THE ROLE OF THE ECB IN THE SUPERVISION OF CREDIT INSTITUTIONS

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1. Introduction

Since the launching of the EMU in the Maastricht Treaty, the unification of the supervision of credit institutions has been a delayed issue. In this context, Article 127(6) TFEU contained not only a potential competence but was the harbinger of an unavoidable future: 'The Council, (…) may unanimously, (…) confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions'. However, many member states resisted such a move for two decades. National (or sometimes protectionist) interests blocked this possibility. The supervision of banks gave the national authorities some capacity to influence their lending policies, and this was very appreciated taking into account that (what today is) Article 124 TFEU prohibits privileged access to credit to public authorities. This was a huge and tempting power and it is easy to understand why governments would resist relinquishing such an authority. Besides, the economic burden of the restructuring of a credit institution would be mainly borne by national taxpayers, and there were reasonable concerns about the democratic control of decisions which had such important budgetary repercussions.

The advantages of this centralization of supervisory functions are varied and diverse:

a) The creation of a level playing field for competition among credit institutions which share not only a single market but even a single currency[1]. You avoid the 'race to the bottom' of regulatory standards in order to attract financial business, but above all, you apply the same supervisory standards for entities competing in the same market.

b) The facilitation of cross-border mergers and acquisitions of credit entities and therefore of a more dynamic financial market. It is easier to accept the acquisition of a national credit institution by a foreign entity if this fact does not mean losing the competence to supervise such institution for the benefit of another member state.

c) Supervision will be performed more objectively because it will not be influenced by the nationality of the bank and the identity of the member state that has to pay most of the economic consequences of its potential restructuring.

d) The supervision of financial conglomerates becomes much easier, at least with regard to the Eurozone, because a single supervisor enjoys direct access to the information of the activities of these entities in the different member states.

In spite of all these arguments, a financial crisis like the one that the EU has suffered since 2008 was necessary to gather sufficient political will to make this centralization of supervisory powers in the ECB possible. The evidence that many national supervisors had not provided all the information available to them in order to protect the position of some of the national credit institutions, and the important differences of criteria when

[1] For a review of the fragmentation of European financial services markets see David Howarth/ Luicia Quaglia, 'Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary Union', 51 JCMS 103 (2013) 104-107.

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judging the situation of the same entity depending on the nationality of the supervisor, among other problems, required speedy action to restore the confidence of the markets in the European banking industry.

In this context, the Single Supervisory Mechanism (SSM) appears as an essential component to provide credibility to the Banking Union. Together with a common system for deposit protection[2], and an integrated scheme for bank crisis management[3], the SSM sends the signal that European banks will not have recourse often to these two other instruments because they will be better supervised, or at the least, more objectively supervised. Before being placed under the supervision of the ECB, European banks have been obliged to strengthen their capital structure[4] and have had to succeed in stress tests that challenged their resilience to potential negative financial scenarios[5]. In this way, the SSM helps to break the link between sovereign debt and bank debt that has caused so much damage to some member states' public finances[6]. Experience demonstrated that the three European Supervisory Authorities created in 2010 lacked the powers to achieve this objective[7].

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[2] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ L 173/149, 12 June 2014).

[3] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (OJ L 173/190, 12 June 2014), Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (OJ L 225/1, 30 July 2014), and Agreement on the transfer and mutualisation of contributions to the Single Resolution fund (Council Doc. 8427/14, 15 May 2014).

[4] This was done through the adoption of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (OJ L 176/338, 27 June 2013) and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (OJ L 176/1, 27 June 2013). Both texts implement the international standards established in the 'Basle III agreement' agreed by Basle Committee on Banking Supervision (see http://www.bis.org/bcbs/basel3.htm, last visited October 2014).

[5] A comprehensive assessment of the quality of European bank's capital structure and balance sheet has been under way in 2014. The European Banking Authority published in April 2014 the methodology and macroeconomic scenarios that it would use to test banks' resilience to hypothetical external shocks (the different texts are published in https://www.eba.europa.eu/-/eba-publishes-common-methodology-and-scenario-for-2014-eu-banks-stress-test) and, in coordination, the ECB developed an asset quality review which included the adequacy of asset and collateral valuation (ECB, Note on the Comprehensive Assessment, April 2014, available in http://www.ecb.europa.eu/pub/pdf/other/notecomprehensiveassessment201404en.pdf?f76543999bdb25be25521bd9728f41d8). On 26 October 2014 the ECB made public the results of this examination and detected a capital shortfall of 25 billion euros in 25 of the 130 participant banks (the Comprehensive assessment can be found in https://www.bankingsupervision.europa.eu/banking/comprehensive/html/index.en.html, last visited October 2014).

[6] Valerie de Bruyckere/ Maria Gerhardt/ Glenn Schepens/ Rudi Vander Vennet, 'Bank/sovereign risk spillovers in the European debt crisis', 37 Journal of Banking & Finance 4793 (2013).

[7] The supervision of financial entities continued to be a national competence as a general rule, in spite of the EBA capacity to take decisions directly addressed to financial institutions in certain cases or to settle disagreements between competent authorities (Articles 17, 18, 19 and 20 of Regulation (EU) No 1093/2010 of 24 November 2010, establishing a European Supervisory Authority, OJ L 331/12, of 15.12.2010). In most cases, it was not possible for the European authority to remedy decisions taken for political considerations or influenced by the nationality of the supervised entity. See Martin Merlin, 'Le nouveau système européen de supervision financière', 1 Revue du droit de l'Union Européenne 17, 27-37 (2011); Stavros Hadjiyianni, 'La surveillance prudentielle des établissements de crédit dans l'Union européenne, vers une re-régulation après la crise financière ?', 552 Revue de l'UE (2011) 577, 586-588 ;

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The Commission presented its proposal in September 2012[8] and the negotiation was relatively quick because of the pressure exerted by the markets on the public debt of several member states. The new Regulation (SSM Regulation) was adopted a year later on 15 October 2013[9], together with the Regulation that reformed the European Banking Authority to adapt its functioning to the new situation after the centralization of supervisory competencies in the ECB[10].

The purpose of this contribution is to summarize the broad lines of the SSM in the next section, so that we can draw the contour in which to comment in the following sections on some more specific issues that have generated controversy and are inspiring the public debate: the criteria to select the credit institutions supervised by the ECB (section 3), the decision-making procedure in the ECB and the position of non-euro member states (section 4), the separation of supervisory and monetary functions (section 5), the relationship between the ECB and the national competent authorities (section 6), the structure of democratic accountability in the new supervisory system (section 7), and the distribution of normative functions between the EBA, the ECB and the Commission (section 8). Some final remarks on the future of the SSM put an end to this chapter.

2. A General Overview of the system

This chapter will not deal with the debate on whether it would have been preferable to centralize the supervisory functions in an independent European Supervisory Agency rather than in the ECB. Although there were powerful arguments to defend the advantages of an independent Agency[11], it is understandable that under the urgencies of the financial crisis it was easier and quicker to resort to the already existing ECB: in the first place, it avoided the creation of a new organ whose powers would be limited by the Meroni doctrine[12], and in the second place, this option was also facilitated because there was a specific legal basis in the Treaty enabling this transfer of competencies (Article 127(6) TFEU)[13]. Of course, all this does not mean that in the future, if there is consensus for that policy change, the supervisory functions are severed from the ECB and placed in an independent European agency (based on the present Supervisory Board).

Donato Masciandaro, Maria Nieto and Marc Quintyn, Exploring Governance of the New European Banking Authority: a Case for Harmonization?, 7 Journal of Financial Stability 204 (2011).

[8] COM (2012) 511 final of 12.9.2012.

[9] Regulation (EU) No 1024/2013 of 15.10.2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63 of 29.10.2013.

[10] Regulation (EU) No 1022/2013 of 22.10.2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), OJ L 287/5 of 29.10.2013.

[11] In the past, this author proposed the creation of an independent European Supervisory Agency arguing that the excessive independence of the ECB might question the democratic accountability of the supervisory authorities, the existence of a relative conflict of interests between the macro-prudential control of the stability of the financial system and the micro-prudential control of credit entities (including consumers' protection), and the unnecessary option against the unification of supervision of the different sectors of financial markets at the European level (Luis M. Hinojosa Martínez, 'La unificación de la supervisión prudencial de las entidades de crédito en la Unión Europea', 5 Revista Española de Derecho Europeo 91-122 (2003)).

[12] On the Meroni doctrine, see infra note 37.

[13] Gianni Lo Schiavo, 'From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe? The Stability Function of the Single Supervisory Mechanism', 21 Maastricht Journal of International and Comparative Law 110, 120-122 and 137-138 (2014).

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The SSM is designed as a coherent system integrated by both the ECB and the national authorities (NAs) of participating Member States which act in coordination. The ECB assumes the competence to directly supervise 'significant' credit institutions, while NAs remain in charge of the supervision of 'less significant' credit institutions (this distinction between significant and less significant entities will be commented below). The ECB receives several instruments to guarantee the consistent functioning of the SSM:

a) The ECB will be the only competent authority in the participating member states to grant and withdraw authorisations for all credit institutions and to assess acquisitions of qualifying holdings in all credit institutions.
b) The ECB has the power to address general instructions to NAs concerning the exercise of their supervisory competences over 'less significant' credit entities
c) The ECB enjoys investigatory powers over all supervised entities in the participating member states, such as the authority to require all necessary information, conduct investigations, and on-site inspections.
d) The ECB may at any time decide to exercise directly itself all relevant supervisory powers over one or more 'less significant' entities when it considers it necessary to ensure a consistent application of the European supervisory standards.

The relationship between the ECB and the NAs in the ordinary implementation of its supervisory tasks reflects the experience of cooperation already developed in the monetary field with the national central banks. The ECB relies in the long-established expertise of NAs, whose staff will support the ECB in the daily implementation of its supervisory functions and assessments (Article 6(3) SSM Regulation) and will cooperate in the on-site verifications (Article 12 SSM Regulation).

Member states outside the euro-area may also participate in the SSM through the establishment of a 'close cooperation' between the ECB and the NAs[14]. They must accept to implement fully and without delay the supervisory guidelines and decisions of the ECB, comply with the ECB's information requirements and adopt the relevant national legislation (Article 7(2) SSM Regulation). However, an opt-out procedure is established for these non-euro area participating member states in case that they irrevocably disagree with a draft decision of the SB, or with an objection of the Governing Council to a draft decision of the SB (Article 7(7) and (8) SSM Regulation).

The ECB and the NAs of member states not participating in the SSM have to conclude a memorandum of understanding organizing their cooperation, especially as regards cross-border banking activities and the management of emergency situations (Article 3(6) SSM Regulation). The EBA keeps its competences of supervisory coordination within the whole European Union.

[14] The 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), lays down the procedure for the establishment, suspension or termination of a close cooperation. Regulation (EU) No 468/2014 of 16 April 2014, establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (Framework Regulation), OJ L 141/1 of 15 May 2014, regulates the procedures relating to the operation of close cooperation (Articles 106 to 119).

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Supervisory decisions of the ECB can be questioned in an internal administrative review (article 24 SSM Regulation) or challenged before the CJEU (Article 263 TFEU and Article 24(11) SSM Regulation).

3. The selection of the credit institutions to be supervised by the ECB

The original proposal of the Commission conferred the power to supervise 'all credit institutions established in the participating Member States' on the ECB[15]. However, some member States, led by Germany, preferred that the ECB did not get involved in the supervision of small entities without systemic relevance[16]. The final compromise was reached on the basis that the ECB would only supervise systemic credit institutions, but that specific quantitative criteria would be established to identify those institutions, thereby diminishing the role of political bargaining in their identification[17].

Thus, the SSM Regulation (Article 6) distinguishes between 'significant' and 'less significant' credit institutions of the participating countries. While the significant institutions are supervised by the ECB, the less significant banks continue, in principle, to be supervised by the competent national authorities. A credit institution is considered significant in any of these cases:

(a) When the total value of its assets exceeds 30 billion euros[18].
(b) When the ratio of its assets exceeds 20% of the GDP of the participating Member State of establishment and the total value of its assets is not below 5 billion euros[19].
(c) When the institution is considered important for the economy of the Union or any participating Member State[20]. A specific procedure is established whereby national competent authorities may ask the ECB to consider an institution of significant relevance for the domestic economy. In any case, the ECB will supervise 'the three most significant credit institutions in each of the participating Member States, unless justified by particular circumstances'[21].

[15] Article 4(1), supra note 8.
[16] The arguments of these member states focussed on the technical difficulties that a European institution would encounter to supervise thousands of entities which developed merely regional or even local activities, but the interest to keep these smaller entities outside the European radar also had to do with the desire to maintain elements of political decentralization in these countries and to preserve this atomized sector of the banking system for its social role in spite of its capitalization weaknesses. These political considerations finally had more weight in the drafting of the SSM Regulation than the potential systemic consequences of the simultaneous collapse of small institutions.
[17] The criteria to determine the systemic character of a credit institution are debatable. This is not only because different countries have used diverse parameters to identify the systemic character of a financial entity (See the Background Paper 'Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations', prepared for the G-20 by the Staff of the International Monetary Fund, and the Bank for International Settlements, and the Secretariat of the Financial Stability Board in October 2009, available at http://www.bis.org/publ/othp07b.pdf), but because of inconsistencies between the accounting or other standards utilized to identify their systemic importance. In this context, at the request of the G-20, the FSB is developing an initiative since 2009 to improve the collection, sharing and comparability of the information gathered from global systemically important financial institutions in order to provide a better and wider perspective to supervisory and macroprudential authorities (FSB Data Gaps Initiative, with information available at http://www.financialstabilityboard.org/list/fsb_pa/tid_168/index.htm). Additionally, the FSB has published a list of global systemically important financial institutions regularly updated since 2011.
[18] Articles 50-55 Framework Regulation.
[19] Article 56 Framework Regulation.
[20] Articles 57-58 Framework Regulation.
[21] Articles 65-66 Framework Regulation.

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The calculations made to determine whether a bank has to be considered significant must be based on consolidated data ('at the highest level of consolidation')[22], and the individual supervision of the ECB extends to all the subsidiaries and branches of significant institutions in the participating member states. On the contrary, if a credit institution of a non-participating member state establishes branches in participating member states, the latter are considered individually to determine their 'significance'[23].

Additionally, the ECB also supervises:

(d) Credit institutions with significant cross-border activities in various participating member states[24].
(e) Credit institutions that have requested or received European financial assistance directly[25]. The European Parliament requested that any bank receiving public assistance should pass to be supervised by the ECB, but this proposal was not introduced in the final text[26], and Article 3(5) SSM Regulation merely states that 'the ECB shall cooperate closely with any public financial assistance facility'.

The coherence of the system is guaranteed because the national competent authorities, in the exercise of their supervisory powers, must follow the guidelines issued by the ECB[27]. They must bear in mind that the ECB may decide 'at any time' to assume directly the supervision of any credit institution that had previously been classified as less significant when it considers it necessary to ensure the consistent application of its supervisory standards[28]. On the contrary, the ECB may also decide that 'particular circumstances'[29] justify the classification as less significant of an entity that meets the requirements established in Article 6(4) SSM Regulation to be considered 'significant'[30]. In both cases, the ECB seems to enjoy a wide margin of discretion. The granting of the last word to the ECB in these cases seeks to avoid regulatory arbitrage[31] and the appearance of significant competition distortions as a result of the co-existence of two different supervisory authorities in the participating member states.

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[22] Article 6(4) SSM Regulation and article 8 Framework Regulation.
[23] Ibid. See also article 4(2) SSM Regulation.
[24] Articles 59-60 Framework Regulation.
[25] Articles 61-64 Framework Regulation. If a credit institution receives financial assistance indirectly from the ESM (i.e. through a loan to a member state), the ECB may also decide to take over the supervision of such entity (Article 6(5)(b) SSM Regulation).
[26] Bulletin Quotidien Europe, No 10766, 18 January 2013, 7.
[27] As already said, the ECB has exclusive competence to authorize or to withdraw authorizations, and to assess notifications of the acquisition and disposal of qualifying holdings with regard to all credit institutions (significant or not) of the participating members states in order to reinforce the consistency of the system (Article 6(4) SSM Regulation).
[28] Article 6(5)(b) SSM Regulation and articles 67-69 Framework Regulation.
[29] The Framework Regulation does not specify what these particular circumstances can be, but it only indicates that 'the term "particular circumstances" shall be strictly interpreted' (Article 70(2)).
[30] Five entities that met one of the criteria to be considered as significant were nevertheless classified as less significant by the ECB in its first official list of supervised entities (see infra note 33).
[31] Part of the supervisory legislative framework continues to be national (Article 4(3) SSM Regulation). However, it is to be expected that the ECB will implement these different pieces of national legislation in a harmonious way. See Andreas Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?', 21 Maastricht Journal of International and Comparative Law 89, 107 (2014).

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The ECB issued a provisional list of significant entities in October 2013 according to the quantitative criteria established in Article 6(4) SSM Regulation[32], and left for a later stage the identification of additional systemic banks according to other criteria of the same provision that involve supervisory judgment. In September 2014, the ECB published its definitive first list of supervised entities and supervised groups[33] that will be updated on a regular basis. Only 119 credit entities (out of the approximately 6000 existing in the Eurozone) are included in this list. However, according to the ECB's estimation, they represent 82% of the banking assets of the euro area.

4. Decision–making and the position of non-euro member states

The Governing Council is the main decision-making body of the ECB and, as such, it is the organ that has to adopt formally the supervisory decisions of the ECB. However, in order to keep the monetary functions separate from the supervisory tasks, a Chinese wall has been built up inside the ECB, that now hosts two independent organic structures (Article 25 of the SSM Regulation). Focussing on the supervisory structure, a Supervisory Board (SB) has been created. This 'internal body'[34] of the ECB is composed of:

a) A Chair (an independent individual appointed by the Council but proposed by the ECB and accepted by the European Parliament),
b) A Vice-Chair (a member of the ECB's Executive Board also appointed by the Council but proposed by the ECB and accepted by the European Parliament),
c) Four representatives of the ECB (that cannot perform duties directly related to the monetary functions and appointed by the Governing Council), and
d) One representative of the national competent authority from each participating Member State.

As the decisions of the SB are normally[35] taken by simple majority and each member has one vote, it is clear that the national authorities enjoy a pre-eminent role in the decision-making. Nevertheless, the supranational context of this decision-making and its highly technical background provide an environment that favours objectivity.

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[32] ECB, Note: Comprehensive Assessment, 23 October 2013 (available at http://www.ecb.europa.eu/ssm/assessment/html/index.en.html, last visited November 2014) and Decision 2014/123/EU of the ECB identifying the credit institutions subject to the comprehensive assessment (OJ L 69/107 of 8 March 2014).
[33] ECB, The List of Significant Supervised Entities and the List of Less Significant Institutions, Update of 4.9.2014, available at https://www.ecb.europa.eu/pub/pdf/other/ssm-listofsupervisedentities1409en.pdf?7f491a3d1ffd265b97f0ed2d9a7d939e, last visited November 2014. To avoid repeated alternations of supervisory authorities deriving from an institution's assets fluctuations, a moderation rule has been established: 'the shift in status from less significant to significant is triggered if just one criterion is met in any one year, [however] a significant group or credit institution will only qualify for a reclassification as less significant if the relevant criteria have not been met over three consecutive calendar years' (ECB, Guide to Banking Supervision, November 2014, 11, available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf?404fd6cb61dbde0095c8722d5aff29cd, last visited November 2014).
[34] Article 26(1) SSM Regulation.
[35] With the exception of some normative acts (article 26(7) SSM Regulation) where a qualified majority is required. During the negotiations, France and Germany pressed for a qualified majority voting for horizontal decisions (as opposed to executive decisions affecting single entities).

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In any case, the SB only prepares 'complete draft decisions' to be adopted by the Governing Council and we have to bear in mind that only the countries of the eurozone are represented in the last organ. Although the original Commission proposal envisaged the possibility of the Governing Council delegating certain supervisory tasks and related decisions to the SB[36], this was not finally retained in the SSM Regulation as it would be difficult to reconcile with the case-law of the ECJ regarding the delegation of discretionary decisions to European agencies (Meroni doctrine)[37]. Thus, during the negotiations in the Council, the Cypriot Presidency proposed a decision-making procedure in which the Governing Council would always formally take the supervisory decisions, but to do so it could only approve or object (but not modify) the draft proposals of the SB[38]. Furthermore, to object to a draft decision of the SB, the Governing Council had to state its reasons in writing (Article 26(8) SSM Regulation). In this way, the SB became an unavoidable part of the decision-making process and, in practice, a co-decision-making body[39].

Although these conditions were introduced to facilitate the acceptance of the decision-making procedure by the member states outside the eurozone, in fact, however, this negative decision-making capacity of the Governing Council does not substantially cut back its executive/normative power as it is to be expected that in case of rejection, the SB shall change its proposal taking into account the concerns expressed by the Governing Council[40]. As happens when the European Parliament has to give its consent in a special legislative procedure (Article 289(2) TFEU), its right of veto allows this institution to negotiate in practice amendments to the piece of legislation to be adopted. The mediation panel envisaged in Article 25(5) SSM Regulation is the forum where this negotiation should take place. Thus, non eurozone member states such as Poland, Czech Republic or Sweden found that this decision-making procedure still did not protect their position appropriately[41].

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[36] Article 19(3), COM (2012) 511.

[37] The old Meroni doctrine was established in Case 9/56 *Meroni v. High Authority* [1958] ECR 135. According to this case-law, the lawful delegation of powers to independent European agencies by the European institutions was conditioned to a precise delimitation of the powers conferred, an efficient mechanism of control by the delegating institution, the possibility of judicial review, and the absence of transfer of political responsibility. However, more recent case-law distinguishes between 'European Union entit[ies], created by the EU legislature' and private entities (as was the case in *Meroni*). If we take into account that all the binding decisions of these EU entities are now subject to judicial control (article 263 TFEU), in a situation where highly technical factual assessments are necessary, and where the factors to take into account to make the decisions and the kind of measures to be adopted are precisely delineated in the delegating act, the requirements laid down in Meroni are to be considered as respected (Case C-270/12 *United Kingdom v. European Parliament and Council* [2014] paras 41-53). Although this judgment softens the conditions for the delegation of powers in EU agencies, the degree of discretionality involved in banking supervision would make it practically impossible that a fully independent Supervisory Board pass the Meroni test. On this debate see Pieter Van Cleynenbreugel, '*Meroni* Circumvented? Article 114 TFEU and EU Regulatory Agencies', and Rob Van Gestel, 'European Regulatory Agencies Adrift?', both in 21 Maastricht Journal of International and Comparative Law (2014) 64 and 188.

[38] Council Doc. 15663/12, of 6 November 2012, at 4.

[39] The short timeframe in which the Governing Council has to object (ten working days or 48 hours in emergency situations- article 26(8) SSM Regulation) makes us think that most supervisory decisions will be deemed approved by its silence, because its members will not have time to review day to day supervision. In the logic of this procedure, only when macroeconomic (or more specifically monetary) objectives are at stake will the Governing Council have a relevant incentive to intervene.

[40] Eurozone member states represented in the ECB Governing Council make up the majority of the SB.

[41] *Bulletin Quotidien Europe*, No 10727 of 10 November 2012, 7-8.

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Under these difficult circumstances, and in order to achieve wider consensus, a further guarantee was introduced to safeguard the position of non-euro area member states: a right of retreat that gives them the possibility not to be bound by a decision taken in the SSM. This opt-out clause has different modalities:

a) The non-eurozone member state may request the ECB to terminate close cooperation at any time after a lapse of three years (Article 7(6) SSM Regulation);
b) If the Governing Council rejects a proposal of the SB, a participating member state whose currency is not the euro may decide not to be bound by a subsequent amended draft decision by the Supervisory Board, and the ECB may then choose to terminate the close cooperation with such Member State (Article 7(7) SSM Regulation and Article 119 Framework Regulation);
c) The non-eurozone member state may disagree with a draft decision of the Supervisory Board and if such decision is supported by the Governing Council, the said member state can request the ECB to terminate the close cooperation with immediate effect and it will not be bound by the ensuing decision (Article 7(8) SSM Regulation and Article 118 Framework Regulation).

Is this enough to attract member states outside the Eurozone to the SSM? It will depend on the member state and on the characteristics of its banking system[42], but there are important incentives that increase the SSM's drawing power. In the first place, the supervision of the ECB is a condition for the participation in the Single Resolution Mechanism and the Single Resolution Fund[43], and this safety net appears as one of the most interesting elements of the SSM. Secondly, it may be positive for the reputation of the financial institutions of some member states outside the Eurozone to be supervised by the ECB (this could mean a better rating by the credit agencies, improved capacity to raise financing, etc.). The option to join the SSM may also depend on the number of credit institutions that would be considered 'significant' and would therefore pass to be supervised by the ECB. In practice, branches and subsidiaries of banks established in the Eurozone (to be supervised on a consolidated basis by the ECB[44]) represent a great part of the banking system of some non-Eurozone member states, and joining the SSM would give them a chance to improve their supervisory outreach. And finally, the opt-out clause preserves what we could call supervisory sovereignty[45], because no decision will be finally imposed on a member state against its will.

Under these circumstances, it is expected that several non-eurozone member states will participate in the SSM[46]. Nevertheless, this display of legal engineering does not seem enough to safeguard the interests of a country such as the UK, with a strong confidence

[42] Aneta B. Spendzharova, 'Banking union under construction: The impact of foreign ownership and domestic bank internationalization on European Union member-states' regulatory preferences in banking supervision', 21 *Review of International Political Economy* 949 (2014).
[43] See Article 4 of the Regulation (EU) 806/2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund, OJ L 225/1 of 30 July 2014, and of European Parliament, Doc. P7_TA(2014)0341, 15 April 2014. In May 2014, 26 member states had signed the Intergovernmental Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, an essential part of the Single Resolution Mechanism.
[44] Article 4(1)(g) SSM Regulation.
[45] Eddy Wymeersch, The Single Supervisory Mechanism or "SSM", Part One of the Banking Union, ECGI Working Paper Series, No. 240/2014, 61.
[46] At the time of writing Denmark was negotiating its possible participation in the SSM.

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in its supervisory system, and that has made a political choice to defend the singularity of its financial market[47]. In fact, no country outside the Eurozone will participate in the SSM if it thinks that there is a real possibility that it will use the opt-out clause, because this escape could severely damage the credibility of its supervisory policy and, ultimately, the rating of its national banks. Therefore, the opt-out clause represents a bet on the smooth functioning of the different procedures put in place to settle disagreements among supervisors, as it involves non-negligible risks for the SSM. The withdrawal of a non-eurozone member state could not only have negative consequences for its own fiscal position or the prestige of its banks, but it could also undermine the confidence of the markets on the real authority of the ECB in relation to the credit institutions of other non-eurozone member states that remained within the SSM.

5. The separation of supervisory and monetary functions

One of the main arguments against the centralization of the supervisory competences in the ECB was based on the difficulties of establishing a system that guaranteed that there would be no contamination between its supervisory and monetary functions. The ECB has built a strong reputation as a solid monetary authority, and it is essential that concerns related to the stability of systemic financial institutions or the liquidity of the inter-bank market do not lead to a relaxation of the monetary policy[48] (which has as 'primary objective' price stability – Article 127(1) TFEU).

The independence of the two functions is assured by a series of reiterative statements of principle in Article 25 of the SSM Regulation and by the establishment of separate administrative structures[49]: a two-tier division of the administrative staff organisationally separated, with distinct reporting lines. Even the professional secrecy and the information exchanges between the two areas are governed by public internal rules[50] (Article 25(3) SSM Regulation). Nevertheless, at the end of the decision-making process, the same Governing Council is taking the monetary decisions and confirming the supervisory decisions, even if it does so in different meetings and with a separate agenda (Article 25(4) SSM Regulation)[51].

Fifteen years ago there was a tendency towards separation between the monetary and supervisory functions in different institutions with the objective of isolating and safeguarding price stability. After the crisis, this trend has been reversed and several countries that opted for the severance of these policies are returning the supervisory functions to their central banks to enhance macroeconomic stability and better prevent systemic risks[52].

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[47] For a description of the British position and interests during the negotiation of the new legislation, see David Howarth/ Luicia Quaglia, supra note 1 at 114-117.

[48] Hugo Dixon, 'Mario Draghi's poisoned banking chalice', Reuters, 4 February 2013 (http://blogs.reuters.com/hugo-dixon/2013/02/04/mario-draghis-poisoned-banking-chalice/).

[49] The separation will even be physical, as the two parts of the ECB structure are placed in different buildings in Frankfurt.

[50] Decision of the ECB of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the ECB (ECB/2014/39).

[51] Although a mediation panel is created to resolve the differences when the Governing Council objects to decision of the Supervisory Board, the first has the last word and can impose its position.

[52] James R. Barth/ Daniel E. Nolle/ Apanard Parva, 'Banking Structure, Regulation, and Supervision in 1993 and 2013: Comparisons across Countries and over Time', 13 J. Int'l Bus. & L. 231 (2014); Donato Masciandaro/ María Nieto, Governance of the Single Supervisory Mechanism: Some Reflections, BAFFI

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In spite of the intense political and doctrinal debate on the possible contamination between the monetary and supervisory functions of the ECB[53], it is submitted here that this is, to some extent, an exaggerated discussion. The economic doctrine is divided as to whether it is better to keep the two functions in the same institution or to assign them to different ones[54]. Throughout the world, we find examples of both options that have worked successfully[55] and if there are reasonable arguments alerting the negative consequences of a conflict of interests, there are equally reasonable arguments to defend the positive synergies generated by keeping these two tasks in the same institution[56] (in both functions there is a common interest in maintaining or restoring the stability of the financial system, and the flow of information may improve the efficacy of the ECB in achieving its objectives[57]). And at the end of the day, the conflict of interests for the monetary authority also exists when it is not responsible for the prudential supervision of banks, as the present crisis has shown time and again[58].

Therefore, I think that the SSM Regulation contains a balanced solution by keeping this two-tier structure in the ECB, establishing an independent decision-making procedure for supervisory decisions, and giving the final word to the supreme monetary authority, the Governing Council, as it was legally necessary to respect the assignment of powers within the ECB made by the Treaty[59].

6. The relationship between the ECB and the national authorities

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Center Research Paper Series No. 2014-149, 4-9 http://ssrn.com/abstract=2384594 (accessed October 2014).

[53] Hellwig, Martin F., *Financial Stability, Monetary Policy, Banking Supervision, and Central Banking*, MPI Collective Goods Preprint, No. 2014/9, July 2014; G. Scherf, *Financial Stability Policy in the Euro Zone* (Springer 2014) 169-198; German Council of Economic Experts, Annual Report 2012-2013, 9 January 2013, § 301-304, http://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/Sonstiges/chapter_three_2012.pdf (accessed 2 October 2014).

[54] Chrysovalantis Gaganis/ Fotios Pasiouras, Financial supervision regimes and bank efficiency: International evidence, 37 Journal of Banking & Finance 5463 (2013); Alex Cukierman, 'Regulatory Reforms and the Independence of Central Banks and Financial Supervisors', in M. Balling/ E. Gnan/ P. Jackson (Eds), *States, Banks and the Financing of the Economy: Monetary Policy and Regulatory Perspectives* (Larcier 2013) 121-133; Christian Weistroffer, *Macroprudential Supervision: In Search of an Appropriate Response to Systemic Risk*, Deutsche Bank Research, 24 May 2012 (http://dbresearch.com/).

[55] See the World Bank's *Bank Regulation and Supervision Survey*, periodically published on its website as Policy Research Working Papers (in 2001, 2003, 2007 and 2013).

[56] In fact, the ECB has identified several business areas of its administration that will provide support both to its monetary and supervisory arms when there are common objectives and no conflicts of interest (Recital 11 and article 3(4) of Decision ECB/2014/39).

[57] Esther L. George, 'Supervisory Frameworks and Monetary Policy', Journal of Economics Dynamics and Control (forthcoming 2014); Karl Whelan, New Roles and Challenges for the ECB, September 2013 (http://www.karlwhelan.com/EU-Dialogue/Whelan-September-2013.pdf); Thorsten Beck/ Daniel Gros, Monetary Policy and Banking Supervision: Coordination instead of Separation, CEPS Policy Briefs No. 286, 12 December 2012.

[58] E.g. Thomas Beukers, 'The New ECB and its Relationship with the Eurozone Member States: between Central Bank Independence and Central Bank Intervention', 50 CMLRev. 1579 (2013); Philippe Herlin, Headed toward a conflict between Germany and the ECB?, 2 October 2014 (https://www.goldbroker.com/news/); Interview with Jens Weidmann published in Spiegel on 22 September 2014 (http://www.bundesbank.de/Redaktion/EN/Interviews/); German Council of Economic Experts, supra n. 53, § 300.

[59] Articles 9(3) and 12(1) of the Statute of the European System of Central Banks and of the ECB. See also n. 37 on the Meroni doctrine.

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The SSM can work properly only if there is intense cooperation between the ECB and the national competent authorities (NAs), a type of cooperation almost as coordinated as the one that takes place in monetary matters[60]. Although some elements of hierarchy have been introduced to safeguard the consistency of the system[61], this relationship is more complex than in the monetary field because the NAs enjoy certain discretion in the exercise of their supervisory competences, and because there are connected areas of national competence ancillary to prudential supervision beyond the reach of the ECB[62] (where the principle of sincere cooperation will apply – Article 4(3) TFEU). Besides, the fact that smaller non-systemic entities continue to be supervised at the national level allows taking advantage of the network and experience of NAs avoiding unnecessary centralization. Thus, we find here a new experiment of multilevel governance between direct European administration and national administration, less integrated than in the case of monetary policy but more centralized than in the application of competition law.

The cooperation between the ECB and NAs thus presents several complex aspects that may challenge the coherent functioning of the SSM:

A) There are many tasks on the boundaries of prudential supervision that remain in national hands, such as consumer protection or anti-money laundering procedures[63]. Therefore, the national authorities not only will continue to supervise the less significant banks, but will also have to help actively the ECB in supervising the significant banks and in exercising its supervisory competences that cover all credit institutions[64]. The expertise and human resources of the NAs will be particularly helpful in verification activities (Article 6(3) SSM Regulation) and on-site inspections (Article 13(4) and (5) SSM Regulation), above all if the ECB gets engaged in proceedings before the national judicial authorities[65].

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[60] This cooperation is legally developed in the already cited Framework Regulation (Regulation (EU) No 468/2014).

[61] As already said, the ECB gives general instructions to NAs as regards the exercise of their supervisory competences and it may take up all relevant supervisory powers over one or more 'less significant' entities when it considers it necessary. The ECB may also require that supervisory teams of NAs regarding a concrete credit institution also involve staff from NAs from other Member States (Article 31(2) SSM Regulation) and request, on an ad hoc or continuous basis, information from NAs on their supervisory performance.

[62] Article 1 SSM Regulation states that all supervisory tasks not conferred on the ECB continue to be exercised by the NAs, and Recital 28 contains a non-limitative list of these national competencies.

[63] Article 4(1) of the SSM Regulation describes the supervisory competences of the ECB as a closed list.

[64] E.g. while the ECB has exclusive competence to authorize the establishment of all credit institutions (significant or not) in the participating members states (Article 6(4) SSM Regulation), the original proposals have to be submitted to the NAs that will reject the applications if they do not comply with relevant national law. If the applicant complies with national law, then the NA sends a draft decision to the ECB proposing to grant the authorization. This decision shall be deemed adopted by the ECB unless it objects within a maximum period of ten working days, and it can only object if 'the conditions for authorization set out in relevant Union law are not met' (Article 14(3) SSM Regulation). It seems obvious that in the great majority of cases the ECB will simply rely on the assessment made by the NAs.

[65] Article 13 SSM Regulation envisages the possibility of the ECB engaging in proceedings before the national judicial authorities in relation to on-site inspections. While the national judicial authorities may control 'that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive (…) [they] shall not review the necessity for the inspection (…) [because] the lawfulness of the ECB's decision shall be subject to review only by the CJEU'. However, a national judicial decision finding that some ECB measures are 'excessive' might well endanger the efficacy of the inspection.

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B) Some parts of the prudential legislation have not been harmonized and the ECB will have to apply national legislation of each participating state. The experience of NAs in the implementation of these national norms and their knowledge of national case-law should help the ECB, who is nevertheless entitled to make its own interpretation. With time, a convergence in the understanding and application of these pieces of national law is to be expected, but they may create delicate problems during the first years of the SSM. Apparently, credit institutions can only challenge the lawfulness of the decisions of the ECB based on national law before the European judiciary[66] (Articles 263 TFEU and 24(11) SSM Regulation), a circumstance that may raise concerns as regards the right to effective judicial review[67]. However, Article 13 SSM Regulation shows that the national judges keep certain limited functions in the jurisdictional control of the ECB's supervisory activities on the basis of national law and only practice will unveil the real scope of this power. National judges can also review the acts of NAs when they use the powers conferred on them by national law even when they follow instructions from the ECB (e.g. Article 9(1) SSM Regulation)[68].

C) The porosity between the different sectors of the financial market will oblige the ECB to cooperate with national supervisors of the securities market[69] or of insurance companies to assess accurately the financial solidity of the supervised banks.

D) The ECB may not only impose fines for breaches of directly applicable EU law, but it may also ask the NAs to open proceedings to sanction banks or members of their management in questions of national competence when that is necessary to allow the ECB to carry out its supervisory tasks (Article 18(5) SSM Regulation).

Under these circumstances, it is easy to realize that an excellent understanding between the ECB and the national authorities is needed for the functioning of this Mechanism[70]. And in the absence of a complete single rulebook, there is clearly more room for disagreement in this field than in the context of monetary policy[71]. Until this single rulebook is completely achieved[72], during its first years of existence, we will see whether the institutional structure that has been built up resists the potential conflicts of interest or divergences between European and national supervisors (e.g. the joint assumption of responsibilities in case of a bank failure would appear as a symbol of the

[66] See Case 314/85, *Foto-Frost* [1987] ECR 4225 § 17, although the rationale behind 'the Court exclusive jurisdiction to declare void an act of a Community institution' was the need to ensure the uniform application of European law.

[67] In principle, the CJEU does not interpret national law and should judge the legality of the decisions of the ECB exclusively on the basis of European law (Case C-50/00 P, *UPA* [2002] ECR I-6677 § 43). However, this legal novelty of entrusting a European institution to apply and interpret national law may result in an evolution of this case-law (Benedikt Wolfers/ Thomas Voland, 'Level the Playing Field: the new Supervision of Credit Institutions by the European Central Bank', 51 CMLRev 1463, 1482-1485 (2014)).

[68] Witte, supra note 31 at 99-103.

[69] Article 3(1) SSM Regulation encourages the signature of MoUs between the ECB and the 'competent authorities of Member States responsible for markets in financial instruments'.

[70] Lo Schiavo, supra note 13, at 131-132.

[71] Niamh Moloney, 'European Banking Union: Assessing its Risks and Resilience', 51 CMLRev 1609 (2014) 1647-1648; Wolfers/Voland, supra note 67, at 1478.

[72] The Chair of the Supervisory Board has recognized that, in spite of the existence of a SSM's Supervisory Manual (though as internal staff document), 'there are still too many national options in CRD IV, meaning that the EU capital requirements regime may differ across Member States on a number of points' (Speech by Danièle Nouy at the OeNB Economics Conference, Vienna, 12 May 2014) (http://www.ecb.europa.eu/press/key/date/2014/html/sp140512_1.en.html last visited in October 2014).

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maturity and resilience of the system). The Commission will evaluate on December 2015, among other things, the division of tasks between the ECB and the NAs (Article 32(b) SSM Regulation).

7. Democratic accountability in the new supervisory system

The question of the ECB's democratic accountability has attracted much attention and discussions in the academic world in relation to its monetary functions[73]. However, the notion of democratic accountability has different features in the context of prudential supervision, because it manages different objectives which are more clearly influenced by political choices (as opposed to the more technical pre-eminent objective of monetary policy: price stability)[74]. In democratic systems, prudential supervision is more linked to the executive power and is usually subject to more parliamentary control mechanisms. Thus, as a general principle, the ECB is accountable to the European Parliament and to the Council in the exercise of its supervisory functions (Article 20(1) SSM Regulation).

The European Parliament has to approve the nomination of the Chair and Vice-Chair of the SB, although it acts only on the basis of a proposal of the ECB and the appointment is formally made by the Council (Article 26(3) SSM Regulation). The position of the European Parliament thus improves when compared to the procedure for the appointment of the ECB's Executive Board where it is only consulted. After the appointment, the Council by qualified majority may remove from office the Chair or the Vice-Chair[75] of the SB, following a proposal of the ECB and with the approval of the European Parliament (Article 26(4) SSM Regulation). The latter may initiate this procedure (as well as the Council) informing the ECB that it considers that the conditions for the removal of the Chair or the Vice Chair of the Supervisory Board from office are fulfilled, and the ECB is obliged to provide an explicit response to the request. As can be seen, in spite of the enhanced role of the European Parliament, the very independent Governing Council of the ECB keeps on having the key that opens the door to enter or exit the SB. However, it is difficult to imagine the ECB resisting a petition of removal coming from the European Parliament.

Besides that, the rest of the instruments of democratic control over the ECB are similar to those that we find in the context of monetary dialogue with the European Parliament and the Council, although they have been strengthened (Article 20 SSM Regulation). The ECB is not only obliged to publish different types of reports[76] and to participate in

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[73] Grégory Claeys/ Mark Hallerberg/ Olga Tschekassin, *European Central Bank Accountability: How the Monetary Dialogue could Evolve*, Bruegel Policy Contribution 2014/4, March 2014; Fritz W. Scharpf, 'Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability', in Armin Schäfer/ Wolfgang Streeck, *Politics in the Age of Austerity* (Wiley 2013) 108; Fabian Amtenbrink, *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank* (Hart Pub. 1999).

[74] Rosa M. Lastra, 'Banking Union and Single Market: Conflict or Companionship?', 36 Fordham Int'l L.J. 1190 (2013) 1218-1220.

[75] The dismissal of the Vice-Chair has to be preceded by 'compulsory retirement (…) as a member of the Executive Board, pronounced in accordance with the Statute of the ESCB and of the ECB' (Article 26(4) SSM Regulation).

[76] The ECB must submit an annual report on the development of its supervisory tasks to the European Parliament, to the Council, to the Commission and to the euro Group. This report is publicly presented to the European Parliament and to the euro Group by the Chair of the SB (Article 20(2) and (3) SSM Regulation).

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hearings and debates that will take place in the Eurogroup and in the European Parliament[77], but it also has to answer questions orally or in writing. Furthermore, the ECB assumes the duty to cooperate sincerely with any investigations by the European Parliament. An Interinstitutional Agreement has been concluded between the ECB and the European Parliament organising their relationship[78]. This agreement not only regulates the participation of the SBs' Chair in parliamentary sessions but also deals with many other things, such as the procedure for nominating the Chair and Vice-Chair of the SB, the rules ordering the access to information held by the ECB[79], the respective obligations of the ECB and the Committees of Enquiry established by the European Parliament or the information to be given to the latter as regards the ECB's management of conflicts of interest in the exercise of the supervisory competences.

Nevertheless, one of the most notorious and potentially problematic parts of this system of accountability relates to the role awarded to national parliaments (Article 21 SSM Regulation). They receive the ECB's annual report and may address their reasoned observations on that document to the ECB. Furthermore, the national parliaments not only have right to pose questions and obtain answers in writing from the ECB, but can also invite the Chair or a member of the SB to an exchange of views in relation to the supervision of credit institutions in their Member State (together with a representative of the national competent authority). Of course, all these provisions do not prejudice the functioning of other mechanisms of democratic control over the supervisory activities of NAs not conferred on the ECB.

At first sight, the capacity to convene a European authority by national parliaments can be seen as a wholesome reinforcement of the democratic accountability of the system[80]. However, the European Parliament already provides deliberative accountability and national taxpayers are also represented in that institution. Besides, the progressive articulation of a Single Resolution Fund[81] would shift the need for democratic control to the European level. While the provision of additional explanations and enhanced transparency are always welcome, a potential clash of legitimacies may appear when the European authority explains decisions taken in the general 'interest of the Union as a whole'[82] confronting potential conflicting arguments by national MPs who just defend the national interest. It is debatable whether this capacity of national parliaments to exercise pressure on the supervisory policy applied in their countries may endanger the

[77] At the request of the euro Group or the European Parliament the Chair of the SB will participate in hearings on the ECB's supervisory performance. Again upon request, the Chair of the SB shall hold confidential oral discussions behind closed doors with the Chair and Vice-Chairs of the competent committee of the European Parliament.

[78] Interinstitutional Agreement between the European Parliament and the ECB 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 L 320/2, of 30 November 2013.

[79] Article 27 SSM Regulation, complemented by Points 4 and 5 of the Interinstitutional Agreement (supra note 78) establish a limit to the exchange of information: professional secrecy requirements set out in Article 37 of the Statute of the ESCB and of the ECB and in the relevant acts of Union law.

[80] This reinforcement of the accountability of European institutions towards national parliaments forms part of a general tendency in EU law (François Lafarge, 'Légitimité démocratique et «redevabilité» de la Banque centrale européenne en tant qu'autorité chargée de la surveillance prudentielle dans la zone euro', in Christian De Boissieu, Francois-Gilles Le Theule, Paolo Bailo (Dirs.), Comment la régulation financière peut-elle sortir l'Europe de la crise? (Ecole nationale d'administration 2014) 225-226).

[81] Intergovernmental Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund (SRF), Council Doc. 8457/14 of 14 May 2014.

[82] Article 19(1) SSM Regulation.

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independence of some supervisory decisions or, in the end, contribute to question the legitimacy of the ECB in delicate circumstances with important financial repercussions.

While Article 19(1) SSM Regulation contains a strong assertion of the ECB's independence in the implementation of its supervisory competencies (in similar terms to those used in Article 130 TFEU), the different mechanisms of reinforced accountability that have been put in place compensate and nuance this statement. From a legitimizing perspective, the accumulation of powers in the ECB required a strengthened system of checks and balances. In any case, it seems clear that the standard of democratic accountability of the SSM is comparable to or even improves the models existing at national level[83].

8. The division of normative functions between the EBA, the ECB and the Commission

It was obvious that the assumption of supervisory competences by the ECB entailed a reform of the EBA and this proved to be one of the most controversial issues during the negotiation of the SSM. On the one hand, it was necessary to avoid that the overwhelming joint decision-making of the participating member states (through the ECB) rendered irrelevant the position and interests of non-participating member states. On the other hand, the reform could not have the opposite effect of granting a disproportionate value to the votes of those countries. Thus, the SSM Regulation and Regulation (EU) No 1022/2013[84] were negotiated and adopted in parallel (thus granting an indirect say in the drafting of the SSM Regulation to the European Parliament[85]).

The power of the ECB to condition EBA's decision-making is somewhat diminished by the fact that only NAs have right to vote in the Board of Supervisors, while the representative of the ECB in the SB is a member of that organ but cannot vote[86]. Article 44 of the amended Regulation (EU) No 1093/2010 contains the complex voting system that made possible the consensus between participating and non-participating member states. The general rule is that decisions of the Board of Supervisors shall be taken by a simple majority of its members, each voting member having one vote. However, the adoption of directly applicable decisions when there is a breach of Union law[87] and the settlement of disagreements between NAs need a simple majority of the Board's voting members[88], which shall include a simple majority of its members from NAs of participating Member States and a simple majority of its members from NAs of non-participating Member States[89]. This formula will change if there are only four or fewer

[83] Masciandaro/Nieto, supra note 52, at 25.
[84] Supra note 10.
[85] Article 127(6) TFEU -the legal basis of the SSM Regulation- only provides for the consultation of the European Parliament, while Article 114 TFEU -the legal basis of Regulation (EU) No 1022/2013- calls for the application of the ordinary legislative procedure.
[86] Article 40(1)(c) of Regulation (EU) No 1093/2010. This fact may stimulate the freedom of expression (or the appearance of divergent opinions) among the participating states. It is revealing that the competence 'to coordinate and express a common position of representatives from competent authorities of the participating Member States when participating in' EBA organs, that the Commission entrusted in its original draft to ECB, was finally deleted from the SSM Regulation (see Article 4(1)(l) of COM (2012) 511, supra note 8).
[87] Article 17 of Regulation (EU) No 1093/2010.
[88] Article 19 of Regulation (EU) No 1093/2010.
[89] The same voting procedure applies to actions in emergency situations (Article 18(3) and (4) of Regulation (EU) No 1093/2010).

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non-participating member states; then a simple majority including just one vote from a NA of non-participating Member States suffices to take a decision[90]. Finally, for the most delicate decisions (restrictions on certain financial activities[91], the adoption of technical standards[92] and budgetary decisions[93]) a qualified majority that includes the twofold simple majority of participating and non-participating NAs is required, and this rule is not softened if the number of non-participating member states falls to four or fewer.

The negotiation on the voting procedure for the adoption of technical standards was so tough that when it had concluded, the UK introduced a parliamentary reservation which was subsequently withdrawn, but only after obtaining a political declaration by the European Council where member states agreed not to modify the voting rules in EBA at least until the number of non-participating member states descends to four[94]. This two-tier system of simple majorities clearly favours non-participating member states (a minority on the Board of Supervisors) that enjoy an enhanced capacity of influence in EBA decisions, a privilege that will increase if some of them join the SSM and more than four still remain outside. This was the price to be paid for the setting up of the SSM, which required unanimity in the Council (Article 127(6) TFEU). It is striking and revealing that in spite of the complex voting procedures established, the final paragraph of Article 44 nevertheless say that the 'Board of Supervisors of the Authority shall strive for consensus when taking its decisions'.

The ECB is just one of the prudential supervisors participating in the EBA. It may be said that it is a very qualified one because it represents a considerable number of member states, but it is just one prudential supervisor. Therefore, the ECB is obliged to comply with EBA's binding technical standards that are formally adopted by the Commission[95], and must 'make every effort' to follow the EBA's guidelines and recommendations and its handbook of supervisory best practices (Article 4(3) para. 2 SSM Regulation[96]). Thus, the regulations, guidelines or general instructions that the ECB may issue to the NAs of the participating member states are limited to the specification of the supervisory tasks set out in the SSM Regulation and cannot interfere with EBA/Commission's normative powers. In parallel, as a qualified member of the EBA, the ECB is expected to make substantial contributions to those regulatory technical standards (Article 4(3) para. 4 SSM Regulation).

Some member states would have preferred the ECB to be the competent institution for the drafting of a European supervisory handbook. However, following the opinion of

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[90] This seeks to avoid one country being able to have a de facto veto power when there are very few non-participating member states.
[91] Article 9(5) of Regulation (EU) No 1093/2010.
[92] Articles 10 to 16 of Regulation (EU) No 1093/2010.
[93] Chapter VI of Regulation (EU) No 1093/2010.
[94] European Council Conclusions, EUCO 169/13, 25 October 2013, § 41. See also Article 81a of Regulation (EU) No 1093/2010.
[95] The capacity of the Commission to amend EBA's draft regulatory standards is limited to 'very restricted and extraordinary circumstances' and only 'if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services' (Recital 28 of Regulation (EU) No 1093/2010). This defence of EBA's autonomy explores the limits of the Meroni doctrine on the delegation of powers to European Agencies (Guarracino, F., Role and Powers of the ECB and of the EBA in the perspective of the forthcoming Single Supervisory Mechanism, 2 *Law & Economics Yearly Review* (2013) 184, 209-210).
[96] See also Articles 10 to 16 and 29(2) of Regulation (EU) No 1093/2010.

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the Commission and the European Parliament, the task of developing and updating such a handbook was finally entrusted to the EBA[97]. This reinforcement of EBA's powers to coordinate supervisory standards from a normative and practical point of view should contribute to the smooth functioning of the single market by reducing the distance between participating and non-participating member states[98]. Besides, to some extent, the EBA could help to dissipate conflicts of interests between the ECB's monetary and supervisory policies by delimitating the margin of manoeuvre in supervisory decisions.

9. Final remarks

The SSM is an extraordinary step forward in the reform of European financial markets and a strong indication to the economic operators of the EU's commitment towards financial stability. Even before fully entering into force, the banking union has had a very positive effect in the stabilization of financial markets and in the sustainability of public finances in the Eurozone. Equally, this concentration of supervisory power should reinforce the European capacity of influence in the international supervisory coordination bodies such as the Basle Committee.

The legal basis used for the establishment of the SSM (Article 127(6) TFEU) provided a strong negotiating position to non-Eurozone member states which enjoyed a veto power in the drafting of the new legislation. Under such circumstances, they were able to obtain all kinds of safeguards necessary to defend their interests, and in particular, the submission of the ECB to the EBA and the possibility to voluntarily participate in the SSM and abandon it in case of insurmountable disagreement. While the former guarantees the coherence of the single market, the opt-out clause involves serious risks for the credibility of the system and it should be considered as a very exceptional mechanism of last resort. Independently of the (much or little) attractiveness that the participation in the SSM may have for member states outside the Eurozone, one of ECB's main challenges is to avoid the de facto two-tier division of the single market for banking services.

Nevertheless, the consistency of the SSM, especially in the Eurozone, seems assured by its hierarchical structure and by the scope of the ECB's mandate which covers from the beginning 82% of the banking assets in the euro area (not all credit institutions are included, but the great majority of the banking business is covered). The consensus on an ample and precise definition of what should be considered a systemic entity has made it possible. The SSM Regulation thus reflects several transactions that harmonize different conflicting interests, and the short time in which this was accomplished has to be considered a great achievement.

From a normative perspective, the single rulebook and the supervisory handbook together with EBA/Commission's technical standards are expected to harmonize prudential supervision in the EU and contribute to a level playing field as regards competition. However, the exercise of supervisory functions necessarily entails some degree of discretion and risks of overregulation in the rapidly changing and dynamic financial markets should be avoided[99].

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[97] Articles 8(1)(aa) and 29(2) of Regulation (EU) No 1093/2010.

[98] Jacopo Carmassi/ Carmine Di Noia/ Stefano Micossi, *Banking Union: A Federal Model for the European Union with Prompt Corrective Action*, CEPS Policy Brief, No. 282 (2012) 5.

[99] Wymeersch advises regulating 'by principle more than by fine detail' (supra note 45, at 76).

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The ECB is far from being a supervisory emperor. It will have to cooperate and achieve compromises with the supervisory authorities of credit institutions in non-participating member states. It will also have to seek the collaboration of the NAs supervising insurance and securities markets of participating and non-participating member states. In fact, taking into account the porosity of the frontiers between the different sectors of the financial market, we should not rule out that some undertakings move part of their business from one sector to another in order to benefit from some regulatory arbitrage. In such circumstances, the success in the ECB's supervisory performance could pave the way for future further 'federalization' of supervisory competences in the insurance and securities markets. New functions awarded to the ESMA in the context of the emerging Capital Makets Union might point towards that direction.

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