changer might be a different legal framework. JST members – let's face it – belong to different institutions (legal entities) – the ECB or the NCAs – and this still creates a sort of barrier, no matter how thin, that gets in the way.

A suggestion for future work, I guess, could be to think about how to devise the most conducive legal set-up for a full JST integration.

The other ingredients are planning and processes.

Professor Lamandini quoted President F.D. Roosevelt twice this morning. I would like to quote two former US Presidents: Benjamin Franklin – who said: "If you fail to plan you are planning to fail" – and Dwight Eisenhower, according to whom planning is key (and plans are useless). Planning is one of the most distinctive features of the SSM. It is inevitable, with such a complex and structured organisation. But can you have too much of a good thing? I think you can, sometimes. What strikes me is that the SSM was surprisingly quick and effective in reacting to major crises, such as the pandemic or the Ukraine war. But not so much when it comes to day-to-day activities. I believe that more effort should be devoted to streamlining processes, especially when it comes to run-of-the-mill tasks. When I think of the SSM, 'nimble' or 'lithe' are not the first words the come to mind, to be candid.

Significant improvements have been achieved over the last years to promote a more efficient and risk-based supervision. The new SREP Multi-Year Approach (MYA) and the Risk Tolerance Framework (RTF) represent key milestones. However, they should be further developed and their actual implementation should be supported by a deeper risk-oriented supervisory culture and by improvements in the IMAS tool. The tone from the top will be key in this respect. Preliminary evidence from the 2023 SREP cycle shows room for further de-prioritising some areas and focusing on fewer modules to be assessed in-depth.

The quality assurance process led by the Directorate Supervisory Strategy and Risks (D-SSR) is a quantum leap vis-à-vis the past set-up, providing, among other things, a rigorous benchmarking across the board in the SREP, ensuring comparability and bolstering accountability. However, there is room for improvement there, too: i) multilateral meetings with a set of JSTs for comparable banks dealing with similar issues could be much more effective than bilateral interactions between D-SSR and single JSTs; ii) benchmarking activities could benefit from the analysis of the historical evolution of institutions' risk profiles over time, to shed more light on individual situations and provide a more comprehensive and detailed picture.

As confirmed by the report of the Wise Person Group, the SREP methodology to determine the P2R (TOM 2.0) provides low value added and could be bolstered. There are several options on the table to achieve this goal; a possible way-forward could be moving towards a Pillar1+ approach (the one we used to have here at the Banca d'Italia before the SSM, by the way).

This 'cumbersomeness' has a bearing, in my opinion, on our time-to delivery: the core process of supervision, the SREP, takes too long to complete; the same applies to on-site examinations and internal model investigations, which show several areas of improvement, process-wise. For example, the timeliness of notification of final reports to the supervised institutions could be improved. This may ultimately undermine the effectiveness of the SSM, denting promptness of action.

Also the relationship between horizontal functions, expert groups, networks, and second line of defense could be improved. Sometimes we see overlaps and duplication.

Last, but not least, stress testing. It is indeed key to test the resilience of institutions under adverse conditions. However, the outcomes of the exercises conducted over the last years put into question the stress test overall design, its value-added for banks and supervisors and, ultimately, its cost/benefit balance. Also in light of the experience made in 2023, now it is time for a deep and strategic discussion about the future of this tool, duly exploring all possible options: the introduction of a different approach based mainly on top-down estimates; the inclusion of non-bank financial intermediaries, etc.

These are challenges that the new SSM Chair will have to tackle during the upcoming term and we very much look forward to cooperating with her to take the SSM to the next level: from the start-up phase (2014 to 2018) to the consolidation phase that has just finished, and now towards a mature, authoritative, transparent and efficient supervisory authority.

Giovanni Sabatini[1]

The European banking sector is robust and resilient. This resilience has been evident through a series of challenging events, including the COVID-19 pandemic, geopolitical tensions such as the conflict in Ukraine, and more recently, the turbulence witnessed in the banking sectors of the United States and Switzerland. It is a result of the substantial efforts made by banks themselves to adapt their business models and enhance their risk assessment capabilities, as well as the full implementation of the internationally agreed-upon regulations and standards following the global financial crisis. The recent consensus reached on the banking package, which implement the Basel 3 endgame in Europe is set to bolster this resilience even further. However, this has imposed significant constraints on the sector in terms of profitability and the capacity to finance the economy. It has also prompted a notable shift in the role of intermediation and financing towards the unregulated sector of shadow banking, which has grown considerably, with all the risks associated with a less transparent and less regulated sector. It now appears essential to consider additional objectives beyond just stability in order to enable banks to support the necessary growth in Europe.

Banking union (and the SSM within it) as one of EU major accomplishments

Following the 2008 financial crisis, the G20 committed to fundamental reform of the global financial system given the significant economic and social damage that it caused. In Europe, the Commission promoted an ambitious project, the Banking Union, to ensure that EU banks are stronger and better supervised.

Establishing the Banking Union stands as one of EU major accomplishments. Both the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) have contributed to financial stability and a level playing field for Eurozone banks. However, the Banking Union remains unfinished. Persistent political and regulatory constraints hinder the development of universal cross-border bank business models and serve as structural barriers to bank consolidation across the Eurozone.

This regulatory framework has been tested by a series of significant crises different in nature and depth at both the international and European levels.

The significant efforts made by European banks to comply with the highly demanding regulatory standards have been successful. EU Banks have not only demonstrated remarkable resilience but have also played a crucial role in upholding stability and minimising the impact of the crisis on the economy.

---

[1] Associazione bancaria italiana, Executive Director [*at the time of the conference*].

Upcoming years' challenges

However, the upcoming years will remain challenging because of i) stagnating growth and persistent inflation; ii) geopolitical tensions and their consequences on globalisation, international trades, supply chains; iii) the transition towards a more ESG sustainable economy; iv) the speed and breadth of digital transformation affecting all aspects of human activities.

Climate change

Sustainable finance is a key priority for the European banking sector, banks are in a unique position and stand ready to assist their clients in their transition.

Banks are upgrading their governance and internal systems, particularly those related to data collection, risk management and loan origination and credit approval processes, to ensure the alignment of their financing activities with the EU sustainability goals.

Banks' ability to provide finance in support of the transition will depend on whether the conditions are in place to enable the real economy to transition, which then creates opportunities for finance and investment to support those real economy activities. Banks cannot drive the transition of the economy on their own, nor can they shoulder the primary responsibility for enforcing climate policies. It is up to governments to define clear and consistent policies that incentivise all sectors and businesses to progress in this transition.

The more that governments and companies across the economy understand their transition needs and make the necessary substantial investments, and the more governments and policymakers establish roadmaps and make available the necessary incentives to allow real economy companies to transition, the better that investors and financial institutions will be able to channel finance in support of the very significant investment needed.

The system of incentives needs a substantial overhaul, redirecting the ever-increasing fossil fuel subsidies towards transition. In other words, regulation and supervision should not unduly constrain transition financing, via imposing penalising treatments to those assets which cannot be classified as green. Bank credit will be essential to support the transition for those entities starting from a lower degree of sustainability. To this end, it is important that EU institutions establish a clear transition finance framework at the EU level i) outlining sectoral transition pathways and roadmaps against which companies can benchmark their transition plans; ii) introducing policy measures to support and incentivise the real economy transition and promoting the adoption of transition plans; iii) opening a dialogue with financial institutions to address challenges with the provision of transition finance.

What is needed are clear and consistent rules and pragmatic approaches that will effectively guide direct investments and bank-led financing to industries, including carbon-intensive ones for which the transition is critical in contributing to reaching net zero. Furthermore, given that almost a quarter of EU banks' exposures are to entities located outside the EU, it is imperative for rules and standards to be globally coordinated and convergent, ensuring that EU regulation is interoperable with international standards and similar initiatives in other jurisdictions.

Global cooperation and harmonization will play a crucial role in preventing market fragmentation and facilitating the flow of capital to where it is most needed. As a minimum, it is important to ensure the interoperability of the EU regulations and standards with global initiatives, with a view to minimising fragmentation and overlapping regulation.

Digital transition

Proactive in responding to new customer's needs, banks are innovators, embrace new technologies to streamline process and procedures and foster digitalization of the economy. Digitalisation poses several challenges when it comes to regulation and supervision, since not only new risks have to be tackled (such as cyber risk), but also "old" risks find new manifestations (as is the case for the higher speed of deposit outflows in stressed market conditions, in the context of liquidity).

The rapid technological developments and the rise of hyper-scaler tech companies that are penetrating the financial ecosystem on different levels and with no borders, have been met with legislation that is struggling to catch up and supervision that is fragmented both geographically and at sectoral level.

Banks are facing increasing competition from non-banks, which are subject to fewer regulatory burdens. Banks are also competing with (big) tech companies with powerful networks and huge investment capacity. Big techs can amplify fintech offerings thanks to their global scale, multi-billion user bases and cutting-edge technology. But above all, they use their vast troves of user data to offer more personalised and seamless customer experiences. Competition is welcomed: it spurs innovation, benefits customers and drives progress. But it must be fair competition.

Intermediation in the lending market has undergone a dramatic shift from traditional banks to shadow banks, i.e., institutions that fall outside the scope of traditional banking regulation. Shadow banking's ascension may signal growing systemic risks. These could include direct and indirect exposures faced by banks, insurance companies and pension funds, reduced financing availability for banks and non-financial corporate borrowers, and increased asset price volatility. Addressing these emerging challenges is a priority for regulators and supervisors and the shift towards a “same activity-same risks-same regulation” approach is urgently needed.

Moreover, the ECB digital euro project, that is progressing rapidly, is a complex undertaking with profound implications for the society and economic actors, including the banking sector. If not framed correctly, it could inadvertently strengthen the positions of large tech companies while destabilizing the financial system.

Population aging and bank risk-taking

Greater longevity and decline in births, with the consequent aging of the population, now characterize the majority world economies: the continent is ageing, which can lead to less innovation and less productivity. The need for protection against demographic and health risks is growing and a new issue on the stability of current welfare systems is arising, entailing a delicate trade-off that requires significant reallocations of resources. This phenomenon will require a comprehensive response both at the national and European level, focusing on immigration, technological change and innovation. Banks can help to promote private welfare to integrate/couple with public welfare, that because of the ageing of the population, risks to become unsustainable.

End of globalization and multilateralism

Geostrategic fragmentation will increase the risk of fragmentation of world trade, which has been the main engine of growth over the last past decades but that will contribute less to growth in the future. In this changing world, European policymakers must reaffirm the strategic role of the European banking sector in achieving Europe’s competitiveness, growth, and strategic autonomy. This recognition must be coupled with a genuine understanding of what is necessary to maintain a healthy financial sector in Europe. Banks and financial service providers are, in fact, confronted with an excessive and increasingly over-reaching legislation that undermine their position and their ability to effectively fulfil their role in supporting the economy.

Europe requires a strategic vision

Europe requires a strategic vision wherein a robust banking sector that is both efficient and digitally competitive, coupled with deeper European capital markets will finance its future. Such strategic vision can only be driven by deeper cooperation within the EU. It is urgent to harness the potential of a united Europe with greater strength and consistency than ever before.

All the current and future challenges and vulnerabilities – whatever their form or shape – have one thing in common, they require additional financing and investment to support sustainable growth. The banking sector is crucial for funding the substantial investments needed to address the challenges, both immediate and long-term. Banks are fully aware and prepared to assume their responsibilities, however, they do require a regulatory framework that enables the industry to remain competitive and profitable in an ever-evolving global market and ensures fair competition for all entities providing financial services.

The key question to be answered, then, is whether the current regulatory framework is fit for the purpose. Or, to put it differently, whether the current regulatory and supervisory arrangements are consistent with the goal of ensuring financial stability without posing undue constraints on the role of banks with unintended negative consequences on growth, employment, and competitiveness. While banking regulation has predominantly focused on stability, which remains unquestioned, there is now a need to shift toward growth and competitiveness. Financial stability is of course a precondition for growth but in the long-term financial stability is at risk if there is no sustainable growth.

Trade-off between price stability and financial stability

Monetary policy and financial stability are key elements for the development of the EU and are also both preconditions for all European activities. A better understanding of their interaction could be an important guidance for policymakers and co-legislators.

The relationship between price stability and financial stability is a complex one and potentially involves trade-offs. Such trade-offs could appear for, at least, three kinds of reasons:

- first, financial stability may be hurt by monetary policy decisions. While central banks may increase interest rates in order to maintain price stability, this can also lead to a tightening of credit conditions which can affect financial stability. The transmission of monetary policy actually hinges on its effects on financial conditions;
- second, financial sector vulnerabilities like rising non-performing loans (NPL) may be detrimental to price stability. However, the mere decision to limit the share of NPL in total credit, via an overall limit on banking credit or higher interest rates, will inevitably weigh on economic growth;
- third, external shocks may have an impact on the balance of payments. Global economic shocks like an oil price surge or economic sanctions can translate into an abrupt drain on a country´s foreign reserves. Any uptick in interest rates designed to mitigate such shocks could strain the economy and financial markets and feed financial instability.

Moreover, according to the EU legislative framework, price stability is considered a goal per se (as an example, the ECB has a clear mandate to achieve price stability as its primary objective) while nothing is stated about the necessity/ opportunity to achieve also sustainable economic growth as a primary objective. Therefore, the need for sustainable economic growth as a key element of financial stability is often left behind, with negative consequences for the real economy in the short term and, in a longer perspective, for the overall financial stability.

Financial stability, price stability as well as sustainable economic growth are all key elements to give civil society the best possible environment.

Trade-off between financial stability and economic growth, in practice

As noted above, in the last 15 years the regulatory framework for the financial sector has undergone extensive and restless revisions and this was particularly true in Europe.

Due to the incremental nature of the revision process, rather than a cohesive and coordinated project, the current framework is marked by considerable complexity, overlapping measures, hyperdetailed and rigid rules. There is no longer a clear holistic view of the collective impact of all rules, which risks reducing both the provision of financing within the EU at present and the adaptability of these regulations to future challenges.

Looking ahead, in Europe, we urgently need:

- a comprehensive assessment of the existing regulatory framework to weigh the impact and efficiency of regulations, not only in terms of stability and resilience but also concerning the objectives of effectiveness, competitiveness, and support for sustainable growth in Europe;
- to consider whether the current system of multiple layers of regulation (directive and regulation, ESAs technical and regulatory standards, guidelines, supervisory expectations) is still fit for purpose or is a source of complexity, inconsistencies, wrong sequencing in implementation and entry into force of each piece of regulation;
- a regulatory truce to digest the output of almost 15 years of uninterrupted new regulation;

A specific issue which should also be addressed is whether increasing banks' capital is always the right tool to pursue financial stability. This year's crises shown that also well capitalised banks can experience distress, and that good supervision and risk governance can be as important as capitalisation.

Finally, it is essential that regulators and supervisors consider that each regulatory measure has a substantial impact on organisation, procedures, IT system (not to mention budget) of banks and therefore they should allow enough time for implementation to facilitate compliance.

The goal is not less regulation, but more efficient regulations, not deregulation, but streamlined and simplified regulation with adequate degrees of flexibility.

Two examples: Basel3+ and the review of macroprudential framework

In the EU the so called "banking package" (transposing the Basel 3 final standards) is close to being finalised. In this regard, the banking industry has consistently advocated for a well-balanced implementation, oriented to growth and ensuring funding to real economy, without prejudice to financial stability.

Not discussing specific measures (also given that most of them have already been agreed), two points are now worth highlighting:

- the EU law (Level 1 regulation) tasks the European Banking Authority with a huge number of mandates (around 130-140). Most of them require EBA to specify not only details, but also key aspects of the prudential rules (Level 2 regulation);
- the package is expected to enter into force 1st January 2025. Given that the official legislative texts will not be available before 1Q2024, and that thereafter Level 2 measures will still be needed to have clarity on the actual framework, this means that EU banks are supposed to be able to implement the new regulatory framework in a few months (and probably in the absence of many Level2 measures).

Beyond Basel 3+, another crucial element of a well-functioning European financial sector is a robust, proportionate, and predictable macroprudential framework. The European Union's macroprudential framework is, indeed, excessively complex, and the COVID-19 crisis has exposed deficiencies in terms of buffers usability. Greater clarity is needed regarding the risks covered by each of these buffers and the absence of overlap (double counting) with other macroprudential buffers, as well as with the Pillar 2 Requirements (P2R) and Pillar 2 Guidance (P2G), in addition to Pillar 1 requirements.

The review should, therefore, ensure greater predictability and a level playing field by i) providing more certainty concerning the Maximum Distributable Amount (MDA), as banks manage their management buffers based on their distance from the MDA. Unlike the measures that were imposed during COVID, the European banking sector believes that dividend suspension should not occur without the MDA trigger currently set out in the regulation, and that the MDA could be lowered during periods of stress; ii) ensuring that if the countercyclical buffer (CCyB) is increased for greater buffer usability, this should be offset by a reduction in conservation buffers (CCoB). Alternatively, the CCoB could itself be reusable; iii) ensuring that European authorities coordinate the relaxation of buffers to maintain consistency in their reduction across risk-weighted assets, leverage ratios, and the minimum requirement for own funds and eligible liabilities; without considering all the constraints on bank capital, buffers relaxation measures are ineffective.

Furthermore, the roles and responsibilities between national and European authorities need to be clearly defined to ensure coherence of the EU macroprudential framework as a whole, prevent double counting, and avoid fragmentation of the European market.

Additionally, given that banks are now sufficiently capitalised, any review of the macroprudential framework should by no means lead to an increase in capital requirements. Such an increase would be unjustified and further divert resources that could otherwise be invested to support the European economy.

Closing remarks

Marino Perassi[1]

At this late hour on Friday, after a long day of talks and debate, I will truly only provide some brief closing remarks.

I would start from an impression I got from listening to Professor Bruno De Witte's presentation, focused on the EU economic constitutional principles: legally speaking, it is much easier to say what the SSM is not, than what it is. It is indeed really a hard task to reconcile the SSM with the traditional categories of EU law: "*SSM is a visionary initiative*", just to quote the Deputy Governor Alessandra Perrazzelli; "*an experiment in the field of EU administrative law*" in the words of Governor Visco; "*a very advanced experiment of shared administration*" according to Professors Marco Lamandini and Bruno De Witte. This actually highlights a cornerstone of the SSM: the sharing of administrative powers between the ECB and NCAs and the pivotal role that JSTs play in implementing this sharing system, as Professors Bruno De Witte and Niamh Moloney as well as Giorgio Donato recalled us.

The SSM was conceived under time pressure, irrespective of an objective of maximum harmonisation of the national legal frameworks that the ECB would be asked to apply, in a different approach from the avenue that was followed for the introduction of the euro: the reference is to the so called "legal convergence criteria", foreseen in the Maastricht Treaty for joining the single currency and explicitly mentioned this morning by Governor Visco.

Could it be said that this "strange animal" that is the SSM has been beneficial? The answer is likely to be yes. Once again Governor Visco reminded us that the SSM has been a catalyst in the restructuring process of EU banks. Many speakers alluded to the "crazy spring" we experienced in this 2023. The EU banking system proved to be resilient when some US and Swiss banks failed on that occasion, and this can be an evidence of the efficiency of the SSM. It means that the trust in the EU banking system has increased significantly, as Elizabeth McCaul mentioned before. Furthermore, on that occasion, the challenges have been addressed in a uniform way, not just on a national level but on the basis of a coordinated approach, in the words of Deputy Governor Alessandra Perrazzelli and Giovanni Sabatini.

The role of the Court of Justice of the European Union has been extremely relevant in this area. Some leading rulings have provided insightful answers to core questions related to a complex system such as the SSM: a multi-level system, a multi-jurisdictional system. In particular, Judge Lucia Serena Rossi recapped

[1] Bank of Italy, General Counsel.

the judgments pertaining to the horizontal and vertical division of administrative powers among the actors forming the SSM.

Also the role of soft law, in this area, was mentioned many times along this day. Indeed, soft law poses delicate issues: sometimes it presents drawbacks but, as Professor Bruno De Witte noted, it is a flexible tool to adapt the legal framework concerning the banking supervision to the real word, in a very quick manner.

The ABoR's actual role has probably been less prominent in practice, partly as a result of the advisory power that the SSM Regulation reserves to it, even though – as noted by Professors Marco Lamandini and Concetta Brescia Morra – the observations raised by the ABoR have been of value to the running of the SSM.

The SSM does not work in isolation: the Banking Union already consists of two pillars; the third is missing and there is no clear perspective about it. The Single Resolution Mechanism has proved to be essential for the regular functioning of the Banking Union: it started later, it's younger than the SSM, but it has gone into full effect. Professor Luis Morais underlined the need to follow closely the work in progress in Bruxelles to update the SRM framework: that's an opportunity we should not fail.

There are also new challenges for the SSM: non-bank financial intermediation, which is also linked to the transformation of the financial sector, as Giovanni Sabatini, Francois-Louis Michaud and Elizabeth McCaul reminded us. There is then to address the major issue of the artificial intelligence and the rules of the digital finance, the EU digital package, of which MICAR is just a component.

Some final thoughts: the SSM is based on a common set of rules, a common supervisory culture, stemming from the day-by-day work of the JSTs, and also on the federal composition of the Supervisory Board, as highlighted by Professor Niamh Moloney. We know that the single rulebook was a fundamental basis for the single supervision, as Michaud mentioned before, but we also know that there is an open issue concerning the interplay between EU and national law, as Raffaele D'Ambrosio explained. Is the current regulatory architecture adequate? Many speakers were vocal on this issue and the lack of harmonisation outside the core rules concerning supervision is evident, just to mention administrative sanctions, criminal law concerning violations of banking supervision. A number of other fields are still unevenly ruled by Member States: for instance, the corporate law impacting on the governance of the banks; the rules for the transparency of banking contracts, which is outside the SSM's remit, but which is extremely relevant for the prudential supervision of banks, as the Lexitor case daily reminds us.

For these reasons, at the very end of this day, I am pleased to strongly revive Governor Visco's proposal to adopt a European Banking Law, a European Banking Code, which – in my view – could mirror the pattern of the *Testo Unico Bancario*, the Italian consolidated law on banking. Speaking about mirroring, allow me one last hint on a topic raised by Stefano Cappiello and Giovanni Sabatini: the Capital Markets Union. Is the current project on track to meet the future challenges of the Capital Markets Union, or should we start thinking, even with reference to the capital markets area, about adopting a system mirroring the SSM?

Finally, I would like to express my warm thanks to all of you for joining us today at the Bank of Italy.

QUADERNI PUBBLICATI

n. 1 – Francesco Capriglione, *Evoluzione tecnica e disciplina giuridica dell'intermediazione finanziaria,* ottobre 1985 (esaurito).

n. 2 – Francesco Carbonetti, *Moneta,* dicembre 1985.

n. 3 – Pietro De Vecchis, *L'istituto di emissione,* febbraio 1986 (esaurito).

n. 4 – Giuseppe Carriero, *Governo del credito e Regioni a statuto speciale: il quadro istituzionale,* aprile 1986.

n. 5 – Giorgio Oppo, *Una svolta dei titoli di massa (il progetto Monte Titoli),* aprile 1986.

n. 6 – Luigi Desiderio, *Le norme di recepimento della Direttiva comunitaria n. 780/77 in materia creditizia,* maggio 1986 (esaurito).

n. 7 – Giorgio Sangiorgio – Francesco Capriglione, *La legge bancaria: evoluzione normativa e orientamenti esegetici,* giugno 1986.

n. 8 – Vincenzo Mezzacapo, *L'attività bancaria nell'ambito dei movimenti di capitali nella CEE,* giugno 1986 (esaurito).

n. 9 – Francesco Capriglione, *Le gestioni bancarie di patrimoni mobiliari,* luglio 1986.

n. 10 – Francesco Carbonetti, *I cinquant'anni della legge bancaria,* settembre 1986.

n. 11 – *La legge bancaria,* ottobre 1986.

n. 12 – Carmine Lamanda, *L'evoluzione della disciplina del controllo sul sistema creditizio dalla legge bancaria ad oggi,* dicembre 1986 (esaurito).

n. 13 – Giovanni Imperatrice, *L'accertamento dell'illecito amministrativo nel diritto valutario e nel diritto tributario,* marzo 1987.

n. 14 – Giorgio Sangiorgio, *Profilo istituzionale della disciplina pubblicistica del credito,* maggio 1987.

n. 15 – Francesco Capriglione, (a cura di) *La disciplina comunitaria del credito al consumo,* luglio 1987.

n. 16 – Carlo Taglienti, *Il credito documentario: nozione, fondamento, problematica,* settembre 1987.

n. 17 – Pietro De Vecchis, *Aspetti legali delle crisi bancarie in Italia,* gennaio 1988.

n. 18 – Vincenzo Mezzacapo, *Il mercato secondario organizzato dei titoli emessi o garantiti dallo Stato,* agosto 1988.

n. 19 – Francesco Carbonetti, *Il controllo della Banca d'Italia sulle emissioni di titoli atipici,* ottobre 1988.

n. 20 – Francesco Capriglione, *Le polizze di credito commerciale,* dicembre 1988.

n. 21 – Francesco Capriglione, *La responsabilità penale del banchiere: evoluzione giurisprudenziale e prospettive di riforma,* dicembre 1989 (esaurito).

n. 22 – Marcello Condemi, *Le sanzioni amministrative bancarie e la giurisprudenza della Corte d'Appello di Roma,* aprile 1991.

n. 23 – Marco Mancini – Marino Perassi, *I trasferimenti elettronici di fondi,* maggio 1991.

n. 24 – Enrico Galanti, *La crisi degli enti creditizi nella giurisprudenza: la liquidazione coatta amministrativa*, giugno 1991.

n. 25 – Francesco Capriglione, *Note introduttive alla disciplina delle s.i.m. e dell'organizzazione dei mercati finanziari,* giugno 1991.

n. 26 – AA.VV., *La ristrutturazione della banca pubblica e la disciplina del gruppo creditizio,* gennaio 1992.

n. 27 – Giorgio Sangiorgio, *Le Autorità creditizie e i loro poteri,* marzo 1992.

n. 28 – Francesco Capriglione, *Il recepimento della seconda direttiva Cee in materia bancaria. Prime riflessioni,* febbraio 1993.

n. 29 – *Il Sistema dei pagamenti. Atti del Convegno giuridico* (Perugia S.A.Di.Ba., 23-24 ottobre 1992), settembre 1993.

n. 30 – Olina Capolino, *L'amministrazione straordinaria delle banche nella giurisprudenza,* ottobre 1993.

n. 31 – P. Ferro-Luzzi – P. G. Marchetti, *Riflessioni sul gruppo creditizio,* dicembre 1993 (esaurito).

n. 32 – *Testo Unico delle leggi in materia bancaria e creditizia,* marzo 1994.

n. 33 – *Testo Unico delle leggi in materia bancaria e creditizia. The 1993 Banking Law,* marzo 1994.

n. 34 – Giuseppe Carriero, *Struttura ed obiettivi della legge sui fondi immobiliari chiusi,* novembre 1994.

n. 35 – Lucio Cerenza, *Profilo giuridico del sistema dei pagamenti in Italia,* febbraio 1995.

n. 36 – Giovanni Castaldi, *Il riassetto della disciplina bancaria: principali aspetti innovativi,* marzo 1995.

n. 37 – Vincenzo Pontolillo, *L'evoluzione della disciplina dell'attività di emissione di valori mobiliari,* giugno 1995.

n. 38 – O. Capolino – G. Carriero – P. De Vecchis – M. Perassi, *Contributi allo studio del Testo Unico delle leggi in materia bancaria e creditizia,* dicembre 1995.

n. 39 – Francesco Capriglione, *Cooperazione di credito e Testo Unico bancario,* dicembre 1995 (esaurito).

n. 40 – Marino Perassi, *L'attività delle banche in "securities" e la disciplina dei contratti-derivati in Giappone,* aprile 1996.

n. 41 – Enrico Galanti, *Norme delle autorità indipendenti e regolamento del mercato: alcune riflessioni,* novembre 1996.

n. 42 – M. Perassi – R. D'Ambrosio – G. Carriero – O. Capolino – M. Condemi, *Studi in materia bancaria e finanziaria,* novembre 1996.

n. 43 – Convegno *Per un diritto della concorrenza* (Perugia, giugno 1996), dicembre 1996.

n. 44 – *Crisi d'impresa, procedure concorsuali e ruolo delle banche,* marzo 1997.

n. 45 – Donatella La Licata, *La cessione di rapporti giuridici "individuabili in blocco" nell'art. 58 del T.U. bancario,* aprile 1997.

n. 46 – Paolo Ciocca – Antonella Magliocco – Matilde Carla Panzeri, *Il trattamento fiscale dei rischi sui crediti,* aprile 1997.

n. 47 – P. De Vecchis – G.L. Carriero – O. Capolino, M. Mancini, R. D'Ambrosio, *Studi in materia bancaria e finanziaria 1996,* settembre 1997.

n. 48 – Giuseppe Carriero, *Il credito al consumo,* ottobre 1998 (esaurito).

n. 49 – *Fondamento, implicazioni e limiti dell'intervento regolamentare nei rapporti tra intermediari finanziari e clientela*, marzo 1999.

n. 50 – A. Magliocco – D. Pitaro – G. Ricotti – A. Sanelli, *Tassazione del risparmio gestito e integrazione finanziaria europea*, settembre 1999.

n. 51 – Enrico Galanti, *Garanzia non possessoria e controllo della crisi di impresa: la* floating charge *e l'*administrative receivership*,* gennaio 2000.

n. 52 – *Bankruptcy Legislation in Belgium, Italy and the Netherlands* (Brussels, 7 July 2000), giugno 2001.

n. 53 – Vincenzo Troiano, *Gli Istituti di moneta elettronica,* luglio 2001.

n. 54 – Stefano Cappiello, *Prospettive di riforma del diritto di recesso dalle società di capitali: fondamento e limiti dell'autonomia statutaria,* luglio 2001.

n. 55 – Bruna Szego, *Il* venture capital *come strumento per lo sviluppo delle piccole e medie imprese: un'analisi di adeguatezza dell'ordinamento italiano,* giugno 2002.

n. 56 – AA.VV., *Diritto Societario e Competitività in Italia e in Germania*, luglio 2003.

n. 57 – Gianmaria Marano, *I patrimoni destinati in una prospettiva di analisi giuseconomica*, giugno 2004.

n. 58 – Enrico Galanti e Mario Marangoni, *La disciplina italiana dei* Covered Bond, giugno 2007.

n. 59 – Marco Mancini, Vincenza Profeta e Nicola De Giorgi, *La Centrale d'Allarme Interbancaria nella disciplina sanzionatoria dell'assegno*, settembre 2007 (esaurito).

n. 60 – Marcello Condemi e Francesco De Pasquale, *Lineamenti della disciplina internazionale di prevenzione e contrasto del riciclaggio e del finanziamento del terrorismo*, febbraio 2008.

n. 61 – Bruna Szego, *Le impugnazioni in Italia: perché le riforme non hanno funzionato?*, luglio 2008.

n. 62 – Renzo Costi e Francesco Vella, *Banche, governo societario e funzione di vigilanza*, settembre 2008.

n. 63 – Marco Mancini e Marino Perassi, *Il nuovo quadro normativo comunitario dei servizi di pagamento. Prime riflessioni*, dicembre 2008.

n. 64 – Enrico Galanti, *Discrezionalità delle autorità indipendenti e controllo giudiziale*, giugno 2009.

n. 65 – David Pitaro, *Le disposizioni italiane di contrasto all'elusione fiscale internazionale*, luglio 2009.

n. 66 – Cristina Giorgiantonio, *Le riforme del processo civile italiano tra* adversarial system *e* case management, settembre 2009.

n.66en – Cristina Giorgiantonio, *Civil procedure reforms in Italy: concentration principle, adversarial system or case management?*, September 2009.

n. 67 – Olina Capolino e Raffaele D'Ambrosio, *La tutela penale dell'attività di Vigilanza*, ottobre 2009.

n. 68 – Giuseppe Boccuzzi, *I sistemi alternativi di risoluzione delle controversie nel settore bancario e finanziario: un'analisi comparata*, settembre 2010.

n. 69 – AA.VV., *Insolvency and Cross-border Groups. UNCITRAL Recommendations for a European Perspective?*, febbraio 2011.

n. 70 – Bruno De Carolis, *L'Arbitro bancario finanziario come strumento di tutela della trasparenza*, giugno 2011.

n. 71 – Giuseppe Boccuzzi, *Towards a new framework for banking crisis management. The international debate and the italian model*, ottobre 2011 (esaurito).

n. 72 – *Legislazione bancaria, finanziaria e assicurativa: la storia, il presente, il futuro*. Atti della conferenza tenutasi a Roma il 14 ottobre 2011, ottobre 2012.

n.72app – Enrico Galanti, *Cronologia della crisi 2007-2012,* maggio 2013.

n. 73 – Marco Mancini, *Dalla vigilanza nazionale armonizzata alla* Banking Union*,* settembre 2013.

n. 74 – Raffaele D'Ambrosio, *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings*, dicembre 2013.

n. 75 – *Dal Testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri.* Atti del convegno tenutosi a Roma il 16 settembre 2013, marzo 2014.

n. 76 – Giuseppe Napoletano, *Legal aspects of macroprudential policy in the United States and in the European Union,* giugno 2014.

n. 77 – Nicola De Giorgi e Maria Iride Vangelisti, *La funzione di sorveglianza sul sistema dei pagamenti in Italia – Il provvedimento della Banca d'Italia del 18.9.2012 sui sistemi di pagamento al dettaglio,* settembre 2014.

n. 78 – Raffaele D'Ambrosio, *The ECB and NCA liability within the Single Supervisory Mechanism,* gennaio 2015.

n. 79 – Marco Lamandini – David Ramos Muñoz – Javier Solana Álvarez, *Depicting the limits to the SSM's supervisory powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection,* novembre 2015.

n. 80 – Luigi Donato, *La riforma delle stazioni appaltanti. Ricerca della qualità e disciplina europea,* febbraio 2016.

n. 81 – Raffaele D'Ambrosio, *Scritti sull'Unione Bancaria,* luglio 2016.

n. 82 – *Gustavo Bonelli, Un giurista in Banca d'Italia,* dicembre 2017.

n. 83 – *Qualità ed efficienza nel nuovo codice dei contratti pubblici. Prospettive e questioni aperte,* aprile 2018.

n. 84 – *Judicial review in the Banking Union and in the EU financial architecture. Conference jointly organized by Banca d'Italia and the European Banking Institute,* giugno 2018.

n. 85 – *The role of the CJEU in shaping the Banking Union: notes on Tercas (T-98/16) and Fininvest (C-219/17),* maggio 2019.

n. 86 – *A 20 anni dal TUF (1998-2018): verso la disciplina della Capital Market Union?,* agosto 2019.

n. 87 – Fabrizio Maimeri e Marco Mancini, *Le nuove frontiere dei servizi bancari e di pagamento fra PSD2, criptovalute e rivoluzione digitale,* settembre 2019.

n. 88 – Raffaele D'Ambrosio, *Law and Practice of the Banking Union and of its governing Institutions (Cases and Materials)*, aprile 2020.

n. 89 – Luigi Donato, *Gli appalti pubblici tra istanze di semplificazione e normativa anticorruzione. Alla ricerca di un equilibrio tra legalità ed efficienza*, giugno 2020.

n. 90 – Raffaele D'Ambrosio e Stefano Montemaggi, *Private and public enforcement of EU investor protection regulation*, ottobre 2020.

n. 91 – Raffaele D'Ambrosio e Donato Messineo, *The German Federal Constitutional Court and the Banking Union*, marzo 2021.

n. 92 – Raffaele D'Ambrosio, Francescopaolo Chirico, Leonardo Droghini e Giuseppe Pala, *Pandectae. Digest of the case-law on the Banking Union – Jan-Jun 2022*, dicembre 2022.

n. 93 – Vincenza Profeta, *Competition and Payment Services. Conference Papers,* dicembre 2022.

n. 94 – Giuseppe Napoletano, *An EU Legal Framework for Macroprudential Supervision through Borrower-Based Measures. Conference Papers,* febbraio 2023.

n. 95 – Olina Capolino, *Le crisi bancarie: risoluzione, liquidazione e prospettive di riforma alla luce dell'esperienza spagnola e italiana – Crisis bancarias: resolución, liquidación y perspectivas de reforma a la luz de la experiencia española e italiana,* aprile 2023.

n. 96 – Raffaele D'Ambrosio, Francescopaolo Chirico, Leonardo Droghini e Giuseppe Pala, *Pandectae. Digest of the case-law on the Banking Union – Jul-Dec 2022*, maggio 2023.

n. 97 – Olina Capolino, *Regole di settore,* compliance *e responsabilità da reato: l'applicazione del d.lgs. n. 231/2001 alle società bancarie,* maggio 2023.

n. 98 – Raffaele D'Ambrosio, Francescopaolo Chirico, Leonardo Droghini e Giuseppe Pala, *Pandectae. Digest of the case-law on the Banking Union – Jan-Jun 2023,* dicembre 2023.

n. 99 – Alberto Urbani, Roberto Natoli e Diego Rossano, *A 30 anni dal Testo unico bancario (1993-2023): The Test of Time. Atti dei workshops*, febbraio 2024.

n. 100 – Marino Perassi, Maddalena Rabitti, Filippo Sartori e Vincenzo Troiano, *A 30 anni dal Testo unico bancario (1993-2023): The Test of Time. Atti del convegno*, marzo 2024.