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The Single Supervisory Mechanism: the Building Pillar of the European Banking Union

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ABSTRACT: One of the lessons learned from the 2008 financial crisis is that when a bank in Europe goes into trouble the ensuing effects can reach far beyond the immediate threat to its depositors and shareholders. In particular, the crisis has revealed the extent to which irresponsible behavior in the banking sector could undermine the foundations of the financial system and threaten the real economy by turning a banking crisis into a sovereign debt crisis, as occurred in the Eurozone in 2011. In response to this lesson, Member States first tried to address the systemic fragility of their banking systems through national policy tools. The interdependency of countries which share a common currency however required more integrated responses. Therefore, at the euro area summit in June 2012, the European Council agreed to break the vicious circle between banks and sovereign debt by creating a banking union. The union would institute a centralized supervision for banks in the euro area through a newly established Single Supervisory Mechanism (SSM). The SSM, which became operational in November 2014, represents the building pillar of the banking union. After a brief description of the causes that led to the introduction of the European banking union and of the rationale behind a centralized approach to supervision (Par. 1 and Par. 2), this paper purports to analyze the SSM and illustrate its functioning (Par.3) and impact on cross-border banking groups (Par. 4). The analysis then shifts its focus on the position and powers of the ECB within the SSM and on its relations with the European authorities introduced in 2010 (Par. 5 and Par. 6). Finally, this work remarks a few aspects of the balances and perspectives of the new regime (Par. 7).

KEYWORDS: *Single Supervisory Mechanism*; *SSM*; *European Banking Union*.

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1. THE ORIGIN OF EUROPEAN BANKING UNION

The recent financial crisis helped regulators to discover that when a bank in Europe goes into trouble the ensuing effects can reach far beyond the immediate threat to its depositors and shareholders. In particular, the crisis has revealed the extent to which irresponsible behavior in the banking sector could undermine the foundations of the financial system and threaten the real economy by turning a banking crisis into a sovereign debt crisis. This scenario describes the situation of the Eurozone in 2011.

Since 2008 there has been a strong correlation between the finances of Eurozone banks and the sovereign debts of its Members. This correlation has created a vicious cycle between bank risks and sovereign risks.

In countries where domestic supervisors acted in an overly permissive fashion towards national champions,[1] public finances absorbed the costs of the crisis and, therefore, inevitably deteriorated.[2] Examples are offered by Ireland and Spain, where the rescue of failing banks has drained huge amounts of public resources.[3] In other countries events evolved differently. For instance, in Greece and, to a lesser extent, Italy huge public debts

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[1] *See* EDDY WYMEERSCH, *The European banking union, a first analysis* (Fin. Law Inst., Working Paper No. 07, 2012), http://ssrn.com/abstract=2171785; Luigi Federico Signorini, Direttore Centrale per la Vigilanza bancaria e finanziaria, Banca d'Italia, 6ª Commissione permanente del Senato della Repubblica (Finanze e Tesoro), *L'Unione bancaria* (Oct. 24, 2012),https://www.bancaditalia.it/pubblicazioni/interventivari/intvar2012/unione_bancaria_signorini.pdf, and GUIDO A. FERRARINI & LUIGI CHIARELLA, *Common Banking Supervision in the Eurozone: Strengths and Weaknesses* (ECGI Law, Working Paper No. 223, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309897. In order to promote the local banking systems, some supervisors did not adequately counter risky behaviors of intermediaries, such as granting credit to certain sectors of the economy like real estate.

[2] *See* JEAN PISANI-FERRY, ANDRÉ SAPIR, NICOLAS VÉRON & GUNTRAM B. WOLFF, *What Kind of European Banking Union?*, BRUEGEL.ORG (Jun. 25, 2012), http://www.bruegel.org/publications/publication-detail/publication/731-what-kind-of-european-banking-union, emphasizing that banks that were European in ordinary circumstances have become national in crisis times, as they depend on national governments for support.

[3] *See* DOUGLAS J. ELLIOTT, *Key issues on European banking union* (Glob. Econ. & Dev., Working Paper No. 52, 2012), http://www.capitalis.com/admin/white_papers/file188.pdf, noting that in Ireland and Spain, failing banks added massive liabilities to the balance sheets of the sovereigns, weighing them down.

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affected domestic banks as a result of the strong domestic component of their bond portfolios.[4]

Under such circumstances, national politicians, as well as public authorities, tried to avoid burdening taxpayers for the consequences of credits that national banks had spread to other jurisdictions.[5] Banks and national supervisors restricted the circulation of liquidity between countries, including transfers of capital within cross-border banking groups. As a result, the interbank markets ceased to function: intermediaries preferred to allocate liquidity into non-interest bearing deposits at the European Central Bank. In addition, significant funds were moved from peripheral countries to central jurisdictions, even though the interest rates offered by the latter produced negative returns in real terms.[6]

Additionally, the mechanism of monetary policy also came to a halt: this highlighted the pivotal role of financial integration in a well-functioning of the Monetary Union.[7] In particular, the financial system of the Eurozone is fragmented along national borders[8] which leads to the formation of severe macroeconomic imbalances.[9] The remuneration of bank deposits and the interest rates paid on bank loans diverged considerably between countries. Despite the European Central Bank set the same level of reference rate for monetary policy, the costs of credit to households and businesses varied

[4] *See* Benoît Coeuré, Member of the Exec. Bd., European Cent. Bank, *Why the euro needs a banking union* (Oct. 8, 2012), http://www.ecb.int/press/key/date/2012/html/sp121008_1.en.html.

[5] *See* PISANY-FERRY, SAPIR, VERON & WOLFF, *supra* note 2, arguing that banks have been encouraged by national authorities to cut cross-border lending, which is understandable from a national viewpoint. However, the pursuit of national policies to fight the crisis has not led to financial stability.

[6] *See* ELLIOTT, *supra* note 3, at 14.

[7] *See* Vítor Constâncio, Vice-President of the ECB, *Towards a European Banking Union* (Sep. 7, 2012), http://www.ecb.int/press/key/date/2012/html/sp120907.en.html, arguing that a high degree of financial integration, where financial institutions diversify their assets and liabilities across eurozone countries, is essential for an effective transmission of monetary policy. Imperfect financial integration complicates the task of the central bank in a currency union making it more difficult to achieve a uniform impact in the transmission of monetary policy and ensures uniform levels of interest rates across countries. It is therefore essential to reverse this fragmentation and restore the proper transmission mechanism of monetary policy. *See also* EUROPEAN CENT. BANK, *Financial integration in Europe*, ECB.EUROPA.EU (Apr. 2009),http://www.ecb.eu/pub/pdf/other/financialintegrationineurope200904en.pdf; André Uhde & Ulrich Heimeshoff, *Consolidation in Banking and Financial Stability in Europe: Empirical Evidence*, 33 J. BANK. & FIN., 1299 (2009). *See also*, A.SAPIR & G.B. WOLFF, *The Neglected Side of Banking Union: Reshaping Europe's Financial System*, BRUEGEL.ORG (Sep. 13, 2013),http://bruegel.org/2013/09/the-neglected-side-of-banking-union-reshaping-europes-financial-system/.

[8] *See* EUROPEAN CENT. BANK, *Financial integration in Europe*, ECB.EUROPA.EU (Apr. 2012), https://www.ecb.europa.eu/pub/pdf/other/financialintegrationineurope201204en.pdf.

[9] *See* WYMEERSCH, *supra* note 1, at 6.

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substantially between Eurozone countries. The highest costs were recorded in the countries with the weakest economic conditions. Therefore, rather than a single currency, there were as many "euros" as countries in the Monetary Union.

In reaction to this economic scenario, Member States first tried to address the systemic fragility of their banking systems through national policy tools. These measures were however insufficient: indeed, as countries that share a common currency are more inter-dependent they required more integrated responses. Therefore, at the euro area summit in June 2012[10] the European Council in order to break the vicious circle between banks and sovereign debt introduced a banking union so as to provide centralized supervision for banks in the Eurozone. These objectives were realized by establishing the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). Whereas the former is devoted to the monitoring of banks in the euro area, the latter provides a centralized resolution system for credit institutions.[11]

Consequently, on the 12th of September 2012, as part of a roadmap towards the establishment of the SSM as the building pillar of the banking union in the Eurozone,[12] the European Commission published a Regulation proposal which conferred supervisory tasks on the European Central Bank

[10] On May 23, 2012, the European Council - in order to "strengthen economic union and make it commensurate with the monetary union" - asked president Van Rompuy and other top European officials to identify "building blocks", among which "a more integrated banking supervision and resolution, and a common deposit insurance scheme" - in short, a banking union: *see* Herman Van Rompuy, President, European Council, Remarks Following the Informal Dinner of the Members of the European Council (May 24, 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/130376.pdf. On June 19, 2012, the G20 leaders expressed support for "the intention to consider concrete steps towards a more integrated financial architecture, encompassing banking supervision, resolution and recapitalization, and deposit insurance": *see* G20 Leaders Declaration (Jun. 19, 2012), http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131069.pdf.
On June 29, 2012, the euro area Heads of State or Government called on the Commission to present proposals to provide for a single supervisory mechanism involving the ECB – *See* how the European Council concluded, (Jun. 29, 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131388.pdf. On the euro area Summit of June 2012 *see* Pedro Gustavo Teixeira, *The Single Supervisory Mechanism: Legal and Institutional Foundations*, QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, March 2014, at 73.

[11] *See* Jens-Hinrich Binder, *The European Banking Union - Rationale and Key Policy Issue in* THE EUROPEAN BANKING UNION: A COMPENDIUM 1 (Jens-Hinrich Binder & Christos V. Gortsos eds., 2015).

[12] *See* European Commission Proposal [hereinafter SSM Commission Proposal] for a Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions COM (2012) 511 final (Sep. 12, 2012), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0511:FIN:EN:PDF.

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(ECB). The Regulation provided the ECB with a clear mandate and broad direct and indirect supervisory powers on all Eurozone banks.

The Commission also gave new impetus to the European legislative project (CRR/CRD IV) which, according to the 20th recommendation of the De Larosière Report,[13] was expected to overcome the inconsistencies caused by different implementations of the European Directives on banking and supervision between national legislations.[14] On the 12th of June in 2012, the Commission presented a Draft Directive with the intent to harmonize and strengthen national banks resolution mechanisms.[15] The Commission also proposed the establishment of a SRM for the euro area. One year later on the 10th of June, this project was formalized in a Draft Regulation Proposal.[16] In greater detail, this proposal placed the Single Resolution Board at the top of the SRM hierarchy. This decision-making body was established to secure the resolution of the serious difficulties of credit institutions with minimal costs to taxpayers and to the real economy. For the same purpose, the proposal also included the establishment of a Single Resolution Fund. With the aim of further harmonizing national DGS, the original banking union roadmap also provided for the quick approval of the Directive on Deposit Guarantee

[13] The De Larosière Report is available on the E.U. Commission's website http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf;for a comment, see Guido Ferrarini & Filippo Chiodini, *Regulating Cross-border Banks in Europe: A comment on the De Larosière Report and a Modest Proposal*, 1 CAP. MKT. L. J., 123 (2009).

[14] *See* European Commission Proposal for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms COM (2011) 0453 final (Jul. 20, 2011), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011PC0453, and Proposal for a Regulation of the European Parliament and the Council on prudential requirements for credit institutions and investment firms COM (2011) 0452 final (Jul. 7, 2011). http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011PC0452.

[15] *See* European Commission Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms COM (2012) 280 final (Jun. 6, 2012), http://eur-lex.europa.eu/%20LexUriServ/LexUriServ.do?uri=COM:2012:0280:FIN:EN:PDF.

[16] *See* European Commission Proposal for a Regulation of the European Parliament and the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms COM (2013) 0520 final (Jul. 10, 2013). http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013PC0520:EN:NOT.

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Schemes (DGS) which amended Directive 94/19/EC.[17]

By shifting the focus of the discussion to the European Banking Authority (EBA), the Commission, on the one hand, confirmed its authority to act as a non-binding mediator for the regulatory harmonization of cross-border supervision and bank resolution in the European Union.[18] On the other hand, the proposed amendments to Regulation (EU) No. 1093/2013 would reinforce the powers and functions of the EBA with respect to the ECB. Coherently with this project, the regulation proposed a change in the voting mechanisms in order to prevent Members of the SSM-from holding a block majority in the EBA.[19]

The Regulation for the establishment of the SSM was repeatedly amended until its final approval by the European Council on October 15, 2013.[20] A few days later, the Council also amended the EBA by approving Regulation (EU) No. 1022/2013.[21]

[17] *See* European Commission Proposal for a Directive of the European Parliament and the Council on Deposit Guarantee Schemes COM (2010) 0368 final (Jul. 12, 2010). http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52010PC0368. The Proposal provided shorter pay-out periods (that would be limited to seven working days) and funding arrangements, where the lack of common standards has allowed for diverging models of ex ante and ex post funding schemes. On DGS see FRANCESCA ARNABOLDI, DEPOSIT GUARANTEE SCHEMES: A EUROPEAN PERSPECTIVE (2014).

[18] *See* SSM Commission Proposal, *supra* note 12, art. 4(1)(3): "The ECB will carry out its tasks within in the framework of the European System of Financial Supervision and will closely cooperate with the three European supervisory Authorities. The EBA will keep its powers and tasks to further develop the single rulebook and ensure convergence and consistency of supervisory practice. The ECB will not take over any tasks of the EBA and the exercise of its regulatory powers in accordance with art. 132 of the TFEU will be limited to areas which are necessary for the proper exercise of the tasks conferred on the ECB by this regulation".

[19] *See* European Commission Proposal for a Regulation amending Regulation No. (EU) 1093/2010 establishing the European Banking Authority COM (2012) 512 final (Sep. 12, 2012). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0512:FIN:IT:PDF.

[20] *See* Regulation 1024/2013 [hereinafter SSM Regulation or Regulation] of the European Parliament and of the Council of 15 October 2013, Conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 2013O.J.(l.287),56(EU).http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:287:0063:0089: EN: PDF.

[21] *See* Regulation 1022/2013 [hereinafter EBA amended Regulation] of the European Parliament and of the Council of 22 October 2013, amending Regulation 1093/2010 and establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation 1024/2013, 2013 O.J. (L 287) 5. (Oct. 15, 2013), which is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:287:0005:0014: EN: PDF.

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Regulation (EU) No. 575/2013 and Directive 2013/36/EU were later approved on June 26, 2013 with the intent to harmonize the legislation in the banking sector (CRR/CRD IV).[22]

After several delays, the Directives on deposit guarantee schemes and on the resolution of banks, have been approved on April 15, 2014.[23] Similarly, the Regulation for the establishment of a SRM has finally been adopted by

[22] *See* Memorandum from the European Comm'n on Capital Requirements (Jul. 16, 2013), http://europa.eu/rapid/press-release_MEMO-13-690_en.htm?locale=en. Among the main innovations, a special mention has to be made regarding the general strengthening of supervision (*e.g.* through supervisory plans, onsite inspections, more robust and intrusive supervisory assessments) and a harmonization of sanctions to ensure uniform application of Basel II and III by limiting national options and discretions. The CRR also tightens large exposure limits, liquidity ratios, and public disclosure requirements, and introduces an indicative leverage ratio. Ensuring full consistency of rules is a natural policy response to the high degree of financial and monetary integration in the European Union in general and in the euro area in particular. The CRR/CRD IV acknowledges that financial stability risks differ across jurisdictions and institutions, and provides national authorities with the flexibility to impose stricter standards to respond to macro-prudential concerns. In particular, Common Equity Tier 1 capital ratios can be increased by up to 3% (systemic risk buffer) on all exposures or up to 5% on domestic or non-EU exposures without the Commission's pre-approval. For higher buffers, pre-approval is required. Member States keep the power to impose temporarily (for up to two years, but extendable) some stricter prudential requirements for domestically licensed financial institutions. The Regulation maintains the national authorities' capacity to require Pillar 2 capital add-ons for individual institutions, based on their risk profile. The texts of Regulation (EU) 575/2013 [hereinafter CRR] of the European Parliament and of the Council of 26 June 2013, 2013 O.J, on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012, and of Directive 2013/36/EU [hereinafter CRD IV] of the European Parliament and of the Council of 26 June 2013, 2013 O.J, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. See: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0001:0337:IT:PDF; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0338:0436:IT:PDF.

[23] *See* Directive 2014/59/EU [hereinafter BRRD] of the European Parliament and of the Council of 15 April 2014, Establishing a framework for the recovery and resolution of credit institutions and investment firms, 2014 O.J. (173) 190 which is available at http://ec.europa.eu/internal_market/bank/crisis_management/index_en.htm and Directive 2014/49, of the European Parliament and of the Council of 16 April 2014, on Deposit Guarantee Schemes, 2014 O.J. (173) 149. available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0049&from=EN. Moreover, with respect to DGS on November 24, 2015 the European Commission published a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme [hereinafter EDIS] COM (2015) 586 final (Nov. 24, 2015), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015PC0586. According to such Proposal the EDIS would be developed over time and in three stages. It would consist of a reinsurance of national DGS, moving after three years to a co-insurance scheme, in which the contribution of EDIS will progressively increase over time. As a final stage, a full European Deposit Insurance Scheme is envisaged in 2024. The scheme includes a series of strong safeguards against "moral hazard" and inappropriate use, in order to give incentives to national schemes to manage their potential risks in a prudent way. In particular, a national scheme will only be able to access EDIS if it fully complies with relevant Union law.

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the European Council on July 15, 2014.[24]

2. THE RATIONALE BEHIND A CENTRALIZED SUPERVISION

This paragraph is intended to illustrate the main reasons that have driven recent European regulatory reforms towards major centralization in banking supervision by focusing in particular on the position of cross-border banking groups. These credit institutions are usually integrated groups which operate through branches or subsidiaries. Subsidiaries are incorporated under the law of the jurisdiction in which they operate. By becoming legally separate entities as a result of the process of incorporation subsidiaries can benefit from the rules on limited liability. On the contrary, as branches are not legally separated from the parent company, they are subject to a regime of joint liability with the latter and share the same applicable laws.

Traditionally, the division of responsibility between the home country and the host jurisdiction depended on whether the bank operated through branches or subsidiaries.[25]

Moreover, notwithstanding the process of harmonization of the prudential regulation initiated by the European Union, diverging national implementations and supervisory practices have always generated

[24] *See* Regulation 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 and amending Regulation 1093/2010, 2014 O.J. (225) 1, available at http://eurlex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.225.01.0001.01.ENG.

[25] In the European Union, mutual recognition and the single license allow a European financial institution to establish branches in other Member States under the prudential regulation and supervision of the home country. Subsidiaries, on the contrary, fall under the competence of their State of incorporation. However, the single license system has enjoyed limited success in practice as international banking groups often chose to establish subsidiaries rather than branches in other Member State. *See* Jean Dermine, *European Banking Integration: Don't put the cart before the horse*, 15 FIN. MKT., INSTITUTIONS & INSTRUMENTS 57 (2006), *see also* Guido Ferrarini & Filippo Chiodini, *Nationally Fragmented Supervision over Multinational Banks as a Source of Global Systemic Risk: a Critical Analysis of Recent EU Reforms*, *in* FINANCIAL REGULATION: A POST CRISIS ANALYSIS (Guido Ferrarini, Eddy Wymeersch & Klaus J. Hopt eds., 1st ed. 2012).

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substantial discrepancies.[26] As a result, cross-border banking groups were generally subject to nationally fragmented regulation and supervision.

In particular, the mismatch between the scope of cross-border groups and the national character of the supervision had a negative impact on crisis prevention and increased systemic risk. This was especially true in a political context in which the absence of credible agreements between governments on how to share the burden of crisis was a barrier to cross-border bank bailout. As a consequence, there was the considerable risk of spreading contagion to other banks. In addition, the belief that governments need to save insolvent banks has been a source of moral hazard for the management of the banks and for the behavior of shareholders and creditors. At the same time, the fact that some countries were not able (or simply did not want) to implement a bailout of troubled banks with public money created competition distortions by penalizing banks in countries with weaker economies (or smaller in terms of GDP).

It seems therefore evident that greater centralization in the supervision resolves at least part of these problems.[27] Indeed, the fragmentation between national regulations as well as the related systemic risk would be reduced if national regulators transfer some of their powers to a supranational body and Member States give up part of their sovereignty.[28] Therefore, it is not surprising to notice that the typical legislative response to

[26] *See* Dirk Schoenmaker & Sander Oosterloo, *Cross-Border Issues in European Financial Supervision in* THE STRUCTURE OF FINANCIAL REGULATION (Davis Mayes and Geoffrey Wood eds., 2005); Eva Hüpkes, *Form Follows Function - A New Architecture for Regulating and Resolving Global Financial Institutions*, 10 EUR. BUS. ORG. L. REV. BOR. 369, 377 (2009).

[27] However, critics of centralization advocate "more national" solutions, in which national authorities would be better empowered to supervise regulated entities in view of safeguarding domestic financial stability. According to similar proposals, new powers would be attributed to host regulators, including the power to impose "subsidiarization" of foreign branches that are systemically significant in the host State; in other words, regulators would be entitled to treat these branches like subsidiaries for supervisory purposes. In addition, host authorities would be empowered to regulate cross-border financial operations on the basis of their potential effect on host economies (so-called "effect based regulation"). These enhanced powers would supposedly facilitate coordination and cooperation with home authorities. Host regulators would be in a position to "bargain" with home regulators, who would be incentivized to take the financial stability of host economies seriously into account. On this point see in particular KATARINA PISTOR, *Host's Dilemma: Rethinking EU Banking Regulation in Light of the Global Crisis* (European Corp. Governance Inst. – Fin. & Columbia Law Sch., Working Paper No. 286, 2010), http://www.ecgi.org/wp/wp_id.php?id=447.

[28] *See* Nicolas Veron, *The Economic Consequences of Banking Union in* EUROPEAN BANKING UNION (Guido Ferrarini & Danny Busch eds., 2015).

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the financial crisis is the introduction, or the enhancement, of forms of regulatory and supervisory centralization.[29]

In particular, a centralized approach to supervision can be achieved along three different routes: (i) cooperation and coordination between authorities in different Member States; (ii) lead home (or consolidating) supervisor;[30] (iii) supranational authority. These three models can be combined to form two-tier systems consisting of a national and a supranational level.[31]

Following the De Larosière Report on the reform of the European supervisory architecture, the legislation approved on 24 November 2010,[32] [33] represented a significant step towards regulatory convergence and centralization of cross-border supervision. The most recent regulatory framework indeed combines "enhanced" cooperation with elements of the other two models of centralization. In particular, the 2010 reform institutes a European System of Financial Supervision (ESFS). Firstly, it assigns the macro-prudential supervision to a newly established European Systemic Risk Board (ESRB). Secondly, a network of national supervisors, which re-employs pre-existing European Supervisory Committees and is subject to the coordination of the new European Supervisory Authorities (ESA), is

[29] *See* David T. Llewellyn, *Role and Scope of Regulation and Supervision, in* HANDBOOK OF SAFEGUARDING GLOBAL FINANCIAL STABILITY: POLITICAL, SOCIAL, CULTURAL AND ECONOMIC THEORIES AND MODELS 451 (Gerard Caprio ed., 2013).

[30] The lead supervisor model consists of a single authority with supervisory powers over the whole cross-border group, irrespective of whether operating through branches or subsidiaries. It avoids duplication of regulatory requirements and reduces compliance and enforcement costs. The home authority is the lead supervisor, retaining responsibility for consolidated supervision over the banking group and its individual entities. A variant of this model keeps host authorities involved, so as to ensure supervisors' proximity to cross-border establishments and allow local conditions to be sufficiently taken into account.

[31] *See* Ferrarini & Chiodini, *supra* note 25, at 8, 10.

[32] The relevant legislation includes: Regulation (EU) 1092/2010 of the European Parliament and of the Council of 24 November 2010, Establishing the new ESRB in charge of macroprudential supervision, 2010 O.J. (L 331) 1; Regulation (EU) 1093/2010 [hereinafter EBA Regulation], of the European Parliament and of the Council of 24 November 2010, Establishing the EBA, 2010 O.J. (L 331) 12; Regulation (EU) 1094/2010 of the European Parliament and of the Council of 24 November 2010, 2010 O.J, establishing the European Insurance and Occupational Pensions Authority [hereinafter EIOPA], and Regulation (EU), 1095/2010 of the European Parliament and of the Council of 24 November 2010, 2010 O.J, Establishing the European Securities Markets Authority [hereinafter ESMA], in charge of microprudential supervision, respectively of the banking, insurance, and securities sectors, 2010 O.J. (L 331) 84. The Regulations are available, among others, on the website of the EBA at http://www.eba.europa.eu/.

[33] *See supra* note 13.

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appointed as micro-prudential supervisor.[34]

The creation of a centrally coordinated network was aimed at enhancing effective cooperation between competent authorities in the supervision of cross-border financial institutions, while leaving day-to-day supervision to national authorities.[35]

This architecture, however, as it represents the result of a political compromise, is ultimately a weak form of centralization which is based on cooperation among competent authorities.[36] As unquestionably proven by the recent financial crisis cooperation is doomed to fail in emergency situations because national supervisors tend to privilege domestic interests.[37]

The lack of a sufficiently consistent system to supervise the banking sector of Member States which became interdependent after the creation of a Monetary Union was highlighted by the simultaneous crisis of both credit institutions and sovereign debts. With the aim to restore confidence in the financial stability of Eurozone banks and to temper the connection between

[34] The EBA, in particular, has been provided with the power to: (i) develop proposals for regulatory technical standards to be submitted to the European Commission, under EBA Regulation, *supra* note 32, art. 10 and 15, (ii) to adopt guidelines and recommendations addressed to national authorities or to financial institutions with a view to establishing consistent, efficient and effective supervisory practices, and to ensuring the common, uniform and consistent application of E.U. law (EBA Regulation, *supra* note 32, art. 16), (iii) to adopt, in emergency situations, acts in place of the national authorities in the event of a breach of E.U. law and to resolve disputes between competent authorities in cross-border situations (respectively pursuant to EBA Regulation, *supra* note 32, artt. 17, 19 and 19).

[35] *See* Marco Mancini, *Dalla vigilanza nazionale armonizzata alla banking union* [*From the Harmonized National Supervision to the Banking Union*], QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, Sep. 2013, at 1 (It.). With the exception of the ESMA, which have been entrusted with the task of direct control over transnational bodies such as rating agencies and managers in post-trading facilities, and aside from the limited powers granted to EBA only in the cases set out in note 34, the European legislator merely attributed to the European Supervisory Authorities responsibilities for coordination of the national authorities, while leaving to them the exercise of direct supervision of intermediaries. *See also* EMILIOS AVGOULEAS & DOUGLAS W. ARNER, *The Eurozone Debt Crisis and the European Banking Union: A Cautionary tale of Failure and Reform* (Univ. of H. K. Faculty of Law, Working Paper No. 37, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347937.

[36] *See*, for comments, F. Recine and P. G. Teixeira, '*Towards a New Regulatory Model for the Single European Financial Market*', 4 *Revue Trimestrielle de Droit Financier* (2009); Anders Neergaard, *European Supervisory Authorities–A New Model* for the *Exercise* of *Power* in the *European Union*?, 2009 EUREDIA 603; Guido Ferrarini & Filippo Chiodini, *Regulating Multinational Banks in Europe: An Assessment of the New Supervisory Framework*, 6 CURRENT DEVELOPMENTS IN MONETARY AND FIN. L. 93 (2012); Eilis Ferran, *Understanding the New Institutional Architecture of EU Financial Market Supervision in* FINANCIAL REGULATION: A POST CRISIS ANALYSIS (Guido Ferrarini, Klaus J. Hopt & Eddy Wymeersch eds., 2012).

[37] Voluntary cooperation and coordination mechanisms tend to fail when the financial stability and national taxpayers' money are at risk. Due to a problem of collective action, similar to that of the prisoner's dilemma, the national mandate and the consequent misalignment of incentives of supervisors prevent them to seek cooperative, although more efficient, solutions, by giving precedence to nationalistic and protectionist solutions. *See* Ferrarini & Chiodini, *supra* note 36.

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bank solvency and government debt, centralized banking supervision emerged as a necessary response to the crisis of the euro.[38] In practice, even though the need to rethink bank surveillance in Europe was often highlighted before the 2008 financial crisis, most countries, including euro countries, were reluctant to transfer additional sovereignty to European institutions in this crucial sector. After the 2011 sovereign debt crisis, national self-interest was however put aside and the idea of a centralized supervisory mechanism, also widely supported by scholars, became more broadly accepted.

Centralized supervision allows, *inter alia,* to mitigate national interest concerns which, in the past, have been responsible for deteriorating public finances. Indeed, in some instances, domestic authorities have turned a blind eye to the accumulation of considerable imbalances in the balance sheets of credit institutions with the intent to promote national champions.

In this scenario of sovereign debt crisis, the European Commission published a draft Regulation which conferred supervisory tasks on the ECB, which was intended to represent a milestone in the establishment of a single supervisory mechanism in the Eurozone as the central pillar of the banking union.

The ECB was therefore given a clear mandate and broad powers to supervise all Eurozone banks. As the ECB was endowed with extensive internal expertize in the areas of both macroeconomics and financial stabilization, it was well-equipped to conduct supervisory tasks with the purpose of preserving the stability of the European financial system.

[38] *See* Gianni Lo Schiavo, *From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe*, 21 MAASTRICHT J. EUR. & COMP. L. 110 (2014).

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Indeed, the establishment of a new agency would have required the revision of the Treaty.[39]

Major forms of centralization in banking supervision in the Eurozone was also interpreted as a pre-condition to the establishment of a jointly-funded common mechanism for the resolution of crises in the banking sector and the prevention of growing moral hazard.

The SSM entered into force on November 4, 2014.[40] Therefore, the SSM essentially belongs to the third model of centralization - single supervisor - described above. The following paragraphs illustrate the functioning of the single supervisory mechanism, the role of the EBC within it, its impact on the supervision of cross-border banking groups and its potential weaknesses.

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[39] *See* Francesco Guarracino, *Il Meccanismo Unico di Vigilanza sugli Enti Creditizi tra Diritto Primario e Riforma dei Trattati,* 2013 RIVISTA TRIMESTRALE DI DIRITTO DELL'ECONOMIA 171 (It.) and CONCETTA BRESCIA MORRA, *From the Single Supervisory Mechanism to the Banking Union: The Role of the ECB and the EBA (*Luiss Guido Carli Sch. of European Political Econ., Working Paper No. 2, 2014), http://sep.luiss.it/sites/sep.luiss.it/files/WP%20SEP%20C.%20Brescia%20Morra%20def.pdf. According to the "Meroni doctrine", in fact, tasks that involve the exercise of discretionary powers cannot be assigned to newly established bodies not provided by the Treaties. In particular, the term "Meroni Doctrine" refers to the position taken by the European Court of Justice in its judgment of 13 June, 1958, Case 9/56, *Meroni & C. v. High Authority*, ECLI:EU:C:1958:7, where the CJEU considered the delegation of power - by the European Union institutions to external bodies - to be unlawful if the delegation includes so much "freedom" to take the form of a real discretion. However, in January 2014 the CJEU (Case C-270/12, *United Kingdom v. Parliament and Council,* ECLI:EU:C:2014:18) has delivered a decision that repositions the extent to which European institution can organize separate bodies to whom part of their own decision making power can be transferred. In particular, in a case opposing the United Kingdom to the European Council and Parliament involving the powers of ESMA to directly prohibit short selling in certain circumstances, the Court held that this conferral of powers did not infringe the "Meroni rule", that only prohibits to delegate a wide margin of discretion. The Court analysis based its finding on the existence of strict objective criteria in the contested provision in the Short Selling Regulation, and the fact that its decisions are amenable to judicial review. The ESMA judgment does not reject the "Meroni doctrine" outright but it attenuates its impact by making it clear that the test for the legality of the conferral of discretion on an agency is a nuanced one: provided there are conditions and criteria to limit the discretion, and the power is precisely delineated so as to be amenable to judicial review, the requirements laid down in the "Meroni rule" are satisfied. *See* JACQUES PELKMANS & MARTA SIMONCINI, *Mellowing Meroni: Hows ESMA can help build the Single Market*, CEPS.EU (Feb. 18, 2014), http://www.ceps.be/book/mellowing-meroni-how-esma-can-help-build-single-market. On this point see also LORENZO CUOCOLO, *Constitutional Issues of the Banking Union, between European Law and National Legal Orders* (Baffi Carefin Ctr., Working Paper, No. 10, 2015).

[40] *See* Francesco Ciraolo, *Il Regolamento UE n. 1024/2013 sul Meccanismo Unico di Vigilanza e l'Unione bancaria Europea. Prime riflessioni* (2014) [*EU Regulation No. 1024/2013 Regarding the Single Supervisory Mechanism and the European Banking Union*] , http://www.amministrazioneincammino.luiss.it/app/uploads/2014/07/Ciraolo_Unione-bancaria.pdf; Klaus Lackhoff, *How will the Single Supervisory Mechanism (SSM) Function? A brief overview*, 29 J. INT'L. BANK. L. & REG. 498. (2014); CHRISTOS V. GORTSOS, THE SINGLE SUPERVISORY MECHANISM (SSM): LEGAL ASPECTS OF THE FIRST PILLAR OF THE EUROPEAN BANKING UNION (2015).

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3. THE SINGLE SUPERVISORY MECHANISM (SSM). SCOPE, DIVISION OF TASKS AND COOPERATION WITHIN THE SSM

The single supervisory mechanism is composed by the ECB and by the national competent authorities.[41] The European Central Bank is appointed as central prudential supervisor of financial institutions in the euro area. Given that the ECB is responsible for its effective and consistent functioning, this model aims at more than enhanced cooperation.

While the SSM covers all credit institutions which are established in the Eurozone, most of the less significant supervisory tasks are normally carried out by national authorities under a two-tier regime.[42] Indeed, the criteria to determine whether banks fall under the direct supervision of the ECB include the bank's size, its importance for the economy of the European Union, as well as for the economy of the Member State, and the extent of its cross-border activities.[43]

More specifically, in order to fall under the direct supervision of the ECB one of the following conditions needs to be met: (i) the assets of the bank exceed 30 billion euros, (ii) the *ratio* of its total assets to the GDP of its Country of establishment is above 20%, or (iii) the competent national authorities define the institution as significant. The ECB, however, retains the power to bring any bank under its direct supervision, when necessity so requires.[44] For example, the ECB may consider an institution as significant if it has substantial cross-border assets or liabilities, if it relies upon the ESM

[41] For an in-depth analysis of the respective competences of the ECB and the national authorities see Raffaele D'Ambrosio, *The ECB and NCA liability within the Single Supervisory Mechanism*, 78 QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA 1 (2015); *see also* E. WYMEERSCH, *The single supervisory mechanism or "SSM", part one of the Banking Union* (Nat'l Bank Of Belg., Working Paper No. 255, 2014), https://www.nbb.be/doc/ts/publications/wp/wp255en.pdf. *See also* EUROPEAN CENT. BANK, *Guide to banking supervision*, ECB.EUROPA.EU (Nov., 2014), https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf.

[42] The Regulation is without prejudice to the responsibilities and related powers of the competent authorities of the participating Member States to carry out supervisory tasks not conferred to the ECB. *See* SSM Regulation, *supra* note 20, art. 1.

[43] *See* SSM Regulation, *supra* note 20, art. 6(4).

[44] According to the SSM Regulation, *supra* note 20, art. 6(4), the ECB may also, on its own initiative, consider an institution to be of significant relevance where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities.

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for financial assistance, or if it is one of the three largest institutions in its Country of establishment. The ECB is therefore able to exercise direct supervision on the largest banks in smaller countries. According to these criteria, banks that fall under the direct supervision of the ECB account for about the 80% of the aggregate banking assets of the euro area.[45]

The SSM's prudential supervision[46] applies to banks or, more precisely, "credit institutions", which are defined as an undertaking whose business is to "receive deposits or other repayable funds from the public and to grant credits for its own account".[47]

Institutions that national laws may define as "banks" even if they do not receive deposits, would therefore be excluded from the SSM as they do not qualify as banks under E.U. law.[48] The European definition of "credit institution" prevails as otherwise Member States would be able to determine the scope of the SSM.[49]

Several categories of financial institutions that do not formally qualify as banks are therefore not subject to the SSM. This may result surprising as some of these institutions are clearly significant, and may even be systemically relevant.

However, even though non-banking activities remain supervised nationally, they are not entirely excluded from the supervision of the SSM. These activities will often have a direct impact on the risk profile of the banking group and, therefore, they will also fall within the orbit of the banking supervisor.[50]

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[45] *See* Klaus Lackhoff, *Which Credit Institutions will be supervised by the Single Supervisory Mechanism?*, 28 J. INT'L. BANK. L. & REG. 454 (2014); G.B.WOLFF & C. DE SOUSA, *A banking union of 180 or 81%?*, BRUEGEL.ORG (Dec. 14, 2012), www.bruegel.org/nc/blog/detail/article/965-a-abanking-union- of-180-91- percent.USX4lh03hWI.

[46] On the scope of the SSM see E. Wymeersch, *The Single Supervisory Mechanism for Banking Supervision: Institutional Aspects in* EUROPEAN BANKING UNION (Danny Busch & Guido Ferrarini eds, 2015).

[47] *See* SSM Regulation, *supra* note 20, art. 2(3).

[48] According to French law, specialized financing institutions - leasing, factoring and similar - are subject to prudential supervision, without receiving deposits from the public. For the list see www.acp.banque-france.fr/controle-prudentiel/les-assujettis- au-controle.html.

[49] *See* WYMEERSCH, *supra* note 41, at 27.

[50] *See* WYMEERSCH, *supra* note 41, at 28.

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In this respect, art. 127 (6) of the TFEU would allow "other financial institutions", with the exception of insurance undertakings, to be included in the SSM's remit.[51]

However, while insurance firms have been expressly excluded, the increasing similarities between banking and insurance supervision and the recognition of their systemic significance[52] will, sooner or later, lead to the introduction of a more integrated form of supervision for insurance firms.[53]

The Regulation conferred to the ECB the following tasks when dividing the duties within the SSM between the ECB and national authorities: to authorize credit institutions and withdraw their authorizations; to assess applications for the acquisition and disposal of qualifying holdings in credit institutions; to ensure compliance of credit institutions with prudential requirements (e.g. own funds requirements, large exposure limits, liquidity, leverage, etc.) as well as governance arrangements ("fit and proper" management, risk management processes, internal control mechanisms, remuneration policies, etc.); and finally, to carry out supervisory reviews, including stress tests and other supervisory tasks such as, for instance, recovery and early intervention plans.[54]

On the other hand, by looking at the tasks which are conferred upon the ECB by art. 4, competent national authorities carry out, and are responsible for, all relevant supervisory decisions in accordance with art. 6 (7). They also have to regularly report to the ECB on the performance of their supervisory activities. They are also exclusively responsible for consumer protection and anti-money-laundering tasks, for receiving notifications from credit institutions in relation to the right of establishment, for supervising

[51] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 127(6) Jun. 7, 2016, 2016 O.J. (C 202) 47 [hereinafter TFEU].
[52] *See* INT'L ASS'N OF INS. SUPERVISORS, *Consultation on G-SIIs, Global Systemically Important Insurers: Proposed Policy Measures*, IAISWEB.ORG (Oct., 2015), http://www.iaisweb.org/index.cfm?pageID=988&lyrHighlightWord=systemic%20&searchvalue=systemic; Jaime Caruana, Gen. Manager, Bank for the Int'l Settlements, *Insurance and financial stability: a Basel view* (Mar. 20, 2013), http://www.bis.org/speeches/sp130408.htm; PWC, '*The supervision of global systemically important insurers - G-SII*', (Jul., 2013), http://www.genevaassociation.org/portals/0/Geneva_Association_Systemic_risk_in_Insurance_Report_March20 10.pdf.
[53] *See* WYMEERSCH, *supra* note 41, at 27.
[54] *See* SSM Regulation, *supra* note 20, art. 4(1).

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the activities of branches of credit institutions from third countries as well as payment services.[55]

The Regulation pays ample attention to the functioning of the SSM as a cooperative mechanism. The ECB and the competent national authorities must cooperate in good faith cooperation and have an obligation to exchange information.[56] Additionally, national authorities are responsible for assisting the ECB with the preparation and implementation of acts in connection with the tasks conferred to the ECB by the Regulation.[57]

In particular, according to art. 6 (5) and (6) the ECB and national authorities share responsibility for the exercise of regulatory oversight on credit institutions which are only indirectly supervised by the ECB. Competent national authorities shall perform these supervisory tasks in conformity with the regulations, guidelines and general instructions issued by the ECB. When necessary to ensure the consistent application of high supervisory standards the ECB may decide to exercise its powers directly in relation to one, or more, credit institutions. Moreover, as the ECB oversees the functioning of the system, it may, at any time, exercise its investigatory powers and request information from the competent national authorities on the performance of the tasks that fall within their purview.

This kind of cooperation between the ECB and competent national authorities is, however, innovative with respect to previous experiences. Whereas the old model is generally horizontal, with supervisory authorities standing at the same level, in the SSM cooperation is vertical so as to ensure the overall functioning of the SSM under the leadership of the ECB.[58]

[55] *See* SSM Regulation, *supra* note 20, pmbl. 28.
[56] *See* SSM Regulation, *supra* note 20, art. 6(2), referring probably to TFEU, *supra* note 51, art. 4(3), stating: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks, which flow from the Treaties".
[57] *See* SSM Regulation, *supra* note 20, art. 6(3).
[58] *See* WYMEERSCH, *supra* note 41, at 41.

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This cooperation has been further refined in the Framework Regulation for the SSM,[59] an instrument developed by the ECB in consultation with national authorities.[60] The Framework Regulation develops and illustrates cooperation procedures between the ECB and competent national authorities within the SSM as specified by the SSM Regulation itself. This document is particularly important as it coordinates and defines the relationship between the two levels of supervision. In particular, The Framework Regulation illustrates three main aspects: the methodology for determining the quantitative criteria for classifying banks as significant, or less significant, with special attention to changes in the regime;[61] arrangements with respect to the exercise of powers by both national supervisors and the ECB; procedures governing the relation between the ECB and national supervisors for the supervision of significant, as well as less significant, banks. The ECB has to be informed by national authorities about their concrete supervisory procedures in relation to less significant credit institutions (*e.g.* administrative or disciplinary measures, including sanctions and their implementation). The ECB can request further information and impose additional supervisory duties. Before the national supervisor adopts its final decision, it must obtain the opinion of the ECB, which does not, however, amount to a binding approval.

On the other side, the Framework Regulation establishes Joint Supervisory Teams (JSTs) for the supervision of significant banks. Every significant institution will have one team made up of personnel from both the ECB and competent national authorities. The team will be coordinated by a member of the ECB who, as a rule, will not have the same nationality of the supervised institution. The effectiveness of day-to-day supervision, however, largely depend on the support from the regulator of the State of

[59] *See* Regulation 468/2014 [hereinafter SSM Framework Regulation] of the European Central Bank of 16 April 2014, Establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities, 2014 O. (L 141) 1 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0468.

[60] *See* SSM Regulation, *supra* note 20, art. 6 (7) (b) (iii).

[61] In accordance with the SSM Framework Regulation, *supra* note 59, art. 49(1), the ECB published a list containing the name of each entity and group directly supervised by the ECB and the list of entities supervised by a national competent authority as of December 30, 2015. The significant entities directly supervised by the ECB amount at 129. The list is available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/list_for_publishing_20151230en.pdf.

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establishment. Indeed, whilst leading the supervisory activities, the ECB still has to utilize the local knowledge and the expertise of national authorities.

From this perspective, a potential limit of this regulatory setting is the extensive reliance on cooperation among supervisors as well as the delegation of supervisory functions to national authorities. The SSM, despite the strong powers conferred to the ECB, largely functions by delegating supervisory tasks to national authorities and by relying on their cooperation. The duties of cooperation and exchange of information[62] should prevent, or at least mitigate, information asymmetries between the periphery and the center of the SSM. The responsibility of the ECB for the system, together with the powers of direction and substitution with respect to national supervisors, lead to the conclusion that this model does not simply provide for enhanced cooperation.

In other words, the hierarchical structure of the SSM should solve problems of coordination between authorities, as well as information asymmetries which might otherwise advantage national authorities because of the apical position of the ECB. Information asymmetries can, however, be exploited, especially in times of crisis, to protect local and particular interests from the scrutiny of the ECB. National authorities may, for example, delay the transmission of important information to the ECB or procrastinate actions against national banks that are under their direct supervision regardless of the European interest to financial stability.

The recourse to this multifaceted architecture - based on cooperation and delegation under the direction and control of a central authority - was, to some extent, unavoidable. Indeed, out of more than 6,000 banks which are established in the Eurozone the top 150 institutions count for the 80% of banking assets.[63] Limited resources, political expediency, the existence in the Eurozone of different legal, accounting and taxation frameworks, as well as the coexistence of many languages and business backgrounds were all

[62] *See* SSM Regulation, *supra* note 20, art. 6(1) and (2).
[63] *See* IMF, *Staff Discussion Notes A banking union for the euro area* (Feb. 13, 2013), https://www.imf.org/external/pubs/ft/sdn/2013/sdn1301.pdf.

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relevant factors in deciding to lean on national authorities.[64] Full centralization was not an option even with regard to banks which operate transnationally: resources are mainly national and successful supervision still depends on the proximity of the banking institutions. Decentralization to domestic supervisors should not, however, mean that the central supervisor is merely validating decisions taken locally. Supervision is to be consistent throughout the Eurozone.[65]

As highlighted above, the SSM Framework Regulation tries to balance centralization and delegation by taking into account the size of banks as well as their national, or transnational, nature.[66]

Delegation, in fact, is a better solution for domestic institutions, even if the ECB is empowered to instruct national authorities and also to replace them in the supervision of one or more institutions.[67] Delegation mechanisms are, however, also in place for transnational banks, even though the ECB still exercises a stronger control.

On the other hand, cooperation mechanisms tend to fail in the event of a crisis. Rather than acting from a European perspective, supervisors tend to pursue their national interest. Delegation, indeed, inherently suffers from information asymmetries which allows the delegated authority to exploit information advantages. Duties to cooperate and share information are insufficient to compensate for similar imbalances, as national supervisors are often incentivized to disregard them, particularly when approaching a crisis. Moreover, the the ECB's powers to direct and substitute, which aim at preventing failures in the supervisory system, may be impaired by the non-cooperation of local supervisors, including non-compliance with their duty to share relevant information.[68]

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[64] *See* TOBIAS H. TRÖGER, *The Single Supervisory Mechanism – Panacea or Quack banking Regulation?* (Inst. For Monetary and Fin. Stability, Working Paper No. 73, 2013), http://www.imfs-frankfurt.de/fileadmin/user_upload/pdf/WP_73.pdf.

[65] *See* IMF, *supra* note 63.

[66] *See* SSM Framework Regulation, *supra* note 59.

[67] *See* SSM Regulation, *supra* note 20, art. 6(5).

[68] *See* G.FERRARINI, *Single Supervision and the Governance of Banking Markets* (European Corp. Governance Inst. – Law, Working Paper No. 294, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2604074&download.

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4. NON PARTICIPATING MEMBER STATES. THE OPT-IN REGIME

As highlighted, the SSM essentially applies to Member States within the euro area. The Regulation, however, allows Member States from outside the Eurozone to adhere to the SSM by entering a "close cooperation scheme" on a "contractual" basis. Adhesion requires the drafting of a Memorandum of Understanding.[69]In particular, States from outside the euro area must declare their adhesion to the SSM along with the commitment of their national authorities to respect the guidelines and comply with the requests of the ECB by furnishing all necessary information. These declarations are rendered by simultaneously notifying a request to other Member States, to the Commission, to the ECB and to the EBA.[70]

E.U. Member States that opt into the SSM are treated as States of the Eurozone, with the exception of a few aspects mentioned below.

Prudential supervision will be exercised according to the rules of the SSM and all banks established in the requesting Member State will be subject to the SSM regime. The abovementioned two-tier mechanism of the SSM would then equally apply.[71] Only the most significant banks are going to be supervised by the ECB which will then instruct national supervisors according to the protocol for banks in tier-one. Less significant institutions would remain under national supervision.[72]

The Treaty provides viable legal foundations for making the ECB the central supervisor for the Eurozone.[73] It does not, however, provide legal underpinnings for fully including countries from outside the Eurozone within the ECB's supervisory scope. In particular, the Treaty stipulates that non-Eurozone countries are not allowed to vote in the final decision-making body of the ECB. Similarly, non-Eurozone countries are not bound by the

[69] *See* SSM Regulation, *supra* note 20, art. 7.
[70] However, technically, admission to the SSM is a unilateral decisions of the ECB under art. 7 (2) (a) of the SSM Regulation, *supra* note 20, art. 7(2)(a).
[71] *See* SSM Regulation, *supra* note 20, art. 7(2)(a) referring to artt. 5 and 6. As a consequence the entire two tier system, with significant and less significant banks becomes applicable and is notified to all Member States, whether or not belonging to the SSM.
[72] *See* SSM Regulation, *supra* note 20, art. 7(2)(a) referring to art. 6, meaning that the distinction between significant and less significant banks also apply here.
[73] *See* TFEU, *supra* note 51.

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deliberations of the ECB.[74] As a consequence, Member States from outside the Eurozone cannot become full members of the banking union as they do not enjoy the same rights and obligations as Eurozone countries. Whereas they can be full members of the Supervisory Board, only a change of the Treaty could allow them to become members of the Governing Council.[75] On this point, a few mitigating instruments have been implemented such as, for instance, the right to send an observer to the Governing Council.[76]

As a consequence, even when a non-Eurozone State has entered the SSM, the ECB is not allowed to take a decision that directly applies to a bank of that country.[77] The ECB has to communicate its decisions to the national supervisor, which will then ensure the bank's compliance. On the other hand, banks which are established in the Eurozone receive direct instructions from the ECB. "Close cooperation" agreements have a duration of at least three years. The loss of sovereignty which is inherent to this supervisory regime only allows to make provisional arrangements. Whereas States from the Eurozone do not have an option to leave the SSM as their adhesion is a consequence of their membership, States from outside the Eurozone could leave the SSM if the regime is no longer beneficial to them or if they disagree with its development. This clause has been drafted in order to safeguard sovereignty.[78] When the three years period expires, due to the voluntary nature of the close cooperation agreement, as well as to the ECB's inability to enforce supervisory decisions outside the Eurozone, the agreement can be terminated any time. The ECB and the participating third State can both terminate the agreement.[79] Termination would typically be the result of a disagreement on a supervisory decision.

On the one side, the ECB has two options to terminate. Firstly, the ECB can issue a warning to a State in which it declares that the State does not respect one of the aforementioned conditions. After the warning if sufficient

[74] *See* TFEU, *supra* note 51, art. 139(1)(b).
[75] *See* TFEU, *supra* note 51, art. 139(1)(b).
[76] *See* SSM Regulation, *supra* note 20, pmbl. 43. The Governing Council and the Supervisory Board are the governing bodies of the SSM. On their composition and tasks see below the relevant paragraph.
[77] *See* SSM Regulation, *supra* note 20, art. 7 (4).
[78] *See* SSM Regulation, *supra* note 20, art. 7(5).
[79] *See* SSM Regulation, *supra* note 20, artt. 7(8) and 26(8).

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actions to stop the breach are not implemented, the ECB can terminate the close cooperation agreement. Secondly, if the Governing Council objects to a decision by the Supervisory Board, the State can then notify the Governing Council that it objects to the resolution of the Supervisory Board, as amended following the objection of the Governing Council. If the latter maintains its decision nonetheless, the State can choose whether to apply the supervisory decision. The Governing Council has then to evaluate the impact of the State's failure to implement the decision and decide whether to suspend or terminate the close cooperation agreement.[80]

On the other side, States from outside the Eurozone are given more options to terminate. A State can terminate the close cooperation agreement whenever it disagrees on a draft decision by the Supervisory Board. Moreover, if a State has been part of the SSM for more than three years its termination does not require any specific motivation. In the event of termination, the terminating State is not allowed to send a new proposal of close cooperation for the following three years.[81] This last provision[82] is intended to deter a State from interrupting the close cooperation agreement, by imposing costs of leaving the system[83], with the sole purpose of avoiding a decision of the Supervisory Board.[84]

The flexibility of the close cooperation agreement was inspired by the desire to include non-Eurozone States in the SSM. As a consequence, the final Regulation is more accommodating than the original SSM Commission Proposal. Too much flexibility can, however, undermine the ECB's supervisory authority as non-Eurozone States could at any point threaten not to apply a supervisory decision, or even leave the SSM altogether.[85]

The opt-in regime aimed at alleviating the evident shortcomings of a supervisory system that covers only part of the European Union. It is however doubtful whether States from outside the Eurozone have interest to

[80] *See* SSM Regulation, *supra* note 20, art. 7(7).
[81] *See* SSM Regulation, *supra* note 20, art. 7(9).
[82] *See* SSM Regulation, *supra* note 20, art. 7(9).
[83] *See* WYMEERSCH, *supra* note 41, at 63.
[84] *See* WYMEERSCH, *supra* note 41, at 63.
[85] On this point *see* STIJN VERHELST, *Assessing the single supervisory mechanism: passing the point of no return for Europe's banking union* (Egmont, Working Paper No. 58, 2013),http://www.egmontinstitute.be/wp-content/uploads/2013/07/Egmont-papers-58.pdf.

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enter the SSM. Reputational advantages, cost saving, as well as an overall simplification of the regulatory regime, may be contributing factors in attracting banking groups with large activities within the SSM jurisdiction. Ideally, after some time, markets will prefer a solid supervisory regime under the leadership of the ECB whose actions are not skewed by national interests. This choice will then lead to more favorable interest rates, credit ratings and equity prices. By obeying to a single supervisory regime these groups will benefit from uniform regulations and, therefore, they will all stand on the same footing in terms of supervisory standards. However, only "significant" groups would enjoy such benefit. Hence, the structure of the national banking systems will be a key factor in deciding whether to adhere to the SSM. Even States without major banking groups but with a considerable presence of branches and subsidiaries might prefer to reduce their involvement in prudential matters, as well as the costs of supervision, by adhering to the SSM. In addition, the adhesion to the single supervisory regime may have a beneficial effect on the credit rating of adhering States, especially in the run-up to joining the Monetary Union. By contrast, this regime entails a relevant loss of sovereignty and, therefore, the advantages of joining the regime are not so evident, not only for less significant banking groups.[86]

5. THE IMPACT OF THE SSM ON THE SUPERVISION OF TRANSNATIONAL BANKING GROUPS

The impact of the SSM Regime on transnational banking groups deserves a specific analysis, which, for the purposes of this paper, will be confined to the attribution of key supervisory competences.

First of all, the ECB exercises direct supervision on all activities in the Eurozone of the branches of significant banking groups whose headquarters are located in States which are under the supervision of the SSM. In particular, when a branch qualifies for direct ECB supervision (which is to be determined according to the abovementioned criteria) the whole group falls

[86] On the reasons to opt-in see WYMEERSCH, *supra* note 41, at 61.

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under the supervision of the ECB. In this respect, the SSM regime is merely applying the "home country rule" where the home supervisor, whose functions have now been transferred to the ECB, is fully in charge of both home and host activities. Additionally, the same principle will apply to branches which operate in non-participating States. The ECB, indeed, maintains identical supervisory functions with respect to significant banking groups which, though under the supervision of the SSM, have established branches in non-participating States.[87]

Secondly, subsidiaries of significant banking groups that qualify for ECB's direct supervision are also directly supervised by the ECB regardless of their individual importance. As anticipated, since the assessment is done on a consolidated basis, national supervisors would not, therefore, maintain any direct supervisory competence.[88] Subsidiaries of banking groups that do not fall under the ECB's remit continue to be supervised nationally by the supervisors of the host country.

There are some significant consequences which stem from this new regime.[89] For instance, in term of prudential supervision differences between branches and subsidiaries are likely to disappear.[90] With respect to supervisory activities, differences in banking operations, regardless of whether they involve branches or subsidiaries, will in some respects become less relevant. As a consequence, it may become more profitable to exercise the activity through branches, as this would avoid the additional requirements of having to manage separate entities (e.g. own capital requirements, separate liquidity, management, boards, auditors, different regulators, etc.).[91] On the other hand, other aspects, such as for instance

[87] *See* SSM Regulation, *supra* note 20, art. 4(1)(b). But this obviously only refers to banking groups under the ECB's direct supervision, as this task is placed within the framework of SSM Regulation, *supra* note 20, art. 6(6).
[88] *See* SSM Regulation, *supra* note 20, art. 9(1).
[89] For an overview of the consequences of the SSM on the supervision of cross-border banking groups see E. WYMEERSCH, *supra* note 41, at 32-37.
[90] Indeed, underlying banking law may still contain some differences that the ECB will have to respect. Other factors may continue to play an important role in decisions as to where additional operations will be established.
[91] *See* WYMEERSCH, *supra* note 41, at 34.

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taxation, labor law, minority shareholders rights and local culture might, however, still be relevant in deciding whether to maintain a subsidiary.[92]

Less significant groups continue to be governed by the previous scheme: while branches fall under the purview of the home supervisor, the host supervisor is competent to supervise subsidiaries. Medium sized groups, that are active in several E.U. States, are now subject to a multitude of supervisors. For these institutions this regime is likely to be quite burdensome: all their activities, regardless of whether they are located in participating or in non-participating States, will have to deal with a fragmented supervisory landscape. An adequate response might be to convert the subsidiary into a branch so as to trigger a uniform, though national, supervisory regime. The structure of medium sized groups is relevant in determining whether the ECB might be able to retain competence. The ECB, indeed, in the presence of considerable cross border activities, and when the network of subsidiaries is significant, can decide to supervise them as tier one banking groups.[93] On the basis of the abovementioned criteria, only the ECB is, however, entitled to decide whether to exercise direct supervision on a credit institution. Indeed, according to the SSM regime cross-border banking groups are not offered an "opt-in option".[94]

With respect to participating States from outside the Eurozone, the rules to determine supervisory competence remain unchanged. Whether the ECB will be able to retain competence over national supervisors depends on the abovementioned criteria. The parent company's consolidated data will be utilized to determine the applicable supervisory regime.

A comparable national regime is applicable to less significant groups where the supervision is exercised by the national supervisors of the home State for the parent company and its branches. Subsidiaries, on the other hand, fall within the purview of the host State.

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[92] *Cf.* SSM Regulation, *supra* note 20, art .1(5).

[93] The Regulation mentions the ECB competence only with respect to subsidiaries but the assessment on a consolidated basis should prevail and therefore also the branches of the parent should be included in this calculation.

[94] *See* WYMEERSCH, *supra* note 41. at 34.

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The basic regime, as laid down in the Directives, then continues to apply to branches of banks which are established in non-participating States. The home supervisor of the State where the subsidiary is located will be the competent supervisory authority for their subsidiaries in the SSM area. The ECB will not be involved, even when banking groups cross the abovementioned consolidated quantitative thresholds.[95]

When quantitative thresholds are met exclusively by subsidiaries (on sub-consolidated basis) the ECB would be the competent supervisory authority as the subsidiary is a separate legal entity which is established in the SSM area. Under these circumstances, the ECB and the home supervisor of this group would have to conclude a Memorandum of Understanding (MOU) so as to define their respective positions in the college of supervisors.[96]

Even within the SSM area, the SSM Regulation approaches differently branches whose banking groups are established in a non-participating State. According to the relevant Directives, whereas the home supervisor is normally competent, the host supervisor has limited intervening powers.[97] In accordance with the SSM Regulation, "the ECB shall carry out the tasks for which the national authorities are competent in accordance with relevant Union law".[98] Therefore, all branches, regardless of their importance or volume, will be supervised by the ECB and in accordance ECB standards. Vice versa, according to E.U. law, when banking groups that fall within the purview of the SSM establish branches in non-participating States, these branches fall under the home competence of the ECB.[99]

On the basis of the rules on consolidated supervision, the local supervisor is competent to supervise subsidiaries of banking groups within the Eurozone even if they are located in a non-participating State.

[95] *See* WYMEERSCH, *supra* note 41, at 35.
[96] *See* SSM Regulation, *supra* note 20, art. 3(6), makes this mandatory for States housing the systemically important institutions. For the other non-participating States, a MOU in general terms will be concluded: *see* SSM Regulation, *supra* note 20, pmbl. 14.
[97] *See* CRD IV, *supra* note 22, artt. 40 ss; *see also* the regime for the significant branches set out in CRD IV, *supra* note 22, art. 51.
[98] *See* SSM Regulation, *supra* note 20, art. 4(2), irrespective whether there will be one or several branches. By incorporating one of these, supervision may shift to the national level, provided this group is "non-significant".
[99] *See* SSM Regulation, *supra* note 20, art. 4(1)(b), applying general Directive principles.

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Coordination among competent supervisors follows the existing E.U. Directives and supervisory coordination rules within colleges of supervisors for deciding between home and host supervisors. Therefore, if the headquarter of a significant banking group is located in the Eurozone, the ECB will be the leading supervisor, and the supervisory college will include supervisors from the non-participating jurisdictions where the subsidiaries are located. Vice versa, where a subsidiary in the euro area is part of a banking group whose place of establishment is in a non-participating jurisdiction, the supervisors of the States where these subsidiaries are located will normally join and lead the supervisory college, while the ECB is merely invited as a member. When a subsidiary is crossing the thresholds, the consolidated supervisor that is in charge of the group will not participate and the ECB will be in charge of the subsidiaries within the Eurozone.

Finally, with respect to banking groups in third countries' jurisdictions, the SSM Regulation remains largely silent.[100] Their subsidiaries and branches are therefore subject to the national supervisor of their place of establishment within the European Union and the regime of that jurisdiction will apply. This would mean that these groups could continue to operate under a regime of freedom to provide services while their subsidiaries would be subject to the supervision of national authorities on capital, management and all other aspects of banking regulation. Only if significant subsidiaries are subject to the supervision of the ECB. As mentioned above, the regime subjecting branches to direct ECB supervision [101] is only applicable to activities of groups established in non-participating States, but it does not apply to third country groups. From the perspective of systemic protection this difference could be justified: protection is merely offered to creditors of banks which are in the Eurozone. It may, however, create unfair advantages

[100] SSM Regulation, *supra* note 20, pmbl. 28, reminds that their supervision remains a national matter. With third countries, international agreements could be concluded by the ECB (pmbl. 80), but respecting the competences of the E.U. institutions, of the EBA and of the Member States. The European Union banks have to be considered third country banks.

[101] *See* SSM Regulation, *supra* note 20, art. 4(2). Host supervision for branches and services has been redefined and extended in CRD IV, *supra* note 22: if branches are not subject to host authorization (art. 17), there has to be close cooperation on a broad range of issues for both supervisors of branches (artt. 51 - 53). The host can request a branch to be qualified significant (art. 52) in which case special supervision is needed on liquidity and risks. Inspection for financial stability reasons are initiated by the host, although action from the home is expected (art. 53).

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for banks which are established in third countries. In this case, the national supervisory regime would be competing with the SSM.[102]

In conclusion, the effects of the SSM regime on the legal position of subsidiaries and branches which are located in the Eurozone are likely to be quite significant. Institutions which fall under the direct supervision of the ECB enjoy full advantages from the new regime and only deal with one supervisor. Therefore, notwithstanding the discrepancies between their domestic regimes, these groups, branches and subsidiaries are subject to the same supervisory regime regardless of their location. Conversion from subsidiary to branches is likely to become more frequent, as this may result in a better use of capital, including full exploitation of economies of scale, as well as considerable savings in administrative and legal costs. Moreover, other formalities, including reporting, should be centralized and significantly simplified; assessment will take place on a fully consolidated basis allowing for a better risk spreading. These advantages, however, exclusively exist at prudential level.[103] If local authorities have implemented diverging obligations, requirements and practices, these standards would nevertheless remain in place and continue to be different from State to State.[104]

According to the guidelines of the ECB, banks which are supervised nationally should be subject to a simplified supervisory regime, especially considering their marginal impact in terms of financial risk. However, if these banking groups operate in multiple Member States they would still be subject to several diverging regimes unless they convert subsidiaries into branches. On the other hand, little has changed for banking groups from non-participating Member States. Unless they restructure into subsidiaries, which would then remain under the supervision of national authorities, the ECB has now authority over incoming branches and services. When branches are converted into subsidiaries the SSM Regulation requires the conclusion of

[102] *See* WYMEERSCH, *supra* note 41, at 36.
[103] *See* Benedikt Wolfers & Thomas Voland, *Level the Playing Field: the New Supervision of Credit Institutions by the European Central Bank*, 51 COMMON MKT. L. REV. 1463 (2014).
[104] *See* WYMEERSCH, *supra* note 41, at 37.

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a MOU between the ECB and the supervisors of the non-participating States.[105]

6. THE ECB AS A PRUDENTIAL SUPERVISOR. GOVERNANCE AND POWERS

The governing bodies of the SSM are the Governing Council and the Supervisory Board. The former was already operating at the top of the ECB and it comprises the members of the Executive Board as well as the governors of the national central banks.[106] The latter is an "internal organ" of the ECB,[107] which carries out preparatory activities, including specific competences of national supervisors.[108] It is necessary to draw a line between these tasks and the maintenance of price stability which is the primary objective of the ECB's monetary policy.[109] As stated in the preamble to the SSM Regulation, supervisory duties must be fulfilled separately in order to avoid interferences and ensure that each function is carried out in accordance with its specific objectives. Article 25 of the Regulation indeed contains both abstract principles and practical guidelines for achieving a complete separation between supervisory duties and monetary policy.[110] First, monetary policy and prudential supervision must be kept separate. No prejudice to the monetary policy should stem from the exercise of supervisory tasks. Indeed, supervisory duties should neither interfere nor influence the monetary policy of the ECB.[111] In addition, the organization and

[105] *See* SSM Regulation, *supra* note 20, pmbl. 14, dealing with the effects of the ECB's decision on branches and subsidiaries of SSM banking group in non-participating states, and vice versa. Here a MOU should intervene, including the ECB and the national supervisors.
[106] On the composition of the Governing Council see C. ZILIOLI AND M. SELMAYR, THE EUROPEAN CENTRAL BANK (Giuffré, 2007) and R. SMITS, THE EUROPEAN CENTRAL BANK: INSTITUTIONAL ASPECTS (1997).
[107] *See* SSM Regulation, *supra* note 20, art. 26(1).
[108] *See* SSM Regulation, *supra* note 20, pmbl. 67.
[109] About the need to ensure a clear separation between monetary policy and supervisory tasks, see PISANY-FERRY, SAPIR, VERON & WOLFF, *supra* note 2, at 10, and ECB, Opinion of November 27, 2012 on the proposal for a Council Regulation entrusting the European Central Bank with specific tasks concerning policies relating to the prudential supervision of credit institutions and on the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 1093/2010 Establishing the European Banking Authority (EBA), 2013 O.J. (C 30) 6, http://www.ecb.europa.eu/ecb/legal/pdf/c_03020130201it00060011.pdf.
[110] *See* HANSPETER K. SCHELLER, *The European Central Bank: History, Role and Functions*, ECB.EUROPA.EU (Oct. 25, 2004), https://www.ecb.europa.eu/pub/pdf/other/ecbhistoryrolefunctions2004en.pdf.
[111] *See* Code of conduct for the members of the Supervisory Board of the ECB (2015/C93/02), https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmlegalframeworkforbankingsupervision.vol3.en.

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hierarchy of the personnel which performs supervisory tasks keeps them separate from other employees within the ECB.[112] As a consequence, based on whether they perform functions of monetary policy or supervision, the agenda and meetings of the Supervisory Board are kept separate.[113] Lastly, the separation between supervision and monetary policy is ensured by creating a Mediation Panel. The Panel deals with the different views of the competent authorities of participating States with respect to an objection of the Governing Council to a draft decision of the Supervisory Board.[114] Each participating States can appoint to the Panel one member which is to be chosen among the members of the Governing Council and the Supervisory Board. All votes count equally and the Panel decides by simple majority.[115]

In particular, the Supervisory Board consists of a chairman and a vice-chairman, four representatives of the ECB (which do not perform tasks which are directly related to the monetary functions of the Bank) and a representative of the national authority which is responsible for the supervision of credit institutions in each participating State. The chairman is selected among persons of recognized standing and professional experience in banking and financial matters. Members of the Governing Council are automatically excluded. The Vice-Chairman is chosen among the members of the Executive Board of the ECB. For both positions, the ECB shall transmit to the European Parliament a proposal of appointment and wait for the approval. Once the proposal is approved, the Board shall appoint the Chairman and Vice-Chairman of the Supervisory Board. These positions are full time and incompatible with other positions with the competent national authorities.[116]

The decisions of the Supervisory Board are adopted by the simple majority of its members. Each member has one vote, but in the event of a draw, the vote of the Chairman is decisive. Exceptionally, regulations are

[112] *See* SSM Regulation, *supra* note 20, art. 25(2).
[113] *See* S. ANTONIAZZI, LA BANCA CENTRALE EUROPEA TRA POLITICA MONETARIA E VIGILANZA BANCARIA [EUROPEAN CENTRAL BANK BETWEEN MONETARY POLICY AND BANKING SUPERVISION] (2014).
[114] On the Mediation Panel see the ECB Annual Report on supervisory activities (2014), https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmar2014.en.pdf.
[115] *See* SSM Regulation, *supra* note 20, art. 25(5).
[116] *See* SSM Regulation, *supra* note 20, art. 26(1) and (3).

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adopted by qualified majority.[117] The Supervisory Board established an internal Steering Committee made up of its own members. The Committee provides support to the activities of the Supervisory Board, including the preparation of meetings.[118] However, it has no decision-making powers.[119] The Supervisory Board plans and executes the tasks which have been assigned to the ECB and acts under the supervision of the Governing Council. All final decisions pertain to the competence of the Governing Council and are adopted by tacit consent. This mechanism purports to avoid that supervisory decisions are overturned as a consequence of the direct involvement of the Governing Council. In fact, the Supervisory Board, after the preparatory work, submits to the Governing Council its draft decisions. Draft decisions are automatically adopted unless the Governing Council objects within ten working days.[120]

A special provision applies to participating States whose currency is not the euro. As noticed before, they participate to the Supervisory Board, but they are not members of the Governing Council of the ECB. Pursuant to art. 7 (8), a participating Member State whose currency is not the euro shall notify the Governing Council when it disagrees on a draft decision of the Supervisory Board. The notification, which is to be drafted within five working days upon receiving the decision. The Governing Council decides on the merits of the dissent within five working days, by taking into account the motivations of the dissenting State. The State is also entitled to ask the ECB to immediately terminate the close cooperation agreement.

Special attention is given then to the independence of the ECB from the competent national authorities. The accountability of the ECB vis-à-vis the European Parliament, the Council and national parliaments is also to be illustrated.[121] Firstly, the members of the Supervisory Board and of the Governing Council shall act independently and objectively in the interest of

[117] *See* SSM Regulation, *supra* note 20, art. 26(6) and (7).
[118] *See* SSM Regulation, *supra* note 20, art. 26(10).
[119] *See* EUROPEAN CENT. BANK, *Rules of Procedure of the Supervisory Board of the European Central Bank*, ECB.EUROPA.EU(Dec.15,2014),https://www.ecb.europa.eu/ecb/legal/pdf/rop_sb_consolidated_version.pdf.
[120] *See* SSM Regulation, *supra* note 20, art. 26(8).
[121] *See* SSM Regulation, *supra* note 20, artt. 19 and 20. *See* DONATO MASCIANDARO & MARIA NIETO, *Governance of the Single Supervisory Mechanism: Some Reflections* (Baffi Ctr. Research, Working Paper No. 149, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384594.

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the whole Union. They should not seek or take instructions from communitarian institutions or bodies, Member States governments or other entities.[122] Secondly, the ECB responds to the European Parliament and to the Council for the implementation of supervisory tasks under the Regulation. The ECB then transmits an annual report to the European Parliament, to the Council and to the Eurogroup. The same document is also transmitted to the national parliaments of participating Member States.[123] Moreover, the Eurogroup may host hearing sessions with the President of the Supervisory Board of the ECB with regard to the execution of supervisory tasks. On the other hand, the European Parliament may, when necessary for exercising its powers in accordance with the TFEU, require the Chairman of the Supervisory Board to attend *in camera* hearings before the relevant committees. In particular, practical arrangements between the ECB and the European Parliament should be implemented in order to ensure full confidentiality, as required by the relevant rules.[124]

National parliaments of participating States may invite the Chairman, as well as other members of the Supervisory Board, to discuss with a representative of the competent national authority the supervision of credit institutions within their jurisdiction.[125]

In order to fund the supervisory activities of the ECB credit institutions, as well as branches which have been established in a participating Member State by a credit institution whose main place of establishment is in a non-participating State, pay annual contributions.[126] These fees, which should not exceed the actual costs of supervision (according to artt. 4 to 6 which illustrate its supervisory duties) will be calculated according to objective criteria, such as for instance the relevance

[122] *See* SSM Regulation, *supra* note 20, art. 19(1).
[123] *See* SSM Regulation, *supra* note 20, art. 20(2).
[124] *See* SSM Regulation, *supra* note 20, art. 20(6) and (8).
[125] *See* SSM Regulation, *supra* note 20, art. 21.
[126] *See* SSM Regulation, *supra* note 20, art. 30(1).

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and risk profile of individual credit institutions.[127] Furthermore, competent national authorities are responsible for enforcing these payments, as well as for recovering the costs which arise from their duties to cooperate with and assist the ECB.[128]

In order to ensure high supervisory standards, the ECB shall apply relevant EU law, which is broadly defined as encompassing all national acts which implement EU directive. To that effect, all guidelines, recommendations and decisions of the ECB should comply and be subject to the requirements of Union law.[129] The ECB may also adopt Regulations to the extent necessary to organize or clarify the modalities of its supervisory tasks.[130]

In this respect, however, it must be highlighted that the semi-strong harmonization of the single rulebook for the supervised entities, which is the foundation of the banking union as well as an important precondition of the SSM, could be a potential flaw of the present regime.[131]

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[127] *See* Regulation (EU) 1163/2014 of the European Central Bank of 22 October 2014 on supervisory fees (ECB/2014/41), 2014 O.J (L 311) 23 and Decision (EU) 2015/530 of the European Central Bank of 11 February 2015 on the methodology and procedures for the determination and collection of data regarding fee factors used to calculate annual supervisory fees (ECB/2015/7), 2015 O.J. (L 84)67,https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmlegalframeworkforbankingsupervision.vol3.en.

[128] *See* SSM Regulation, *supra* note 20, art. 30(3) e (5).

[129] *See* SSM Regulation, *supra* note 20, art. 4(3).

[130] Before adopting a Regulation with regard to matters having a substantial impact on credit institutions, the ECB shall conduct open public consultations and analyze the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the Regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify the urgency. *See* SSM Regulation, *supra* note 20, art. 4(3).

[131] The single rulebook is the foundation of the banking union. It consists in E.U. Regulations, Directives, implementing acts and recommendations, guiding principles and other non-binding instruments that all banks in the European Union must comply with. These rules, among other things, lay down capital requirements for banks, ensure better protection for depositors, and regulate the prevention and management of bank failures.
The European Banking Authority plays a key role in building up of the single rulebook. The EBA is mandated to produce a number of Binding Technical Standards (BTS): legal acts that specify particular aspects of an E.U. legislative text (Directive or Regulation) and aim at ensuring consistent harmonization in specific areas. BTS are always finally adopted by the European Commission by means of Regulations or decisions. At that point they become legally binding and directly applicable in all Member States. This means that, on the date of their entry into force, they become part of the national law of the Member States and their implementation into national law is not only unnecessary but also prohibited. *See* Andrea Enria, Chairperson European Banking Auth., *Developing a Single Rulebook in Banking* (Apr. 27, 2012),http://www.eba.europa.eu/documents/10180/27011/Andrea-Enria-s--Speech-at-CBI-Dublin---FINAL.pdf.

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Member States have, in fact, traditionally enjoyed considerable discretion in the implementation of Directives. The banking system in the Eurozone is indeed characterized by regulatory polycentrism: whereas the SSM provides for a centralized supervisory regime, a plethora of rule-makers is still involved in the process. As a consequence, the ECB conducts its supervisory duties according to the diverging rules of all participating States.[132]

As long as regulation and supervision remain national, cross-border differences in legislation create international frictions and give rise to regulatory arbitrage. However, this is not necessarily a problem for domestic supervisors. Centralized cross-border supervision, on the other hand, may be negatively affected by diverging national legislations.[133] In particular, the ECB may incur into higher information costs as it constantly has to consult national authorities on the applicable rules. In addition, the ECB may encounter issues in the interpretation of national legislation implementing EU Directives. The ECB will also face challenges in areas where no common rules are in place, such as for example non-performing loans, for which accounting standards and prudential requirements largely differ from one jurisdiction to the other.[134]

On the other hand, the ECB has the same powers which are available to competent supervisory authorities according to EU law.[135] To the extent necessary to carry out its tasks under the SSM Regulation, the ECB may

[132] *See* Guido Ferrarini & Fabio Recine, *Verso un Testo Unico Bancario Europeo* [*Towards a European Single Banking Act*], BANCARIA, Jun. 2015 (It.).

[133] For an analysis, see WYMEERSCH, *supra* note 41, at 12.

[134] *See* Sabine Lautenschläger, Member of the Exec. Bd. of the ECB & Vice-Chair of the Supervisory Bd., Single Supervisory Mechanism, *After one year of European banking supervision, have expectations been met?* (Jan. 13, 2016), which is available at https://www.bankingsupervision.europa.eu/press/speeches/date/2016/html/se160113.en.html.

[135] According to SSM Regulation, *supra* note 20, art. 9(1), "for the exclusive purpose of carrying out the tasks conferred upon it by art. 4(1), (2) and 5 (2), the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law. For the same exclusive purpose, the ECB shall have all the powers and obligations set out in this Regulation. It shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation. In particular, the ECB shall have the powers listed in Sections 1 and 2". *See* Marcello Clarich, *I Poteri di Vigilanza della Banca Centrale Europea* [*ECB's Supervisory Authority*] *in* L'ORDINAMENTO ITALIANO DEL MERCATO FINANZIARIO TRA CONTINUITÀ E INNOVAZIONI (Alessio Bartolacelli, Vincenzo Calandra Buonaura, Filippo Rossi eds., 2014.) (It.)

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instruct national authorities to utilize their powers when the Regulation does not confer this authority upon the ECB itself.[136]

In particular, the ECB is vested with broad investigatory powers: it can request credit institutions, as well as other legal or natural persons, to provide information. Additionally, the ECB can conduct all necessary investigations on any relevant person. This includes on-site inspections of its business premises (after being authorized by a judicial authority if the applicable national law so requires).[137] National authorities will also assist the ECB in the exercise of their specific supervisory powers in relation to the authorization of credit institutions and assessment of acquisitions of qualifying holdings.[138] Furthermore, the ECB is empowered to require institutions to exceed their capital requirements; to reinforce arrangements, processes, mechanisms and strategies; to present a plan to restore compliance with supervisory requirements; to apply a specific allocation policy; to restrict or limit their business, operations or network; to limit variable remuneration; to invest their net profit into strengthening their own funds.[139]

The ECB can merely sanction breaches by legal persons of immediately enforceable acts of Union law. Otherwise, the ECB may require competent national authorities to initiate proceedings in order to ensure that effective, proportionate and dissuasive sanctions are implemented.

The legal position of the aforementioned credit institutions *vis-à-vis* the ECB is also to be properly eviscerated.[140] The Administrative Board of Review internally revises the decisions of the SSM. However, even though the SSM Regulation mentions a right to judicial review, no procedure is currently in place.

[136] *See* SSM Regulation, *supra* note 20, art. 9(1), last period.
[137] *See* SSM Regulation, *supra* note 20, artt. 10 - 13.
[138] *See* SSM Regulation, *supra* note 20, artt. 14(2) and 15(2).
[139] *See* SSM Regulation, *supra* note 20, art. 16(2).
[140] For an overview of the legal position of the credit institutions versus the ECB see Tomas M.C. Arons, *Judicial Protection in* EUROPEAN BANKING UNION (Guido Ferrarini and Danny Busch eds., 2015); Raffaele D'Ambrosio, *Due Process and Safeguards of the Persons Subject to the SSM Supervisory and Sanctioning Powers,* QUADERNI DI RICERCA GIURIDICA DELLA BANCA D'ITALIA, Dec. 2013, at 1.

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The decisions of the ECB can directly affect individual credit institutions. The ECB can also issue binding decisions and instructions to national authorities in relation to individual credit institutions. The SSM Regulation does not provide for the right to appeal against subsequent decisions by national authorities. When the ECB asks for the intervention of national authorities, and the national laws of the participating State applies during that procedure, issues of applicable law and jurisdiction need to be discussed. The CJEU, as well as national administrative courts, might be able to exercise jurisdiction over a potential dispute. The latter would then presumably apply national rules of procedure.[141] The effectiveness of the SSM might be undermined by the absence of clear division of judicial competences.[142]

In particular, the directly applicable decisions of the ECB are subject to a two-fold system of review. Internal administrative review, as well as external judicial review can both be relevant. The procedure of administrative review is described in art. 24 of the SSM Regulation. Upon request by the affected institution, the Administrative Board of Review has to carry out an internal administrative review of the decision of the ECB.[143]

However, the scope of paragraph 1 of art. 24 is still to be assessed. It is doubtful whether direct decisions by the ECB qualify for the purposes of internal review when they are taken in accordance with national legislation. This issue is especially relevant when the applicable national statute is, in fact, implementing an EU directive. Even though national law applies, the competence of the ECB stems from the SSM Regulation. Therefore, the decisions of the ECB are not subject to judicial review at national level even if they apply national statutes. Indeed, "EU decisions" (here defined as

[141] *See* Kerstin Neumann, *The supervisory powers of national authorities and cooperation with ECB - a new epoch banking supervision*, 25 EuZW Beilage 9 (2014) stating that "the SSM creates complex classification issues and requires further in-depth analysis regarding the legal implications of different ECB actions. As far as the current understanding suggests, the SSM Regulation permits multiple legal proceedings which may cause inconsistent results within different *fora* that make up the SSM".
[142] *See* Arons, *supra* note 140, at 10.05.
[143] *See* D'Ambrosio, *supra* note 140, at 84.

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decisions which have been taken by a EU institution) are reviewed by EU courts.[144]

The scope of the internal administrative review is circumscribed to the procedural and substantive conformity of the decision of the ECB with the SSM Regulation.[145] On the basis of art. 253 (5) of the TFEU,[146] the ECB has adopted the Operating Rules of the Administrative Board of Review.[147]

In particular, after ruling on the admissibility of the request, the Administrative Board of Review has to express an opinion no later than two months upon receiving the request. Within this timeframe, the duration of the procedure can vary on the basis of the urgency of the matter. This opinion must be sent to the Supervisory Board of the ECB for the preparation of a new draft decision. The Supervisory Board must submit to the Governing Council a new draft decision which takes into account the opinion of the Administrative Board. If the Governing Council does not object within 10 working days after the submission, the draft decision is automatically adopted. The draft decision can abrogate, confirm or replace the initial decision.[148] Both the opinion by the Administrative Board of Review and the draft decision need to be motivated and must be notified to the parties.[149] The request of review, however, does not suspend the decision. On the other hand, after receiving a proposal from the administrative board, the Governing Council may suspend the application of the contested decision when the circumstances so require.[150]

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[144] The following formalities have to be fulfilled. The request for review must be made in writing, including a statement of grounds, within one month of the date of notification of the ECB decision to the person requesting the review. In the absence of notification, the time limit starts as of the day on which the ECB decision came to the knowledge of the person requesting the review.

[145] *See* SSM Regulation, *supra* note 20, art. 24(1).

[146] *See* TFEU, *supra* note 51, art. 263 (5), stating that "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".

[147] *See*, European Central Bank Decision 2014/16 of on the Establishment of the Administrative Board of Review and its Operating Rules, 2014 O.J. (L 175) 47 (Apr. 14, 2014), https://www.ecb.europa.eu/ecb/legal/pdf/oj_jol_2014_175_r_0017_en_txt.pdf.

[148] *See* SSM Regulation, *supra* note 20, art. 24(7).

[149] *See* SSM Regulation, *supra* note 20, art. 24(9).

[150] *See* SSM Regulation, *supra* note 20, art. 24(8).

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Article 24 (11) of the SSM Regulation explicitly states that the abovementioned proceedings of administrative review do not prejudice the right to initiate a claim before the CJEU under the relevant Treaty law. According to article 263 of the TFEU,[151] third parties can ask the CJEU to review the legality of acts of bodies, offices and agencies of the EU when they produce legal effects *vis-à-vis* a third party.[152] All natural and legal persons can initiate proceedings before the CJEU when the contested act has either been addressed to them or it could potentially impinge upon their rights. The right to judicial review remains intact even when the contested act does not have any practical impact.

In conclusion, on the basis of the aforementioned art. 263 of the TFEU all decisions by the ECB which directly address a credit institution fall within the purview of the CJEU. Furthermore, according to paragraph 5 of art. 24 of the SSM Regulation any natural or legal person can challenge a decision of the ECB if that decision is directly addressed to them or if it directly affects their interests.[153]

It is however doubtful whether, on the basis of art. 263 of the TFEU, the CJEU could review decisions of the ECB when the decision making powers of the ECB stem from a national statute, including statutes implementing EU Directives on financial supervision. However, when the decision of the ECB does not directly address the plaintiff or affect its interests the case could be declared inadmissible. On the other side, standing will be granted if the decision of the ECB directly affects a credit institution.[154] In general, it could be desirable to apply national administrative statutes, as interpreted by national courts. However, according to art. 263 of the TFEU the jurisdiction of the CJEU encompasses, but it is not limited to, directly applicable E.U.

[151] *See* TFEU, *supra* note 51, art. 263, paragraph 1.
[152] The European Central Bank is an E.U. institution. *See* Consolidated version of the Treaty on European Union art. 13(1), Jun. 7, 2016, 2016 O.J. (C 202) 13 [hereinafter TEU].
[153] *See* SSM Regulation, *supra* note 20, art. 24(5).
[154] *See* TFEU, *supra* note 51, art. 263(2).

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law.[155]

A fundamental point to determine is whether indirect ECB decisions or instructions to national authorities can be subject to judicial review. Furthermore, if they can be subject to review it is important to determine what court is competent to hear the case. These questions are to be answered by assessing the nature of the decisions and instructions of the ECB. According to art. 263 of the TFEU the applicant must be directly affected by the decision of a E.U. institution. Alternatively, the applicant must have a direct interest in the outcome of the decision. First of all, ECB decisions clearly qualify as acts of a E.U. institution. Decisions, however, are not directly addressed to credit institutions. The ECB instructs national authorities on the issuance of supervisory decisions. As the decision is not directly applicable there is no legal standing on the basis of the first ground for revision.

However, the second ground could be met. The ECB indeed instructs national authorities to take a decision which affects the interests of individual credit institutions.

Since national authorities mediate between the original decision of the ECB and the final addressee, the issue of 'direct interest' is of critical importance in order to seek remedy against the original decision before the CJEU. 'Direct interest' is only established when the intermediate authority, in this case the national authority, has no autonomous or discretionary decision-making power.[156] These criteria are met if national authority merely implements the decisions of the ECB. Implementation is to be automatic, and stem from the direct application of E.U. law. It is therefore fundamental to

[155] *See* SSM Regulation, *supra* note 20, pmbl. 60, "Pursuant to Article 263 TFEU, the CJEU is to review the legality of acts of, inter alia, the ECB, other than recommendations and options, intended to produce legal effects vis-à-vis third parties". In regard instead of admissibility, the following formality is important. TFEU, *supra* note 51, art. 263(5), provides the proceedings must be instituted within two months of the publication of the ECB decision, or of its notification to the applicant, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

[156] *See* Stichting Woonlinie and Others v. European Commission, No. 133-12, ECLI:EU:C:2014:105 EUR-Lex (CJEU Feb. 27, 2014). *See also* KOEN LENAERTS, IGNACE MASELIS AND KATHLEEN GUTMAN, EU PROCEDURAL LAW (2014).

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assess whether there is some discretion as to the implementation of the original decision of the ECB.[157]

Thus, the legal standing of the credit institution depends on the degree of detail of the ECB instructions.[158] On the one hand, if the ECB decision itemizes what rules find application and how they are to be implemented, affected credit institutions will be able to claim before the CJEU as national authorities have no discretionary powers. National authorities are merely formal intermediaries. On the other hand, if the ECB merely lists the objectives, or otherwise leave national authorities with some degree of discretion (e.g. on the use of supervisory powers) credit institutions have no claim before the CJEU, even if the discretionary powers of national authorities are relatively minor. Moreover, it is important to notice that the competent national administrative courts cannot void the original decision or instruction of the ECB. Therefore, credit institutions have no effective remedies against the original decision. Indeed, as partial standing has not been provided for, affected third parties have no way of independently challenging the non-discretionary instructions.

The potential for conflicting judicial decisions increases if the ECB decision and the decision of the national authority are reviewed by two different courts. This is a clear issue in the administrative and/or judicial review of national authorities decisions, which follow the instructions of the ECB.[159] Furthermore, when national authorities are left with no discretionary decision-making powers, judicial review before domestic courts may encounter obstacles. For example, national authorities may argue that, since it had no discretionary power no remedies are available under national administrative law. National administrative courts cannot void the decisions of the ECB, as they are merely competent for the acts of local administrations. Therefore, national courts may declare the claim inadmissible as the affected financial institution has no sufficient interest in contesting the "decision" of the national authority. Indeed, even if the national decision is declared void, the national authority is nevertheless

[157] *See* LENAERTS, MASELIS AND GUTMAN, *supra* note 156, at 7.91-7.92.
[158] *See* Arons, *supra* note 140, at 13.31.
[159] *See* Arons, *supra* note 140, at 13.32.

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bound to implement the instructions of the ECB. Therefore, the decision would also have to be challenged before the CJEU. However, as mentioned earlier, as partial standing is not a viable path the CJEU is likely to reject the claim when some autonomous decision-making power rests with the national authorities.

The effectiveness of the SSM reform may be further weakened by the absence of clear judicial protection. Sometimes, when national authorities are given little discretion, or even no discretion, individual credit institutions have to challenge both decisions. Indeed, if the ECB decision is left unchallenged, a successful challenge of the local decision would lead to no actual remedy. For this reason, national courts could declare the claim inadmissible for lack of sufficient interest, especially considering that the instructions of the ECB cannot be challenged before national courts. On the other hand, if the decision of the national authority is not challenged and the national authority enjoys some autonomous decision-making power the annulment of the ECB decision may not suffice. Even though art. 266 of the TFEU requires the ECB to comply with the ruling of the CJEU and to instruct national authorities to do the same, the autonomous decisions of national authorities are not directly affected.

Moreover, this could generate conflicting court decisions. Whereas the ECB decision can indeed only be challenged before the CJEU, the decisions of national authorities are to be brought before national administrative courts. No remedy to this situation is currently in place. Indeed, no request can be filed to suspend domestic proceedings if the same case is pending before the CJEU. Additionally, the current system might give rise to some inequalities within the EU. As different substantive and procedural administrative laws apply the chances of conflicting decisions among participating States are rife. A possible solution would be to centralize the judicial review so as to reflect the current supervisory policy, as well as the concentration of decision-making powers. On the other hand, the E.U. dispute resolution mechanism would have to interpret national administrative law if E.U. directives, as well as regulations, leave to national authorities some autonomy in the phase of

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implementation.[160] Since E.U. provisions normally itemize a range of pre-established options, the CJEU would have to ascertain whether domestic authorities have respect the boundaries imposed by E.U. law.

As a further obstacle to centralization, the CJEU, as well as national courts, is already dealing with overcrowded dockets.

7. THE RELATIONSHIP BETWEEN THE ECB AND THE OTHER E.U. SUPERVISORS

One of the most delicate points of the SSM reform concerns the relationship between the ECB and E.U. supervisors.[161]

With regard to the European Banking Authority, the explanatory memorandum accompanying the SSM proposal emphasized the role and existence of the EBA without significant changes in its composition and tasks.[162] In the final draft most of these issues were abandoned and transferred to the EBA amended Regulation,[163] which was discussed and approved together with the SSM proposal.

Some might have expected that it would have been logical to entrust the EBA with prudential supervision. The EBA was only operational in 2011 and it was put in charge, *inter alia,* of "improving the functioning of the internal market by implementing a thorough, effective and consistent level of regulation and supervision".[164] There were, however, several legal impediments that prevented the EBA from being in charge of the SSM. For instance, the Treaty, as well as the prevailing jurisprudence, did not allow for discretionary decisions to be delegated to independent bodies[165]. First of all,

[160] *See* T. Arons, *supra* note 140, at 13.93.
[161] *See* STEFANO CAPPIELLO, *The interplay between the EBA and the Banking Union* (Robert Schuman Ctr. for Advanced Studies Research, Working Paper No. 77, 2015), http://cadmus.eui.eu/bitstream/handle/1814/37378/RSCAS_2015_77.pdf?sequence=1. *See also* Wymeersch, *supra* note 41.
[162] *See* European Court of Auditors, *'European banking supervision taking shape -EBA and its changing context'* (2014), http://www.eca.europa.eu/Lists/ECADocuments/SR14_05/SR14_05_EN.pdf.
[163] *See* EBA amended Regulation, *supra* note 21.
[164] *See* EBA amended Regulation, *supra* note 21, art. 1(5)(a). This was the opinion in the UK: *see* House of Lords, *The Impact of Banking Union on the EBA and the ESRB* (Dec., 2012), http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/88/8806.htm.
See also Eilis Ferran & Valia Babis, *The European single supervisory mechanism,* J.CORP.L.STUD. (2013).
[165] On the "Meroni doctrine" of the Court of Justice of the European Union, see *supra* text accompanying note 39.

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the EBA implements "horizontal" cooperation not only between the eighteen Eurozone authorities, but also between the twenty-eight national legislators; as opposed to the SSM where every significant bank is represented by one delegate whose authority in the participating States is vertical. Furthermore, the EBA's activities do not normally involve supervision and mainly focus on regulation and standard setting; therefore whereas the ECB will be acting as an independent supervisor[166], the EBA is essentially an agency of the Commission.[167] It is then reasonable to assume that the EBA's slightly modified functions will ensure the even application of the EBA Regulation to the twenty-eight Member States. The internal financial market will thus remain cohesive by avoiding the creation of a two-speed Europe. This concern has been one of the main focuses throughout the discussion of the SSM reform.[168]

In order to overcome this issue, the EBA Amended Regulation modifies the balance between the standard setting powers of the EBA and the ECB which acts as a new powerful banking supervisor for the Eurozone.[169] Whereas the relative position of the ECB as prudential supervisor has been weakened the powers of the EBA have been increased. However, the core powers of the EBA have not been altered by this process. The EBA will continue to be in charge of implementing and enforcing regulatory provisions (artt. 10 and 17 to 19). Implementing Regulations will be adopted solely by the European Commission. The enforcement is largely depending upon the procedures of the Commission. Individual decisions will have to closely follow the literal meaning of the directly applicable acts by avoiding discretionary judgments.[170]

The main changes with respect to the previous EBA Regulation have had an impact on the way the EBA conducts its competences. The new regime

[166] *See* Veron, *supra* note 28, at 2.10, for a political explanation: the United Kingdom wanted to have a countervailing force against an all-powerful ECB. Obviously the argument has received attention.
[167] Although more independent than most other agencies. *See* CHRISTOS VI. GORTSOS, *The European Banking Authority within the European System of Financial Supervision* (European Ctr. Of Econ. & Fin. Law, Working Paper No. 1, 2011), which is available at http://www.ecefil.eu/UplFiles/wps/WORKING%20PAPER%20SERIES%202011_1.pdf.
[168] *See* House of Lords, *supra* note 164, at 27.
[169] *See* Niamh Moloney, *European Banking Union: Assessing its Risks and Resilience*, COMMON MKT. L. REV. (2014).
[170] *See* WYMEERSCH, *supra* note 41, at 67.

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has strived to grant equal powers to all supervisory bodies which act "independently and objectively and in a non-discriminatory way in the interest of the E.U. as a whole".[171] As the drafters were concerned that the ECB would have occupied a dominant position with respect to other supervisory bodies,[172] the ECB, despite being given adequate representation on the Board of Supervisors of the EBA,[173] has no right to vote. National supervisors, including those of non-participating States, qualify as voting members.

The EBA amended Regulation contains a plethora of provisions which strengthen the EBA's position in order to avoid "centrifugal" forces in an effort to re-balance the powers of the EBA with respect to the ECB.[174]

The EBA is, *inter alia*, responsible for the development of a "European Supervisory Handbook for the whole Union".[175] The Handbook itemizes the best practices, methodologies and procedures. Although this may seem to limit to the ECB's discretion in developing its own supervisory techniques. The Handbook will, indeed, be utilized by the EBA for peer reviews, as well as for the assessment of supervisory practices. It contains traditional supervisory tools which implement soft law instruments. The Handbook's purpose is to avoid supervisory competition between supervisors.[176] By reviewing the way in which the Handbook has been implemented, the EBA might advise the Commission that "legislative initiative is needed to ensure further harmonization of prudential definitions and rules".[177] The EBA Regulation indeed states that the Handbook will not be a legally binding act

[171] *See* EBA amended Regulation, *supra* note 21, art. 1(5).
[172] *See* WYMEERSCH, *supra* note 41, at 67.
[173] *See* EBA amended Regulation, *supra* note 21, art. 4(c); the representative will not necessarily come from the ECB, having been nominated by the Supervisory Board. However a second representative "with expertise on central banking tasks" may accompany the ECB representative (EBA amended Regulation, *supra* note 21, art. 4(c) and (b)).
[174] *See* Jacques De Larosière, *Privilégier une structure légère mais aux aguets*, 757 BANQUE (2013); V. Constâncio, Vice-President, European Cent. Bank, *The nature and significance of Banking Union* (Mar. 11, 2013), www.ecb.europa.eu/press/key/date/2013/html/sp130311.en.html, who considers that the stronger centralization at the ECB will benefit the coordination role of the EBA.
[175] *See* EBA amended Regulation, *supra* note 21, art. 8(1)(a).
[176] *See D. Nouy, Un superviseur adossé à la BCE est un vrai avantage, Banque*, 757 BANQUE (2013); *N. Veron, L'EBA, arbitre des différends entre le Royaume-Uni et l'Union bancaire*, 757 BANQUE (2013) (*considering that the development of a single Handbook will be very difficult with the United Kingdom as main interlocutor)*.
[177] *See* Nouy, *supra* note 176, at 24-26, who sees it as an instrument to support equal competition especially between the centre and the "periphery".

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as it will not have an impact on the supervisory judgement. There is, however, a risk that national supervisors, despite their lack of authority with respect to significant banking groups, may gain control over supervisory procedures.

The competence of the ECB and the EBA are also likely to overlap with regard to the performance of stress tests:[178] the ECB proceeds to stress testing on individual basis and, as a regular part of its supervision, on individual banks.[179] The EBA, on the other hand, autonomously engages in Union-wide "assessments of resilience" in cooperation with the ESRB.[180] To accommodate EBA's requests, both banks and national supervisors, including the ECB, may be directly asked to undertake specific on-site inspections and examinations.[181]

To summarize, the EBA's rights to obtain information from credit institutions has been expanded to banks, holding companies, branches and non-regulated entities within banking groups.[182]

The EBA also supports the development of more efficient supervision programs by promoting joint supervisory plans and examinations.[183] Before the implementation of the EBA Amended Regulation, the EBA had a wide range of powers. After its implementation, the EBA is also entitled to convene a College of Supervisors.[184]

Special arrangements between governments and the EBA have been implemented in order to re-balance the powers of participating and non-participating States.

Article 40 of the EBA amended Regulation The SSM Regulation[185] states that the ECB can participate to the EBA Board of Supervisors. The Supervisory Board will nominate a representative for the ECB, which is not

[178] *See* CAPPIELLO, *supra* note 161, at 8.
[179] *See* EBA amended Regulation, *supra* note 21, art. 44. See Anna Gardella, Banca d'Italia, *Ruolo dell'EBA e della BCE nella Regolamentazione Bancaria Europea* [*The role of EBA and ECB in the European Banking Regulation*] (May 16, 2014).
[180] *See* EBA amended Regulation, *supra* note 21, art. 22(1)(a).
[181] *See* EBA amended Regulation, *supra* note 21, art. 32(3)(a) and (6).
[182] *See* EBA amended Regulation, *supra* note 21, art. 35(6).
[183] *See* EBA amended Regulation, *supra* note 21, art. 21.
[184] *See* EBA amended Regulation, *supra* note 21, art. 20(a).
[185] *See* EBA amended Regulation, *supra* note 21, art. 3 (2).

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necessarily going to be one of its employees.[186] This representative, despite sitting as an observer next to national supervisors, has no right to vote.[187]

Moreover, the ECB representative does not represent the 18 jurisdictions for which it has supervisory capacity. The divergent views expressed by Member States within the Supervisory Board could undermine the achievement of a well-balanced regulation.[188] On the other hand, it is likely that over time the relative weight of the ECB in this debate will lead the EBA to shift its focus on the relationship with supervisors of non-participating States.[189]

When the Board of Supervisors discusses issues which are related to individual financial institutions, non-voting members, with the exception of the representative of the ECB Supervisory Board, do not participate to the meeting. Therefore, the meeting is attended by the ECB representative, the EBA chairperson and the executive director.[190]

As decision-making procedures in the EBA's Board of Supervisors was one of the key elements in convincing certain Member States, along with the European Parliament, to accept the entire SSM this topic deserves to be further explored. Both the original and the amended Regulation stipulate that decisions are adopted by the Board of Supervisors, *i.e.* by the simple majority vote of the twenty-eight national regulators. The votes of participating or non-participating Member States count equally.

Exceptions are nevertheless possible for the few topics. Qualified majority is needed for deciding on regulatory matters (artt. 10 to 15). Qualified majority is achieved by requiring the simple majority of both participating and non-participating States. The increasing influence of the

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[186] *See* EBA amended Regulation, *supra* note 21, art. 40(1)(b).

[187] *See* EBA amended Regulation, *supra* note 21, art. 40(1)(d).

[188] The SSM Commission Proposal, *supra* note 12, gave the ECB the power to "coordinate and express a common position" for the participating Member States: SSM Commission Proposal, *supra* note 12, art. 4(1)(1). *See also* Explanatory Memorandum to the SSM Commission Proposal, *supra* note 12. This approach has been abandoned by the Parliament in the final version, restoring the full freedom of the competent authorities of the participating Member States to agree on subjects within the EBA's competence.

[189] This fear was repeatedly expressed in House of Lords, *supra* note 164, at 28. The House of Lords stated that voting rights should be proportional to the relative significance of the financial markets in the different Member States.

[190] *See* EBA amended Regulation, *supra* note 21, art. 40(4).

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ten non-participating States with respect to the eighteen Eurozone States may negatively affect the conclusion of "close cooperation" agreements. Implementing Regulations, recommendations, and decisions to prohibit or suspend particular financial services obey to this special voting regime.[191] Decisions on breaches of Union law, emergency decisions and dispute settlement can be decided by simple majority. The simple majority threshold is, however, to be achieved by both groups. The decision is approved when participating States, as well as non-participating States, successfully deliberate by simple majority.[192]

On the other hand, if the number of non-participating States goes down to four, or less than four, non-participating States in the European Union, decisions will be adopted by simple majority as long as at least one non-participating State votes in favor of the proposal. If this voting system is implemented the last non-participating State would be able to obstruct the decision–making process. For instance, the United Kingdom, which is likely to be the last long-term dissenter, will have to concur on the proposed measures even when all participating States have already voted in favor of the proposal. The ECB, with the aid of the EBA as mediating authority, will have to directly negotiate with the dissenting State.

In order to prevent stumbling blocks, the Regulation contains a review clause. As soon as the number of non- participating States goes down to four the Commission will propose to review the current voting regime. It is difficult to see how the system could be reviewed without a radical overhaul in the distribution of regulatory and supervisory powers in the European Union.

By moving on to the legal duties of the EBA, the amended Regulation does not have an impact on the Implementing Regulation. No changes have therefore been made to articles 10 to 15, which specifically deal with

[191] *See* EBA amended Regulation, *supra* note 21, artt. 10 - 16 and 9(5).

[192] *See* EBA amended Regulation, *supra* note 21, artt. 17, 18 and 19. For the composition of the conflict resolution Panel, a supermajority of ¾ of the voting members is required, eliminating the need for the double simple majority: EBA amended Regulation, *supra* note 21, art. 44(1) and (6).

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Regulatory Technical Standards, as well as to art. 16 on Guidelines and Recommendations. However, as explained above, these kind of changes is to be adopted by qualified majority. On the other hand, other legal aspects of the EBA have been modified, *i.e.* "Breaches of Union law", "Emergency situations" and "Settlement of disagreements" (artt. 17, 18 and 19).

Whenever a national supervisor is accused of breaching the law of the European Union, the EBA is entitled to act and, under the formal control of the Commission, officially establish the breach. The EBA, for directly applicable acts and in conformity with the formal opinion of the Commission, may then enforce its deliberation.[193] According to the new regime, an independent Panel would have to be appointed.[194] The Panel would be made up of the members of the Board of Supervisors of the EBA which hold no stake in the deliberations. The Panel would then have to formulate a proposal before the Board of Supervisors. This mechanism would submit the ECB to its peer supervisors, including supervisors from SSM jurisdictions. As the Supervisory Board is a non-voting member of the Board of Supervisors, it cannot be part of the Panel that judges breaches in non-SSM States.

The Regulation also illustrates the fashion for implementing emergency actions.[195] The EBA may "adopt individual decisions requiring competent authorities to take the necessary action (…) to address any such developments by ensuring that financial institutions and competent authorities satisfy the requirements laid down in that legislation". As the ECB is a "competent authority", as well as a central bank, it will surely be involved in emergency matters.[196]

The EBA also plays a role in the dispute settlement of disagreements between supervisors in a transnational context. The EBA intervenes in dispute resolution between national supervisors by establishing committees

[193] *See* EBA amended Regulation *supra* note 21, art. 17(6) and (7); for details see also, WYMEERSCH, *supra* note 41.
[194] *See* EBA amended Regulation, *supra* note 21, art. 41(1) (a). By consensus within the Board of Supervisors, and if not possible, by a ¾ vote: *cf.* EBA amended Regulation, *supra* note 21, art. 44(6).
[195] *See* EBA amended Regulation, *supra* note 21, art. 18.
[196] *See* EBA amended Regulation, *supra* note 21, art. 18(2).

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similar to ones mentioned earlier.[197] In these cases the decisions of the EBA would be directly applicable. Decisions would either be addressed to the competent authorities or, in case of non-implementation, to the individual market participants.[198] However, the EBA has very limited room for discretion. It can only act on provisions that are directly applicable. In other words, once the EBA has identified the applicable rules it can only intervene on the unwillingness of national supervisors to effectively implement them. This also means that the EBA is not creating additional rules, but it is merely implementing already applicable provisions.[199]

When the ECB acts as supervisor for significant banking institutions, or the national supervisor operates under the oversight of the ECB, this dispute resolution mechanism does not apply to disagreements between supervisors of participating States and the ECB.

As a result, art. 19 only encompasses disputes between the ECB and supervisors of non-participating States, as well as conflicts between domestic supervisors of different States. Within the SSM, there is no mechanism for settling disputes between supervisors, as the Governing Council would ultimately judge upon differences of opinion. Its decisions can however be reviewed by the CJEU.

On the other hand, The Regulation does not pay particular attention to the relationship between the ECB and the European Systemic Risk Board (ESRB). The Regulation ignores the ESRB, it merely states that the ECB may replace other supervisory bodies, including the ESRB.[200]

Like the EBA the European Systemic Risk Board was created by the 2010 Reform as a response to the financial crisis. Before the crisis, supervisors focused mostly on the health of individual financial institutions. Therefore, as the overall stability of the financial system was overlooked potential risks to the whole financial sector were underestimated. As a reaction to this failure, the supervisory focus moved to the overall stability of the system ("macro-prudential supervision").

[197] *See* EBA amended Regulation, *supra* note 21, art. 19(4).
[198] *See* EBA amended Regulation, *supra* note 21, art. 19(3) and (4).
[199] *See* WYMEERSCH, *supra* note 41, at 71.
[200] *See* SSM Regulation, *supra* note 20, art. 3.

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The ESRB is the macroprudential supervisor within the European Union.[201] In contrast with the EBA, after the establishment of the SSM no formal changes to the tasks or membership of the ERSB were introduced, even though after the establishment of the SSM the ECB obtained larger competences and expertise in the field of macro-prudential supervision.[202]

A practical consequence of the ECB's expertise is that SSM countries could frequently take the same stance in the ESRB. If this is the case, the position of the SSM-countries is likely to be the determining factor in the decisions of the ESRB. Eurozone Member States hold 19 of the 38 votes in the SSM. SSM countries therefore almost reach the simple majority of voting members. On the other hand, they would be able to stop the adoption of any decision. Whether the SSM-countries will have an absolute majority in the future will depend on the evolutions of the European Union, as well as SSM, memberships.[203]

Even though it may appear hazardous, the power of the SSM in determining the decisions of the ESRB does not pose any real threat. First of all, national supervisors and the ECB will not always vote in a similar way. Discretionary judgment is always a key factor in assessing the scale of a macro-prudential risk. This will likely lead to diverging voting strategies. Most importantly, the decisions of the ESRB have no binding power. Therefore, even if the SSM could impose its decisions on other members of the ESRB, major consequences would be avoided.[204]

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[201] The essential task of the ESRB is therefore to supervise the financial system in order to detect potential risks that can affect the financial system and the real economy. When such a risk is detected, the ESRB can emit warnings and recommendations to the Member States and other E.U. bodies. The ESRB, however, lacks the competence to make decisions that are binding on others, as the Member States and E.U. bodies are not obliged to act upon the warnings and recommendations issued by the ESRB. In its present configuration, the ESRB is a rather bloated body. In an European Union with twenty-eight Member States, the ESRB has sixty-seven members of which thirty-eight have voting rights. Voting members comprise representatives of all Member States, the President and Vice-president of the ECB and other representatives of E.U. bodies. Most decisions in the ESRB are made by simple majority. A majority of ⅔ is needed only when a recommendation or warning is to be made public.

[202] *See* ESRB, *The ESRB Handbook on Operationalizing Macro-Prudential Policy in the Banking Sector*, ESRB.EUROPA.EU(Mar.,2014),https://www.esrb.europa.eu/pub/pdf/other/140303_esrb_handbook_mp.en.pdf. *See also* Goeffrey P. Miller, *Risk Management and Compliance in Banks: The United States and Europe in* EUROPEAN BANKING UNION (Guido Ferrarini and Danny Busch eds., 2015).

[203] *See* WYMEERSCH, *supra* note 41, at 68-70.

[204] *See* VERHELST, *supra* note 85, at 36-37.

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In conclusion, the general framework of E.U. banking regulation and supervision has been left substantially unaltered by the SSM reform. The ECB shall indeed cooperate with other European authorities[205] such as the ESAs (which include the EBA) and form the ESFS in accordance with the De Larosière report.[206] Moreover, the models of enhanced cooperation and supervision of the general framework of the European Union is not affected by the introduction of the SSM.[207] Whereas Eurozone countries have a centralized supervisory framework, models of enhanced cooperation and supervision still characterize bank supervision in the rest of Europe.

8. BALANCES AND PERSPECTIVES OF THE SSM

This work highlights the weaknesses of the European banking system. The previous banking supervision and resolution framework, which was mainly based on cooperation amongst national authorities, and, as the recent financial crisis has shown, it was therefore doomed to fail in a situation of crisis. Moreover, the absence of common resolution mechanisms and of common deposit guarantee schemes led to an aggravation of the costs of a banking crisis, increasing systemic risk as well as the chances of a bailouts.

In order to overcome the previous fragilities of the European banking system a new major form of centralization and resolution was introduced in the European Banking Union. The SSM, one of the pillars of the European banking union, however, includes elements of cooperation and delegation. On the one hand, this will help the ECB to perform its tasks as a central supervisor. On the other hand, it will give rise to conflicts of interest and information asymmetries which could endanger the effectiveness of the mechanism. The SSM can be described as a semi-strong form of supervisory centralization.[208] Furthermore, the SSM will be limited to the Eurozone. Forms of enhanced cooperation and lead supervisor models will nevertheless apply in the relationships with other countries. Moreover, as already

[205] *See* GUIDO FERRARINI & DANNY BUSCH, *A BANKING UNION FOR A DIVIDED EUROPE* (Guido Ferrarini and Danny Busch eds., 2015).
[206] *See supra* note 13.
[207] *See also* Ferrarini & Chiodini, *supra* note 25, at 8-10.
[208] *See* Ferrarini & Chiarella, *supra* note 1, at 5.

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established by the 2010 reform, the ECB will have to cooperate with the EBA, which will nevertheless keep its regulatory and mediation tasks. As a result, cross-border banking groups will often be subject to substantial supervisory fragmentation. Therefore, the flaws of the previous supervisory framework have not been overcome by the reform.

As highlighted, these flaws could be partially compensated, if the SSM will be extended to a sufficient number of non-euro countries under the close cooperation regime.[209] However, non-euro countries have little incentives to join the SSM. They could benefit from their outsider position by exploiting the voting power of non-euro countries in the Supervisory Board of the EBA.

The SSM Regulation establishes that the European Commission will submit a review report on the functioning of the SSM. This therefore represents a good opportunity to implement the current framework. The report must, *inter alia*, assess the possibilities of developing further the SSM and in particular the appropriateness of the governance arrangements of the SSM. The functioning of the SSM within the ESFS, the division of tasks between the ECB and the national competent authorities within the SSM and the interaction between the ECB and the EBA are also to be ascertained.[210] The report shall be forwarded to the European Parliament and to the Council. The Commission shall then draft accompanying proposals, as it deems appropriate. The hope is therefore that these flaws will be overcome in the future.

At this stage it's still uncertain whether the newly introduced framework will be sufficient to break the connection between sovereign States and banks inside the Eurozone, as still there is no evidence of the SSM reliability. Many structural weaknesses therefore indisputably emerge from the architecture of the SSM. For instance, resources constraints and as well as the difficult balance between the interests of individual Member States

[209] On the regime of close cooperation see *supra* the para. *ad hoc*.
[210] *See* SSM Regulation, *supra* note 20, art. 32.

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and the, often conflicting, interests of the Eurozone. The current framework is, in fact, the outcome of political compromises.[211]

If legal and political constraints had not played a major role in the shaping of the current regime, the SSM would certainly look different.[212] As the role of central banks in prudential supervision has been highlighted by the recent crisis, the ECB probably would still be in charge of the supervisory functions. The allocation of responsibilities between national supervisory authorities and the ECB would however be much more straightforward.[213]

The ECB's remit would be broader. It would continue to include banks while also encompassing other entities, such as for instance systemically relevant insurance companies and providers of market infrastructures.[214] As already highlighted, the breadth of the ECB's remit was nevertheless dictated by art. 127 (6) of the TFEU. If no amendments are implemented, the existing Treaty framework does not allow the SSM to extend its prudential oversight over all systemically relevant factors in the financial market. Although in principle a more elastic approach would have been preferred the SSM reflects a traditional and overly narrow view of the sources of systemic risk. This is one more hint that the design of the current supervisory system is fatally flawed.

Even though piecemeal reforms and technocratic fixes are not ideal it is desirable to implement the current framework in the future.[215]

However, it is important not overlook the major changes in the financial regulation of the Eurozone since 2008. The overhaul of prudential regulation and supervision has been far-reaching. There has been a considerable shift of power from national to European authorities. As

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[211] *See* E. WYMEERSCH, *Banking Union: Aspects of the Single Supervisory Mechanism and the Single Resolution Mechanism Compared* (Univ. of Gent & ECGI, Working Paper No. 290, 2015), http://www.webankon.com/wp-content/uploads/2015/11/SSRN-id2599502_Art.ECGI_Banking-Union.-Aspects-of-the-Single-Supervisory-Mechanism....pdf.

[212] On possible different features of the European banking union see EILIS FERRAN, *European Banking Union: Imperfect, But It Can Work* (Univ. of Cambridge & ECGI, Working Paper No. 30, 2014) (Guido Ferrarini and Danny Busch eds., 2015).

[213] On the possible conflict of interest between the ECB and the relevant national authorities see FERRARINI & CHIARELLA, *supra* note 1, at 51-53.

[214] *See* TFEU, *supra* note 51.

[215] *See* ASHOKA MODY, *A Schumann Compact for the Euro Area*, BRUEGEL.ORG (Nov. 20, 2013), http://www.bruegel.org/publications/publication-detail/publication/802-a-schuman-compact-for-the-euro-area/.

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anticipated, although the connection between banks and sovereign States, which has been the primary cause of the European banking union, has certainly been weakened. Moreover, as a consequence of the crisis the implementation of a E.U. regime for the resolution of failing banks was instituted. It now consist of a sophisticated array of procedures and tools, including bail-in powers that, over time, should considerably reduce the need to call upon public funding.[216]

Those who think that the SSM is an unfinished reform have strong arguments.[217] On the other hand, by taking into account the abovementioned constraints, the argument that the current structure is the best realistically possible outcome is more compelling. In order to strengthen the banking system of the Eurozone, piecemeal reforms which relies on market developments so as to further evolve into a more cohesive framework was probably the best option. Objections to expanding the purview and powers of new institutions do not necessarily set the pace for the evolution of those institutions. Fears can recede in the face of proven institutional usefulness, and issues that were once highly controversial can lose their political saliency while persistent objectors can become accustomed to the new order.[218]

The long term success of the SSM will depend on the operational efficiency and effectiveness of its various components and on its ability to overcome its current limits.

In the meantime, however, the introduction of the SSM helped to change perception and improve the levels of trust and confidence in the market. The current legal framework seems sufficiently robust. Additionally, it enjoys sufficient authority and credibility to help reversing the trend towards financial market disintegration in the EU. Even in its incomplete form, the SSM has had a major stabilizing impact. Even though it is currently

[216] *See supra* note 23 and accompanying text.
[217] *See, e.g.*, Fritz_Breuss, *European Banking Union: Necessary, but not Enough to fix the Euro Crisis*, CESIFO FORUM, Winter 2012, at 26; A. VON BOGDANDY, et al., *Towards a Euro Union*', BRUEGEL.ORG (Aug. 25, 2014), http://bruegel.org/2014/08/towards-a-euro-union/; Miranda Xafa, *European Banking Union, Three Years on*, 73 CIGI PAPER (2015); S. VERHELST, *Banking Union: are the EMU design mistake being repeated?* (European Policy Briefs, Working Paper No. 12, 2012), http://www.egmontinstitute.be/wp-content/uploads/2013/10/EPB12.pdf.
[218] *See* FERRAN, *supra* note 212, at 3.55.

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impossible to assess whether it has broken the vicious circle between sovereign States and banking institutions it has certainly contributed to its mitigation.[219]

Although the SSM reform presents considerable limits, it is still too early to judge on its effectiveness. It has been implemented with the purpose to overcome the fragility of the previous European banking system by loosening the connection between banks and sovereign debt, which is achieved by transferring sovereignty from the single States to the SSM. This should stop the weakening of the financial market.[220]

The current hope is that Eurozone leaders do not forget what led to these reforms and effectively implement them in the future. Regulations and Directives can effectively be reviewed. These chances to fill the gaps and overcome the flaws of the current system cannot be missed.

In the meantime, the scenario could substantially change if a sufficient number of non-euro countries adhere to the system of "close cooperation" which is established by the SSM Regulation. By entering a close cooperation agreement with the ECB non-euro countries will be subject to almost the same regime as the Members of the Eurozone.[221] By assuming that most E.U. Member States will join the SSM, issues of cooperation between the EBA and the competent authorities of non-participating countries could substantially improve.

The system, however, offers little incentives for joining the banking union. No doubt, systemic stability will benefit from the extension of a common supervisory regime to the majority of the EU, as well as to their banking institutions. However, even though this argument is sound on paper, this will not necessarily determine that this regime is going to be implemented in practice. Indeed, by participating to the SSM Member States would give up most of their supervisory powers in favor of the ECB.

[219] *See* D. Nouy, Chair of the Supervisory Bd., Single Supervisory Mechanism, *The Single Supervisory Mechanism after one year: the state of play and the challenges ahead* (Nov. 24, 2015), https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se151124.en.html.
[220] *See* Fritz Breuss, *The Stabilizing Properties of a European Banking Union in case of Financial Shocks in the Euro Area,* 550 ECONOMIC PAPERS (2015).
[221] *See* SSM Regulation, *supra* note 20, art. 2(1).

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Politicians have few incentives to push for this solution. While the loss of sovereignty would be easily noticeable, voters could easily miss the benefits in terms of systemic stability and financial integration.

Moreover, these benefits will largely depend on how many non-euro countries will decide to join the ECB. If this number is low, incentives to participate will be modest, and therefore issues of collective action will not be easily solved. Furthermore, non-participating Member States are going to enjoy some voting power within the Supervisory Board of the EBA. The current voting system could offer to non-participating States a reason not to join the SSM. Therefore, all recent efforts to rebalance voting powers within the EBA Supervisory Board, which, officially, aim at protecting the financial interests of the Union, could paradoxically make it undesirable for non-euro Countries to join the SSM.