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Jakub Gren The Eurosystem and the Single
Supervisory Mechanism:
institutional continuity under
constitutional constraints

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Abstract

This paper analyses regulatory solutions that have been adopted to address constitutional constraints imposed on the functioning of the Single Supervisory Mechanism (SSM), in which the ECB's exclusive supervisory competence is carried out. It argues that the operational framework governing the functioning of the SSM has assimilated, to a certain extent, three specific regulatory solutions underpinning the workings of the ESCB/Eurosystem: 1) the (legislative) allocation of certain tasks and responsibilities between ECB internal administrative bodies and structures; 2) the possibility of internal delegation of decision-making powers; and 3) the decentralised exercise of certain of the Union's tasks. Such a design of the SSM reflects institutional continuity concerning a political choice on how to achieve stage one of a genuine Economic and Monetary Union. It concludes that the Union operates at its best when centralised decision-making on substantial policy issues is combined with a decentralised operational framework allowing for the meaningful involvement of national administrations in the exercise of Union exclusive competences.

Keywords: ECB; Eurosystem; SSM; decentralisation; delegation

JEL codes: K10; K40

1 Introduction

The conferral on the European Central Bank (ECB) by Regulation (EU) No 1024/2013 (the ‘SSM Regulation’)¹ of competence to supervise almost 3,000² credit institutions headquartered in Banking Union jurisdictions³ has considerably transformed its original institutional design. As a successor to the *Stabilitätskultur* of the Bundesbank born in the economic theories of its time,⁴ the ECB was designed to be a highly independent European Union (EU) institution, located at the centre of the European System of Central Banks (ESCB)/Eurosystem and vested with a clear and limited mandate to maintain price stability.⁵

Since democratic principles require that an independent, non-majoritarian decision-maker is accountable and transparent,⁶ a detailed, rigid and clear institutional framework governing the activities and decision-making process of the ECB (the ‘ESCB/ECB Statute’) was encapsulated in Protocol (No 4) to the Treaties.⁷ As a result, the ECB’s governance structure and decision-making arrangements can only be altered using the procedure for amending the Treaties.⁸

Although Article 127(6) of the Treaty on the Functioning of the European Union (TFEU) authorises the Council by means of regulations to confer on the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions, it does not go as far as providing the possibility to adapt the ECB decision-making arrangements to the new function. Therefore, the Governing Council necessarily remains the ECB’s supreme decision-making body also for all decisions adopted when carrying out its supervisory tasks.

From an institutional efficiency perspective, the concentration of the competence to adopt supervisory measures with respect to around 3,000 institutions in the hands of a single body may create structural challenges for the functioning of the overall ECB decision-making process for at least two reasons, relating to: 1) maintaining operational efficiency; and 2) ensuring the primacy of the ECB’s monetary policy

¹ See Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

² More precisely, 2,988 credit institutions at consolidated level (with a reference date for the group structures of 1 October 2017). See ECB (2018) ‘[ECB Annual Report on supervisory activities 2017](#)’, March 2018, page 74.

³ More precisely, in the jurisdictions of ‘participating Member States’, which according to Article 2(2) of the SSM Regulation are either Member States whose currency is the euro or Member States whose currency is not the euro which have established a close cooperation in accordance with Article 7 (of that Regulation).

⁴ See Louis, J–V., Lastra, R. (2013) ‘European Economic and Monetary Union: History, Trends and Prospects’, *Yearbook of European Law*, p. 96.

⁵ See Article 127(1) TFEU.

⁶ See Zilioli, C. (2016) ‘The Independence of the European Central Bank and Its New Banking Supervisory Competences’ in Ritleng, D. (ed.) *Independence and Legitimacy in the Institutional System of the European Union*, Oxford University Press.

⁷ See Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank.

⁸ See Article 48 of the Treaty on European Union (TEU).

mandate over the supervisory policy one; which could result in legal and liability risks.

Against this backdrop, this paper analyses regulatory solutions that have been adopted to address constitutional constraints imposed on the institutional design of the SSM, in which the ECB's exclusive supervisory competence is carried out. It argues that the operational framework governing the functioning of the SSM has assimilated, to a certain extent, three specific regulatory solutions underpinning the workings of the ESCB/Eurosystem: 1) the legislative allocation of certain tasks and responsibilities between ECB internal administrative structures; 2) the possibility of internal delegation of decision-making powers; and 3) the decentralised exercise of certain of the Union's exclusive tasks. Such an operational design reflects institutional continuity and path dependence with respect to the political choice on how to achieve stage one of a *genuine Economic and Monetary Union*.⁹

The remainder of this paper is structured as follows; the next section reviews the institutional framework governing the Eurosystem, which is considered to inform and constrain the regulatory solutions applied to the day-to-day functioning of the SSM.

Section three analyses the institutional framework governing the SSM and identifies three specific solutions that reflect the SSM's institutional continuity with the Eurosystem: 1) the establishment of the Supervisory Board tasked with planning, the execution of supervisory tasks and the preparation of ECB supervisory decisions; 2) the development of the framework for ECB internal delegation of certain supervisory decisions from the Governing Council to ECB lower administrative structures in relation to significant institutions (SIs); and 3) the decentralised implementation of ECB supervisory tasks by the national competent authorities (NCAs) in relation to less significant institutions (LSIs). Section four concludes.

⁹ See Van Rompuy, H. et al. (2012) [Towards a Genuine Economic and Monetary Union](#), 5 December 2012.

2 The institutional framework governing the ESCB/Eurosystem

The Treaties confer on the Union exclusive competence in the field of monetary policy¹⁰, which is conducted by the Eurosystem. Under the Treaties the Eurosystem is understood as consisting of two components: the ECB and the national central banks (NCBs) of the EU Member States whose currency is the euro.¹¹

The Eurosystem is legally distinguishable from the ESCB, which comprises the ECB and the NCBs of *all* EU Member States,¹² also including those Member States whose currency is not the euro (either Member States with a derogation¹³ or an exemption¹⁴). This differentiation between two groups of Member States, determined by their relation to the euro as their currency, was officially constitutionalised by the Lisbon Treaty revision of 2009.¹⁵

Notwithstanding the fact that many provisions of the Treaties and the ESCB/ECB Statute governing the Union's monetary policy competence formally refer to the ESCB, these provisions remain, by virtue of Article 139(2) of the TFEU, applicable only to the Member States whose currency is the euro and whose NCBs are part of the Eurosystem. The Member States whose currency is not the euro retain exclusive competence in the field of monetary policy in their respective jurisdictions.¹⁶ However, even if all Member States have adopted the euro as their currency, the Eurosystem will formally coexist and coincide with the ESCB unless a Treaty revision is introduced.

From an institutional legal perspective, it remains somewhat challenging to define what the ESCB/Eurosystem is and is not. The Treaties do not provide a definition. In Union law, the concept of a system has been defined in the area of payment and securities settlement where it is considered to be a 'formal arrangement...' which is '... governed by law'.¹⁷

This somewhat broad and general definition does not appear to help in explaining the particular legal nature of the ESCB/Eurosystem. In this context, the Committee of Governors understood the term 'system' as describing the existence of the ECB and

¹⁰ See Article 3(1)(c) TFEU.

¹¹ See Article 282(1) TFEU, second sentence.

¹² *Ibid*, first sentence.

¹³ According to Article 139(1) TFEU: 'Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred as "Member States with a derogation".'

¹⁴ There are two Member States which were granted exemption: the United Kingdom and Denmark. See Protocol (No 15) to the Treaties on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; and Protocol (No 16) to the Treaties on certain provisions relating to Denmark.

¹⁵ The Lisbon Treaty entered into force on 1 January 2009.

¹⁶ See Article 282(4) TFEU.

¹⁷ See Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

the NCBs as integral parts of the system, governed by a common set of rules and committed to the objectives and tasks assigned to it.¹⁸ Earlier, the Committee for the Study of Economic and Monetary Union saw in the ESCB a reflection of a federal arrangement corresponding best to the political diversity of the Union and taking the advantages of making existing central banks part of a new system.¹⁹

It is, however, clear from the Treaties that the Eurosystem is a substructure pertaining to the ESCB that is much more deeply integrated than the ESCB itself. Whereas the former conducts the Union's monetary policy, the latter intends to link the ECB with the NCBs of the Member States with a derogation for the purpose of the adoption of the euro as their currency in the future.²⁰ It is also clear that the ESCB/Eurosystem is neither an EU institution nor possesses legal personality.²¹ Although the Treaties confer on the ESCB/Eurosystem a range of policy objectives²² and tasks,²³ they do not attribute to the ESCB/Eurosystem any competence to achieve the former and implement the latter.

The Treaties appear to define the ESCB/Eurosystem through its tasks and objectives rather than through its organisational form. These tasks and objectives can only be achieved and implemented by the members of the ESCB/Eurosystem – the ECB and/or the NCBs. The only ESCB/Eurosystem organisational feature regulated by the Treaties is its basic governance. In this respect, the Treaties stipulate that the ESCB/Eurosystem is governed by the ECB decision-making bodies, which are the Governing Council, the Executive Board and the General Council.²⁴

The Governing Council comprises the six members of the Executive Board and the NCB governors of the euro area Member States²⁵, with the latter acting not as representatives of their NCBs but, instead, in an *ad personam* capacity. The NCB governors of the non-euro area Member States (i.e. Member States with a derogation or an exemption) do not sit in the Governing Council. They remain however members of the General Council, which is the ECB's third decision-making body. The General Council is vested with very limited and non-regulatory competences, listed in an exhaustive manner by the Treaties.²⁶

The institutional position and responsibility of the first component of the ESCB/Eurosystem – the ECB – has been well defined by the Treaties. The ECB is

¹⁸ See Committee of Governors (1991) 'Commentary on the draft statute of the European System of Central Banks', page 1.

¹⁹ See Committee for the Study of Economic and Monetary Union (1989) '[Report on economic and monetary union in the European Community \(Delors Report\)](#)', paragraph 32.

²⁰ See Selmayr, M. (2015) 'Das Recht der Europäischen Währungsunion', in P.-C. Müller-Graff (ed.) *Europäisches Wirtschaftsordnungsrecht* (1st ed.) 1387, at MN 212, 214.

²¹ It is noted however that, in the literature, the ESCB/Eurosystem has been referred to as 'an EU constitutional body', 'a public body' as well as 'a quasi-institution'. See de Lhoneux, E. (2005) 'The Eurosystem' in *Legal Aspects of the European System of Central Bank – Liber Amicorum Paolo Zambroi Ganavelli*, European Central Bank: Frankfurt, pages 161-178.

²² See Article 127(1) TFEU.

²³ See Article 127(2)(5) TFEU.

²⁴ See Article 129(1) TFEU, Articles 8 and 44.1 of the ESCB/ECB Statute.

²⁵ See Article 283(1) and (2) TFEU.

²⁶ See Article 141(1) TFEU, Article 44.1 of the ESCB Statute in conjunction with Article 46 thereof.

one of the Union's institutions²⁷ and has been attributed legal personality separate from the Union.²⁸ As noted by the Court of Justice of the European Union (CJEU), the ECB is at the heart of the ESCB.²⁹ In accordance with Article 9.2 of the ESCB/ECB Statute, the ECB is responsible for ensuring that the tasks conferred on the ESCB/Eurosystem are implemented either by its own activities pursuant to that Statute, or through the NCBs pursuant to Articles 12.1 and 14 thereof. As a rule, the implementation of the ESCB/Eurosystem tasks takes place by having recourse to the NCBs on the instruction of the Executive Board. The Governing Council may, however, decide to limit the role of the NCBs in the implementation of ESCB/Eurosystem tasks and oblige the Executive Board to take direct action.

When exercising the powers and carrying out the tasks and duties assigned to it by the Treaties, the ECB (as well as members of its decision-making bodies) must not seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. Similarly, the Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect the principle of independence and not to seek to influence the members of the ECB's decision-making bodies in the performance of their tasks.³⁰

The institutional position and the responsibilities of the second component of the ESCB/Eurosystem – the NCBs – are twofold. On the one hand, they form integral parts of the ESCB/Eurosystem³¹ and are the sole shareholders of the ECB.³² The NCBs act in accordance with the guidelines and instructions of the ECB when carrying out the tasks and duties assigned to them by the Treaties (ESCB/Eurosystem tasks)³³. The constitutional protections laid down in Article 130 of the TFEU, including the prohibition on taking or seeking instructions, apply to the NCBs and their decision-making bodies in a manner similar to their application to the ECB. It must, however, be noted that the above prohibition does not apply to the ECB's instructions issued under Article 12.1 of the ESCB/ECB Statute, which the NCB are always obliged to follow.

On the other hand, NCBs remain national institutions vested with their own domestic legal personalities and may be attributed other public policy tasks by relevant national laws, including 'central bank' tasks which are non-ESCB/Eurosystem tasks, such as financial supervision and consumer protection³⁴, as well as 'government tasks', such as resolution financing and deposit guarantee/investor compensation.³⁵ When carrying out these additional tasks, the NCBs and their decision-making bodies do not enjoy the constitutional protection laid down in Article 130 of the TFEU

²⁷ See Article 13(1) TEU.

²⁸ See Article 283(4) TFEU.

²⁹ See Case C-11/00 *Commission of the European Communities v European Central Bank* ('OLAF case'), paragraph 92.

³⁰ See Article 130 TFEU.

³¹ See Article 14.3 of the ESCB/ECB Statute.

³² See Article 42.5 of the ESCB/ECB Statute.

³³ See *supra* footnote 31.

³⁴ See ECB Opinions [CON/2007/29](#), [CON/2015/45](#) and [CON/2015/54](#).

³⁵ See ECB Opinions [CON/2011/103](#) and [CON/2012/22](#). See also ECB (2016) 'Convergence Report', June 2016, page 31.

and are not subject to the ECB's guidelines and instructions.³⁶ The NCBs are, however, subject to the Governing Council's scrutiny when carrying out non-ESCB tasks, which may determine that such tasks interfere with the ESCB's objectives and tasks.³⁷ As a result of this assessment, the ECB may oblige the NCBs to stop carrying out such tasks and a failure to comply with such a request may be referred to the CJEU.³⁸ This somewhat peculiar and 'double-hatted' position of the NCBs, which is shaped by both Union and national laws, has led several esteemed commentators of doctrine to apply specific institutional qualifications to explain this phenomenon. *Smits* defines the NCBs as the agents of the ECB, which 'no longer act as bodies of their own States'.³⁹ *Zilioli* and *Selmayr* consider NCBs as functionally disconnected from the institutional framework of the Member States whenever they act to fulfil their tasks within the Eurosystem⁴⁰ which, according to those authors, constitutes the most far-reaching example of 'dédoublément fonctionnel' ever witnessed in Union law.⁴¹

To ensure the efficient and seamless functioning of the complex and two-layered institutional structure of the Eurosystem, in which the Union's exclusive monetary policy competence is exercised, Article 12.1 of the ESCB/ECB Statute foresees three specific regulatory solutions which set a framework for the ESCB/Eurosystem's decision-making arrangements and day-to-day operations: 1) the initial allocation of monetary policy powers between the ECB/Eurosystem decision-making bodies directly by Union primary law; 2) the (optional) delegation of powers within the ECB/Eurosystem; and 3) the decentralised exercise of Eurosystem operational tasks.

2.1 Initial allocation of monetary policy powers between the ECB/Eurosystem decision-making bodies

As noted above, the Treaties confer on the supranational level (the Eurosystem) the exclusive competence to conduct the Union's monetary policy. This implies that the Member States whose currency is the euro have lost all sovereign powers in this field. This loss is total, unconditional and irrevocable, regardless of the specific actions of the Union.⁴² To ensure the singleness of monetary policy, the drafters of the Maastricht Treaty decided to rely on 'decisional centralism'⁴³ and attribute all sovereign monetary powers of the Member States whose currency is the euro to the ECB's decision-making bodies. Since the transfer of sovereignty in monetary

³⁶ See *supra* footnote 31.

³⁷ See Article 14.4 of the ESCB/ECB Statute.

³⁸ See Article 35.5 of the ESCB/ECB Statute.

³⁹ See Smits, R. (1997) *The European Central Bank – institutional aspects*, Kluwer Law International, page 94.

⁴⁰ See Zilioli, C., Selmayr, M. (2001) *The Law of the European Central Bank*, Hart Publishing, page 77.

⁴¹ *Ibid*, page 79.

⁴² See Siekmann, H. (2015) 'The Legal Framework for the European System of Central Banks', SAFE White Paper No 26 (2015), page 5.

⁴³ See *supra* footnote 39 (Smits), page 67.

policy-making represented a tremendous shift of power between the Member States and the Union, there was a need to put in place certain institutional constraints which would impede an excessive concentration of the Union's monetary policy powers in a single body.

Therefore, it was decided to introduce a system of balances between the ECB's decision-making bodies. In this respect, the first and second paragraphs of Article 12.1 of the ESCB/ECB Statute provide for *the initial allocation of monetary policy powers* within the Eurosystem by distinguishing between the power of monetary policy regulation and implementation.

Under this arrangement, the Governing Council is competent to exercise the ECB's normative power to ensure the performance and implementation of the ESCB/Eurosystem tasks, including the formulation of the Union's monetary policy. This power is exercised by means of legal instruments such as regulations, decisions, recommendations, opinions and guidelines.⁴⁴

The Executive Board, in turn, is competent to implement the monetary policy formulated by the Governing Council. The Executive Board's implementing powers are predominantly exercised by means of instructions vis-à-vis the Eurosystem NCBs. It therefore follows that the Governing Council is only competent to formulate monetary policy, but not to implement it, as the latter competence has been exclusively attributed to the Executive Board.⁴⁵ This contrasts with the nature of the implementing powers attributed to the Commission, where the Council is generally obliged to confer implementing powers on the Commission, but 'may also reserve the right to exercise implementing powers in specific cases' (it must state in detail the ground for such a decision).⁴⁶

Therefore, the implementing powers conferred on the Executive Board appear to be stronger than the traditional implementing powers of the Commission in the sense that they cannot be revoked or limited by the Governing Council in the way the Council may do with respect to the Commission.⁴⁷

Due to the lack of any relevant case law on the scope of the Executive Board's powers, the concept of implementation in the context of the ESCB/Eurosystem needs to be approached in general terms. According to the CJEU, implementation refers to wide powers of 'discretion and action'.⁴⁸ More specifically, it has been described as 'both drawing up implementing rules and applying the rules to specific

⁴⁴ See Article 12.1 of the ESCB/ECB Statute in conjunction with Article 34 thereof and Article 132(1) TFEU.

⁴⁵ On the specific modalities of monetary policy implementation in the Eurosystem, see section 2.3 of this paper.

⁴⁶ See Case 16/88 *Commission of the European Communities v Council of the European Communities*, page 11.

⁴⁷ As noted by the Court, the Council may reserve the right to intervene in the implementation process. See Joined Cases C-296/93 and C-307/93 *French Republic and Ireland v Commission of the European Communities*, paragraph 22.

⁴⁸ See Case 23/75 *Rey Soda v Cassa Conguaglio Zucchero*, page 11.

cases by means of acts of individual application'.⁴⁹ Consequently, the CJEU gave the concept of implementation a very broad scope, which includes the adoption of measures 'however important they may be'.⁵⁰ Yet, the implementing powers cannot go as far as to adopt 'provisions intended to give concrete shape to the fundamental guidelines of the Union policy'⁵¹ ('essential elements') which need to be laid down in the basic act. Furthermore, the use of implementing powers should also respect 'the basic elements laid down in the basic regulation'.⁵²

2.2 Delegation of monetary policy powers within the ECB/Eurosystem

The system of balances between the Governing Council and the Executive Board is not of a static, but rather of a dynamic, nature. The second paragraph of Article 12.1 of the ESCB/ECB Statute introduces a regulatory solution which provides the Governing Council with the discretion to delegate part of its monetary policy powers to the Executive Board. It allows the Executive Board to receive further powers in addition to its implementing powers attributed by the Treaties. This explicit delegation provision is exceptional in the Treaties for the width of discretion left to the Governing Council when compared, for instance, to the delegation clause provided in Article 291 of the TFEU.

The possibility of such delegation within the Union institutional framework has been recognised by the CJEU, which stated that 'the powers conferred on an institution include the right to delegate, in compliance with the requirements of the Treaty, a certain number of powers which fall under those powers'.⁵³ In this respect, Article 17.3 of the Rules of Procedure of the ECB supplements this enabling clause by stipulating that the 'Governing Council may delegate its normative powers to the Executive Board for the purpose of implementing its regulations and guidelines. The regulation or guideline concerned shall specify the issues to be implemented as well as the limits and scope of the delegated powers'.⁵⁴

Delegation of powers from the Governing Council to the Executive Board should be conceptually distinguished from initial allocation of powers between the Governing Council and the Executive Board within the ESCB/Eurosystem. Whereas the former involves the transfer of powers from the Governing Council to the Executive Board originally conferred upon the Governing Council, the latter concerns the constitutional attribution of decision-making powers between the Governing Council and the Executive Board by the Treaties.

⁴⁹ See Case 16/88 *Commission of the European Communities v Council of the European Communities*, paragraph 11.

⁵⁰ See Case 41/69 *ACF Chemiefarma NV v Commission of the European Communities*, paragraph 65.

⁵¹ See Case 240/90 *Federal Republic of Germany v Commission of the European Communities*, paragraph 37.

⁵² See Case 46/86 *Albert Romkes v Officier van Justitie for the District of Zwolle*, paragraph 16.

⁵³ See Case C-301/02 *P. Carmine Salvatore Tralli v European Central Bank*, paragraphs 41 and 42.

⁵⁴ See Decision ECB/2004/2 of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank.

Furthermore, the Governing Council may not delegate on an unconditional basis the powers assigned to it by the Treaties to the Executive Board. According to well-established case law, there are several conditions which generally apply to all delegations in Union law, including delegations from the Governing Council to the Executive Board.

- *First*, a delegating body cannot transfer a greater level of, or a different type of, decision-making authority from that which it has received itself.⁵⁵
- *Second*, the exercise of the decision-making authority by the delegate body must be subject to the same conditions as those to which it would be subject if the delegating body exercised them directly, particularly as regards the requirements to state reasons and to publish.⁵⁶
- *Third*, the delegating body must take an express decision transferring decision-making authority, which should be published.⁵⁷
- *Fourth*, delegation can relate only to clearly defined powers the use of which must be subject to the supervision of the delegating body.⁵⁸
- *Fifth*, the delegating body has to retain the right to reconsider the decisions granting delegations of authority, i.e. to decide to withdraw the delegation at any moment in time.⁵⁹
- *Sixth*, the decision-making authority must be exercised in the name of the delegating body, which must remain fully responsible for it.⁶⁰
- *Seventh*, the adopted act may be the subject of an application for annulment under the same conditions as if it had been adopted by the delegating authority.⁶¹

Although delegation of powers by the Governing Council to the Executive Board constitutes a modification of a constitutionally established order of decision-making arrangements within the ESCB/Eurosystem, it does not entail a loss of responsibility for the Governing Council as a constitutionally responsible actor set by the Treaties.

⁵⁵ See *Case 9/56 Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, page 150; see also *supra* footnote 53 (*Case C-301/02 P*), paragraph 43.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, page 151.

⁵⁸ See *supra* footnote 53 (*Case C-301/02 P*), paragraphs 133, 150-151. See also *Case C-270/12 United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* ('short-selling case'), paragraph 39.

⁵⁹ See *Case 5/85 AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, paragraphs 33 and 36.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

2.3 Decentralised exercise of Eurosystem operational tasks

The third paragraph of Article 12.1 of the ESCB/ECB Statute applies another regulatory solution to the functioning of the ESCB/Eurosystem which is based on the *principle of decentralisation*,⁶² or *deconcentration*.⁶³

Whereas decision-making power within the Eurosystem has been exclusively conferred on the supranational level represented by the ECB and its decision-making bodies ('decisional centralism'),⁶⁴ the day-to-day workings of the Eurosystem take place 'close to the ground' in the sense that the NCBs directly conduct monetary policy operations unless this is deemed impossible and inappropriate.

Therefore, it can be argued that the Eurosystem operates under *the presumption* that monetary policy decisions adopted at the supranational level are implemented factually through the action of the NCBs,⁶⁵ subject to the guidelines and instructions of the ECB decision-making bodies.⁶⁶ In this respect, the Eurosystem's periphery (NCBs) is thus more significant than the centre with respect to monetary policy implementation, even despite the fact that 'the ECB must be afforded a broad discretion for the purpose of framing and implementing the Union's monetary policy.'⁶⁷ Moreover, any deviation from the exclusion of the NCBs from the conduct of monetary policy operations has to be justified by the Governing Council which, when doing so, is obliged to assess the 'possibility' and 'appropriateness' of indirect implementation of ESCB tasks in a particular case.⁶⁸

In this context, 'possibility' has been understood as involving an assessment of whether the NCBs have the operational capacity to carry out a certain ESCB task.⁶⁹ The notion of 'appropriateness' remains somewhat ambiguous and, thus, leaves to the Governing Council a large *room of manoeuvre* concerning decentralised exercise of a certain ESCB task.⁷⁰ In line with well-established case law, an introduction of a

⁶² In accordance with this provision, 'the ECB shall have recourse to the NCBs to carry out operations which form part of the tasks of the ESCB to the extent deemed possible and appropriate'. See *supra* footnote 4, page 78 and footnote 39, page 266. See also de Lhoneux, E. (2009) 'Decentralisation and specialisation in the Eurosystem', *Euredia*, pages 459-467; Eijffinger, S. (2003) 'The federal design of a central bank in a monetary union: The case of the European System of Central Banks', *International Journal of Finance and Economics*, Volume 8, Issue 4, page 366; Moutot, P. et al (2008) 'Workings of the Eurosystem – monetary policy preparations and decision-making: selected issues', ECB Occasional Paper Series No 79/January 2008, page 18; Priego, F. J., Conlledo, F. (2005) 'The role of the decentralisation principle in the legal construction of the European System of Central Banks' in *Legal Aspects of the European System of Central Banks – Liber Amicorum Paolo Zambroni Ganavelli*, European Central Bank: Frankfurt, pages 193-198.

⁶³ See Zilioli, C., Selmayr, M. (2006) 'Recent Developments in the Law of the European Central Bank', *Yearbook of European Law*, Volume 25, Issue 1, footnote 289.

⁶⁴ See *supra* footnote 39 (Smits), page 67.

⁶⁵ See *supra* footnote 20 (de Lhoneux), page 174. For the opposite view, see *supra* footnote 63 (Zilioli and Selmayr): '[t]here is in our view no legal presumption in the EC Treaty or in the Statute in favour of an execution of ESCB tasks through the national central banks. It is rather the discretion of the ECB whether it deems it "possible and appropriate" to make use of the national central banks.'

⁶⁶ See *supra* footnote 31.

⁶⁷ As noted by Advocate General Cruz Villalón. See Opinion in Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, paragraphs 109 and 111.

⁶⁸ See *supra* footnote 39 (Smits), page 112; footnote 40 (Zilioli and Selmayr), pages 126-131; footnote 62 (de Lhoneux), page 460.

⁶⁹ See *supra* footnote 62 (Priego and Conlledo), page 195.

⁷⁰ *Ibid.*

(more restrictive) measure is deemed appropriate when it ensures the attainment of the objective in question and does not go beyond what is necessary to attain that objective.⁷¹

Therefore, the rule of law demands an examination by the Governing Council of the appropriateness of not having recourse to the NCBs in a particular case, looked at through the lens of the overall objectives underlying the functioning of the Eurosystem, including such benchmarks as the smooth functioning of the 'monetary policy transmission mechanism', or ensuring the 'singleness of monetary policy'.⁷² A case could arise where the indirect implementation of a single monetary policy through the NCBs could lead to 'distortions of competition: central bank money would be easier or cheaper to access in country A than in country B'.⁷³ In addition, it has been acknowledged that some monetary policy operations (e.g. fine-tuning bilateral operations, or foreign exchange swaps) may be directly exercised by the ECB under *exceptional circumstances*.⁷⁴

An indirect, 'decentralised' framework for the exercise of monetary policy operational tasks reflects the federally oriented design of the ESCB/Eurosystem in which the higher and lower administrative levels jointly participate in the exercise of the Eurosystem's monetary policy mandate.⁷⁵ The choice of a federal and decentralised structure is also motivated by efficiency reasons since knowledge of domestic economy and geographical proximity facilitates the Eurosystem's interactions with various economic agents and counterparties.⁷⁶

Furthermore, the use of decentralisation as a regulatory solution is not only applied to the conduct of monetary policy operations within the Eurosystem, but also to other

⁷¹ See *supra* footnote 67, paragraph 67 (Case C-62/14), C-59/11 *Association Kokopelli v Graines Baumaux SAS*, paragraph 38; Case C-150/04 *Commission of the European Communities v Kingdom of Denmark*, paragraph 46; Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado*, paragraph 25; Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others*, paragraph 65; Case C-58/98 *Josef Corsten*, paragraph 39; Case C-6/98 *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v PRO Sieben Media AG*, paragraph 51; Case C-154/89 *Commission of the European Communities v French Republic*, paragraphs 14 and 15; Case C-180/89 *Commission of the European Communities v Italian Republic*, paragraphs 17 and 18; Case C-198/89 *Commission of the European Communities v Hellenic Republic*, paragraphs 18 and 19.

⁷² *Ibid.* (Case C-62/14), paragraphs 50 et seq.

⁷³ See *supra* footnote 63 (Zilioli and Selmayr), pages 60-61.

⁷⁴ See Annex 'The implementation of monetary policy in the euro area – General documentation on Eurosystem monetary policy instruments and procedures' to Guideline ECB/2006/12 of the European Central Bank of 31 August 2006 amending Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem, in particular sections 2.2 and 3.1.

⁷⁵ See *supra* footnote 21 (de Lhoneux), page 166; footnote 62 (de Lhoneux), page 462; footnote 62 (Moutot), page 18; see also Bonzom, P., Barontini, C. (2006) 'The European Integration Process: A Changing Environment for National Central Banks', OeNB Workshops No 7/2006, page 172. On the other hand, scepticism has been raised concerning whether the ESCB/Eurosystem is a truly federal system, or rather just a 'quasi-federal system' at most. See footnote 40 (Zilioli and Selmayr), pages 63-71.

⁷⁶ *Ibid.* See also *supra* footnote 62 (Moutot), page 18 and footnote 75 (Bonzom and Barontini), page 174. On the criticism of the Eurosystem's decentralised set-up, see Padoa-Schioppa, T. (2004) *The Euro and its Central Bank. Getting United after the Union*, Cambridge, Massachusetts, page 170.

ESCB tasks such as the collection of statistical data⁷⁷ and the production and circulation of euro banknotes.⁷⁸

According to Article 5.1 of the ESCB/ECB Statute, the ECB is assisted by the Eurosystem NCBs when collecting statistical information necessary for the purpose of exercising ESCB tasks, including monetary and financial statistics, banknote statistics, payments and payment systems statistics, financial stability statistics, balance of payments statistics and international investment position statistics⁷⁹. As part of their duties in this context, the NCBs are responsible for checking the reported information, compiling it and submitting it to the ECB. It therefore follows that the ECB collects statistical information from the reporting agents indirectly, through the intermediation of the relevant Eurosystem NCBs which are required to carry out these tasks to the extent possible.⁸⁰ As noted by *von Lindeiner*, the NCBs 'are usually best placed to collect statistical information from reporting agents and national authorities due to their proximity and expertise in the national framework, and the absence of language barriers (...).'⁸¹

This approach is reflected in various ECB regulations, which lay down the rules on collection of statistical information from economic agents operating within the euro area.⁸² The ECB's normative power in the area of statistics is derived from Article 5 of Regulation (EC) No 2533/98 which empowers the ECB to adopt regulations defining statistical reporting requirements in the euro area Member States.

In the field of euro banknotes, Article 128(1) of the TFEU stipulates that the ECB has the exclusive right to authorise their issuance within the Union and provides that the ECB and the NCBs may issue them. Under this provision, the ECB has the competence to establish, *inter alia*, the legal framework for the production of euro banknotes and to set the practical modalities for euro banknote circulation. The ECB has decided that the tasks relating to the production of euro banknotes should be exercised in a system of 'a decentralised production scenario with pooling'⁸³ by allocating the responsibility for producing euro banknotes to the NCBs.⁸⁴ In this

⁷⁷ See Article 5.1 of the ESCB/ECB Statute.

⁷⁸ See Article 16 of the ESCB/ECB Statute in conjunction with Article 128(1) TFEU.

⁷⁹ See the non-exhaustive list in Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank.

⁸⁰ See Article 5.2 of the ESCB/ECB Statute.

⁸¹ See von Lindeiner, F. (forthcoming) in Blanke, H. J., Mangiameli, S. (eds.) *The Treaty on European Union (TEU): A Commentary*, Springer Science & Business Media.

⁸² See, for example, Regulation (EU) No 1072/2013 of the European Central Bank of 18 October 2013 concerning statistics on interest rates applied by monetary financial institutions (ECB/2013/34); Regulation (EU) No 1073/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (ECB/2013/38); Regulation (EU) No 1074/2013 of the European Central Bank of 18 October 2013 on statistical reporting requirements for post office giro institutions that receive deposits from non-monetary financial institution euro area residents (ECB/2013/39); Regulation (EU) No 1075/2013 of the ECB of 18 October 2013 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (ECB/2013/40); Regulation (EU) No 1409/2013 of the European Central Bank of 28 November 2013 on payments statistics (ECB/2013/43).

⁸³ See ECB (2003) 'ECB Annual Report 2002', April 2003, page 132.

⁸⁴ See Recital 1 of Guideline (EU) 2015/280 of the European Central Bank of 13 November 2014 on the establishment of the Eurosystem Production and Procurement System (ECB/2014/44). To fulfil the obligations concerning the production of euro area banknotes, the NCBs may either use their printing works or tender the production.

system, each Eurosystem NCB is entrusted by a decision of the Governing Council with the production of only one, two or three of the six banknote denominations.⁸⁵ Once produced, the banknotes are transported to different Eurosystem NCBs which are responsible for putting them into circulation.⁸⁶ It therefore follows that the majority of auxiliary tasks related to the ECB's exclusive right to authorise the issuance of euro banknotes is exercised in a decentralised framework by having full recourse to the NCBs.

2.4 Summary

This section has analysed three specific regulatory solutions underpinning the functioning of the Eurosystem's operational framework. It confirms that the Eurosystem's institutional design is, in clear terms, open and can be redefined by the system itself, which is a unique feature when compared to the traditional schemes provided in the Treaties.⁸⁷ This openness is evidenced by the following examples.

The initial allocation of monetary policy powers between the Governing Council and the Executive Board provides a system of balances between the ESCB/Eurosystem decision-making bodies and, thus, avoids an excessive concentration of powers in the hands of one actor. It is, however, not a static, but rather a dynamic, system of horizontal balances as the Governing Council has the option to delegate to the Executive Board some of its powers subject to certain constraints stemming from well-established case law.

Furthermore, the day-to-day operations of the ESCB/Eurosystem are constrained by the principle of decentralisation unless the Governing Council deems the indirect implementation of certain ESCB/Eurosystem tasks impossible and/or inappropriate. This regulatory solution can be regarded as introducing a vertical equilibrium concerning the division of labour between two levels of the ESCB/Eurosystem for the conduct of ESCB/Eurosystem executive tasks. It also ensures the participation of the NCBs unless their exclusion can be justified in a particular case.

⁸⁵ It is noted that the seventh EUR 500 denomination is not produced anymore.

⁸⁶ Pursuant to Article 3(1) of Decision ECB/2010/29 of the European Central Bank of 13 December 2010 on the issue of euro banknotes, the NCBs put into and withdraw from circulation euro banknotes, and perform any physical handling in relation to all euro banknotes, including those issued by the ECB.

⁸⁷ See Priego, F. J. (1998) *El anamajaje institucional del Sistema Europeo de Bancos Centrales*, Madrid, La Ley 1998, D-125.

3 The institutional framework governing the SSM

According to Article 127(6) of the TFEU, ‘the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.’

The abovementioned enabling clause (also referred to in the doctrine as the ‘sleeping beauty clause’⁸⁸ or the ‘last resort clause’⁸⁹) can result in the ECB being endowed with ‘a bank supervisory task of its own through rather swift although weighty legislative action’⁹⁰ notably without recourse to the burdensome (ordinary) Treaty amendment procedure laid down in Article 48 of the TEU.⁹¹ In doing so, it alters the basic constitutional allocation of competences between the Union and its Member States as set out by the Treaties.⁹²

Although the wording of Article 127(6) of the TFEU appears to be somewhat vague and open-ended,⁹³ it is, nevertheless, widely considered to be a sound constitutional basis for allowing the ECB to carry out activities (‘tasks’), provided that these are connected to, or stem from, prudential policies.⁹⁴ As noted by *Louis*, Article 127(6) of the TFEU makes ‘it possible, albeit with substantial procedural impediments to be

⁸⁸ See Gortsos, C. (2013), The ‘single supervisory mechanism’: a major building block towards a European Banking Union (the full Europeanisation of the ‘bank safety net’), Working Paper Series No 8/2013 (June), ECEFFIL.

⁸⁹ See Padoa-Schioppa, T. (1999) ‘EMU and banking supervision’, Lecture by Tommaso Padoa-Schioppa, Member of the Executive Board of the ECB at the London School of Economics, Financial Markets Group on 24 February 1999.

⁹⁰ See *supra* footnote 39 (Smits), page 357.

⁹¹ This amendment procedure requires an intergovernmental conference, ratification by national parliaments and sometimes even a national referendum.

⁹² These competences are grouped in Articles 3-6 TFEU and underpinned by the principle of conferral of powers, enshrined in Article 5(2) TEU. The principle of conferral states that ‘the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to obtain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States’. It should be read in conjunction with the Article 4(1) TEU which stipulates that ‘competences not conferred upon the Union in the Treaties remain with the Member States.’

⁹³ The reference to ‘policies’ in the wording of Article 127(6) TFEU could be interpreted as limiting the possibility of the ECB being engaged in actual day-to-day supervision.

⁹⁴ See Tröger, T. H. (2014) ‘The Single Supervisory Mechanism – Panacea or Quack Banking Regulation? Preliminary Assessment of the New Regime for the Prudential Supervision of Banks with ECB Involvement’, *European Business Organization Law Review* 15, No 4 (2014), pages 449-497; Wymeersch, E. (2014) ‘The Single Supervisory Mechanism or ‘SSM’, Part One of the Banking Union’, *National Bank of Belgium Working Paper*, No 255 (2014). For the opposite view, see for example Weismann, P. (2018) ‘The European Central Bank under the Single Supervisory Mechanism: Cooperation, Delegation, and Reverse Majority Voting’, *European Journal of Current Legal Issues*, Vol 24, No 1 (2018); Vaubel, R. (2014) ‘The Breakdown of the Rule of Law in the Euro-Crisis: Implications for the Reform of the Court of Justice of the European Union’, Conference on ‘International Law and the Rule of Law under Extreme Conditions’, Travemünde Symposium on the Economic Analysis of Law, 27-29 March 2014, page 8. Vaubel argues that this clause was never intended for the general supervision all major banks.

overcome, to provide for a form of direct Europe-wide supervision of financial institutions.¹⁹⁵

Since Article 127(6) of the TFEU solely regulates procedural aspects related to the conferral of supervisory competence on the ECB, substantive aspects of the conferral had to be established through a Council legal act. For this purpose, a special act of general application – the SSM Regulation – was unanimously adopted by the Council. In this sense, the SSM Regulation can be regarded as a ‘basic act’ which sits at the top of the institutional legal framework governing the operations of the SSM.⁹⁶

By virtue of Article 4(1) of the SSM Regulation,⁹⁷ the ECB has become exclusively competent to carry out a number of key supervisory tasks in relation to all credit institutions headquartered in the participating Member States, including:⁹⁸

1. granting and withdrawing the authorisations of credit institutions;⁹⁹
2. supervision of cross-border entities;¹⁰⁰
3. assessment of changes in the shareholder structure of supervised entities;¹⁰¹
4. ensuring the compliance by supervised entities with key micro-prudential requirements;¹⁰²

⁹⁵ See Louis, J.V. (1995) *Banking supervision in the European Community: institutional aspects*, Ed. de l'Univ. 1995, page 44.

⁹⁶ It is noted that the CJEU refers to the SSM Regulation as a ‘Basic Regulation’, see Case T-122/15 *Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank* (‘L-Bank’).

⁹⁷ This Regulation entered into force on 4 November 2013, however by virtue of its Article 33(2) it became applicable only on 4 November 2014.

⁹⁸ The foregoing tasks can be considered as pertaining to the core of prudential supervision, they cannot be regarded as an exhaustive list of all prudential tasks. It therefore follows that there might be areas of prudential supervision of credit institutions which have not been conferred on the ECB, which remain within the remit of national competence. In this respect, Recital 28 of the SSM Regulation lists a number of supervisory tasks not conferred on the ECB that remain with the national authorities. They include, 1) receiving of notifications on the exercise of the right of establishment and the free provision of services by credit institutions across the internal market; 2) supervising undertakings which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law; 3) supervising branches of credit institutions from third countries; 4) supervising payments services; 5) conducting day-to-day verifications of all credit institutions; 6) supervising credit institutions as regards markets in financial instruments; 7) preventing of the use of the financial system for the purpose of money laundering and terrorist financing; as well as 8) ensuring consumer protection.

⁹⁹ See Article 4(1)(a) of the SSM Regulation: to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14. This task stems from Articles 8-18 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (the ‘Capital Requirements Directive IV’ (CRD IV)).

¹⁰⁰ See Article 4(1)(b) of the SSM Regulation: for credit institutions established in a participating Member State, which wish to establish a branch or provide cross-border services in a non-participating Member State, to carry out the tasks which the competent authority of the home Member State has under the relevant Union law. This task stems from Articles 35 and 39 of the CRD IV.

¹⁰¹ See Article 4(1)(c) of the SSM Regulation: to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15. This task stems from Articles 22-27 of the CRD IV.

¹⁰² See Article 4(1)(d) of the SSM Regulation: to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters. Accordingly, the obligation to ensure compliance with

5. ensuring the compliance by supervised entities with other micro-prudential requirements;¹⁰³
6. conduct of supervisory reviews ('Supervisory Review and Evaluation Processes', SREPs) and stress tests on supervisees;¹⁰⁴
7. supervision of banking groups on a consolidated basis;¹⁰⁵
8. supplementary supervision of financial conglomerates;¹⁰⁶
9. recovery planning and early intervention.¹⁰⁷

own funds (capital) requirements and securitisation stems from Articles 25-386 and 404-410 of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (the 'Capital Requirements Regulation' (CRR)); the obligation to ensure compliance with limits on large exposures stems from Articles 387-403 of the CRR; the obligation to ensure compliance with liquidity requirements stems from Articles 411-426 of the CRR; the obligation to ensure compliance with public disclosure of information on these matters (Pillar 3) stems from Articles 431-455 of the CRR.

¹⁰³ See Article 4(1)(e) of the SSM Regulation: to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models. Accordingly, the obligation to ensure robust governance arrangements stems from Articles 74-75 and 88-96 of the CRD IV; the obligation to ensure an effective internal capital adequacy assessment process stems from Articles 76-87 of the CRD IV.

¹⁰⁴ See Article 4(1)(f) of the SSM Regulation: to carry out supervisory reviews, including where appropriate in coordination with the European Banking Authority, stress tests and their possible publication, in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by these institutions ensure a sound management and coverage of their risks, and on the basis of that supervisory review to impose on credit institutions specific additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law. The obligation to carry out SREPs and stress tests stems from Articles 97-101 of the CRD IV. The imposition of ad hoc additional requirements is governed by Articles 102-106 of the CRD IV.

¹⁰⁵ See Article 4(1)(g) of the SSM Regulation: to carry out supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States, including over financial holding companies and mixed financial holding companies, and to participate in supervision on a consolidated basis, including in colleges of supervisors without prejudice to the participation of NCAs in those colleges as observers, in relation to parents not established in one of the participating Member State. This obligation stems from Articles 111-118 of the CRD IV.

¹⁰⁶ See Article 4(1)(h) of the SSM Regulation: to participate in supplementary supervision of a financial conglomerate in relation to the credit institutions included in it and to assume the tasks of a coordinator where the ECB is appointed as the coordinator for a financial conglomerate in accordance with the criteria set out in relevant Union law. This obligation stems from the provisions of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate.

¹⁰⁷ See Article 4(1)(i) of the SSM Regulation: to carry out supervisory tasks in relation to recovery plans and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor does not meet or is likely to breach the applicable prudential requirements and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers. Accordingly, the obligation to draw recovery plans for supervised banks stems from Articles 5-9 of the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (the 'Bank Recovery and Resolution Directive' (BRRD)). Early intervention measures available to competent supervisors are governed by the Articles 27-30 of the BRRD.

The abovementioned supervisory tasks are carried out vis-à-vis ‘credit institutions’ within the meaning of Union law,¹⁰⁸ and two categories of holding companies: ‘financial holding companies’¹⁰⁹ (in the context of consolidated supervision of banking groups) and ‘mixed financial holding companies’¹¹⁰ (in the context of supplementary supervision of financial conglomerates).¹¹¹ Those three types of financial market participants, together with branches operating in participating Member States of credit institutions established in non-participating Member States, are included in the scope of ‘supervised entities’ within the meaning of the SSM Regulation.¹¹²

The ECB’s competence to carry out the abovementioned supervisory tasks is exercised within the framework of the SSM, ‘which is a *system* of financial supervision consisting of the ECB and the NCAs of the participating Member States.’¹¹³ Similar to the ESCB/Eurosystem, the SSM is not an institution and does not possess legal personality.

The SSM as a system differs, however, from the Eurosystem. *First*, the supervisory policy mandate has been conferred on the ECB individually, and not on the SSM as a whole. This contrasts with the conferral of the monetary policy mandate, which has been attributed to the Eurosystem as a whole, and not to the ECB individually. *Second*, unlike the ESCB/Eurosystem, the SSM has no own decision-making bodies and supervisory decisions are adopted either on behalf of the ECB or the NCAs but not on behalf of the SSM as a whole. *Third*, the SSM appears to be a less integrated system than the Eurosystem since the NCAs do not legally form its ‘integral parts’.

Moreover, the attribution of the Member States’ banking supervisory competence to the Union is organised through the legislative substitution of their national

¹⁰⁸ See Article 4(1) of the SSM Regulation. According to Article 4(1) point 1 of the CRR: credit institutions are understood as ‘undertakings the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account’.

¹⁰⁹ See Article 4(1)(g)(h) of the SSM Regulation. According to Article 4 point 19 of Directive 2006/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, a financial holding company is a financial institution (1) the subsidiaries of which are exclusively or mainly credit institutions, investment firms or financial institutions at least one of such subsidiaries being a credit institutions or an investment firm; and (2) which is not a mixed financial holding company.

¹¹⁰ See Article 4(1)(g)(h) of the SSM Regulation. According to Article 2 point 15 of Directive 2002/87/EC, a mixed financial holding company is a parent undertaking, other than a regulated entity, which together with its subsidiaries – at least one of which is a regulated entity which has its registered office in the EU – and other entities, constitutes a financial conglomerate.

¹¹¹ A financial conglomerate is a group or subgroup, where (1) a regulated entity is at the head of the group of the subgroup; or (2) at least one of subsidiaries in that group or subgroup is a regulated entity (i.e. a credit institution, an insurance undertaking, a reinsurance undertaking, an investment firm, an asset management company, or an alternative investment fund manager). See Article 2 point 14 of Directive 2002/87/EC.

¹¹² Prudential supervision of financial market participants other than credit institutions is outside the SSM’s jurisdictional remit and remains exclusively under national responsibility, in spite of the fact that some participants may be of systemic relevance to the banking system. This notably includes financial institutions such as leasing, factoring and credit companies, central counterparties, payment institutions, investment firms and undertakings for collective investments in transferable securities management companies.

¹¹³ See Article 2(9) of the SSM Regulation.

supervisory authorities with the ECB.¹¹⁴ Such a legal architecture reflects constitutional constraints imposed on the Union legislator by Article 127(6) of the TFEU. As a consequence, it is the Governing Council, as the ECB's supreme decision-making body, which has exclusive constitutional responsibility for decision-making in respect of supervisory tasks conferred on the ECB under Article 127(6). Such a design may, however, create challenges for the functioning of the overall ECB decision-making process for at least two reasons: operational efficiency and the primacy of the ECB's monetary policy mandate over the supervisory policy one.

From a short-term perspective, the limited possibilities for distinguishing between minor and major supervisory issues, and subsequently filtering the issues which are submitted to the Governing Council, may affect its operational efficiency. The exercise of the ECB's supervisory decision-making powers by the Governing Council requires, on a daily basis, the adoption of a very large number of supervisory decisions under very tight deadlines. This is also true for routine and executive supervisory decisions. These decisions are addressed to individual supervised credit institutions which have a fundamental right to good administration under the Treaties.¹¹⁵

The Governing Council adopts supervisory decisions under a special, non-objection procedure foreseen in Article 26(8) of the SSM Regulation and laid down in detail by Article 13g of the Rules of Procedure of the ECB. Under the non-objection procedure, the Supervisory Board submits to the Governing Council complete draft supervisory decisions and the latter either approves or objects to them but cannot change them. Compliance with the obligation to respect the fundamental right to good administration of supervised entities requires the Governing Council, as the ECB's final decision-making authority, to 'examine carefully and impartially all the relevant aspects of each individual [supervisory] case'¹¹⁶ when deciding whether to approve or object to draft supervisory decisions. Ensuring that the fundamental right to good administration is respected in each and every case might, however, be challenging in the view of very high number of draft supervisory decisions submitted by the Supervisory Board and might create potential legal and liability risks for the ECB.

More importantly, from a long-term perspective, the Governing Council's dual monetary and supervisory decision-making responsibilities could raise legitimate concerns regarding its capacity to maintain sufficient levels of attention on the

¹¹⁴ See Article 9(1) of the SSM Regulation: for the exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(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.

¹¹⁵ As encapsulated in Article 41 of the Charter of Fundamental Rights of the European Union (CFR).

¹¹⁶ In this respect, see for instance Case T-62/98 *Volkswagen AG v Commission of the European Communities*, paragraph 269; Case T-167/94 *Detlef Nölle v Council of the European Union and Commission of the European Communities*, paragraph 73; Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte*, paragraph 14; Joined Cases T-228/99 and 233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission of the European Communities*, paragraph 269; Case C-405/07 *Kingdom of the Netherlands v Commission of the European Communities*, paragraph 56.

Eurosystem's primary objective of maintaining price stability¹¹⁷ despite the applicability of the non-objection procedure in relation to supervisory decisions.

To illustrate this challenge, in the year 2016 alone, the Governing Council was required to make a formal decision on more than 1,400 written procedures, only around 400 of which related to monetary policy matters.¹¹⁸ This indicates that, in purely quantitative terms, the Governing Council had to handle more than twice as many dossiers in the fulfilment of its responsibilities attributed by Union secondary legislation in comparison to the conduct of its tasks conferred by the Treaties. Given that monetary policy issues are usually of a complex nature and that their analysis requires 'all care and accuracy',¹¹⁹ a very large number of supervisory dossiers, even if only requiring approval or objection by the Governing Council, may impede the permanent maintenance of the necessary conditions developed by the CJEU for the ECB's monetary policy decision-making.

To ensure the efficient and seamless functioning of the complex and two-layered institutional structure of the SSM in which the ECB's exclusive supervisory policy competence is exercised, the SSM supervisory *acquis* assimilates, to a certain extent, the three specific regulatory solutions described in section 2 of this paper. They are reflected in 1) the internal allocation of supervisory responsibilities within the ECB by Union secondary law; 2) the delegation of supervisory policy powers within the ECB/SSM; and 3) the decentralised exercise of certain ECB (exclusive) supervisory tasks within the SSM.

3.1 Internal allocation of supervisory responsibilities within the ECB

The Treaties provide that the ECB has three decision-making bodies: the Governing Council, the Executive Board and the General Council.¹²⁰ In principle, only the Governing Council and the Executive Board may adopt decisions of behalf of the ECB that produce legal effects vis-à-vis third parties. This implies that an amendment at the Treaty level is required either to establish a new ECB decision-making body or to alter the existing decision-making modalities of the ECB. As a basic rule, given that it is impossible to establish a new ECB body dedicated to supervisory decision-making without a Treaty change, the Governing Council must formally adopt any supervisory decision capable of granting rights and imposing binding obligations on supervised entities.

¹¹⁷ See Article 127(1) TFEU.

¹¹⁸ According to Articles 4(7)-(9) of Decision ECB/2004/2, written procedure is one of the ways for the adoption of decisions by the Governing Council (physical meetings are the other). On the amount and types of written procedures submitted to the Governing Council, see ECB (2017) '[ECB Annual Report 2016](#)', April 2017, page 102. It is noted that more than 1,000 written procedures were related to supervisory matters.

¹¹⁹ See *supra* footnote 67 (Case C-62/14), paragraph 75.

¹²⁰ See Article 129(1) TFEU in conjunction with Articles 9.3 and 45 of the ESCB/ECB Statute.

To minimise conflicts of interest between monetary policy and supervisory policy decision-making arising from the Governing Council's position as supreme decision-making authority in respect of both policy functions, as well as to promote its operational efficiency, the SSM Regulation has established an internal ECB body – the Supervisory Board – vested with planning and execution of the supervisory tasks conferred on the ECB.¹²¹ The Supervisory Board is also responsible for carrying out preparatory work regarding these supervisory tasks and for proposing to the Governing Council complete draft decisions to be adopted by the latter, pursuant to a special non-objection procedure.¹²² It is, however, noted that no decision-making authority capable of producing external effects is allocated to the Supervisory Board.

The Supervisory Board is led by its Chair and Vice-Chair who are appointed by the Council following a proposal of the ECB and an approval by the European Parliament.¹²³ The Board also consists of four representatives of the ECB, appointed by the Governing Council, and one representative of the NCA in each participating Member State.¹²⁴

Although acts adopted by the Supervisory Board in the exercise of its competence are not formally capable of producing legal effects vis-à-vis supervised entities, they nevertheless play a pivotal role in the ECB's internal supervisory decision-making process in respect of tasks listed in Article 4(1) of the SSM Regulation. The Supervisory Board is competent to set and implement the agenda with respect to the ECB's supervisory activities (i.e. planning, execution and preparation), and it has the exclusive right to initiate the ECB's supervisory decision-making process. It is essential to the exercise of supervisory tasks by the ECB¹²⁵ and its special status is emphasised by Article 19(1) of the SSM Regulation. This provision requires all members of the Supervisory Board to 'act independently and objectively in the interest of the Union as a whole, and [to] neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or from any other public or private body.'

As noted, the Governing Council adopts the draft decisions submitted to it by the Supervisory Board in a special non-objection procedure. Despite being the ECB's ultimate decision-making body on supervisory matters, the Governing Council's discretion to object to draft proposals of the Supervisory Board is accompanied by a requirement to provide the reasons for doing so in writing, in particular stating monetary policy concerns.¹²⁶

¹²¹ See Article 26(1) of the SSM Regulation.

¹²² See Article 26(8) of the SSM Regulation.

¹²³ See Article 26(3) of the SSM Regulation. The Council appoints the Chair and Vice-Chair by means of a Council Implementing Decision. See, for example, Council Implementing Decision 2013/797/EU of 16 December 2013 implementing Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions for the appointment of Ms Danièle Nouy as Chair of the Supervisory Board of the European Central Bank.

¹²⁴ See Article 26(1)(3)(5) of the SSM Regulation.

¹²⁵ See Recital 69 of the SSM Regulation.

¹²⁶ See Article 26(8) of the SSM Regulation.

A clear legislative separation between the competence related to planning, executing and proposing draft supervisory decisions, on the one hand, and the decision-making competence exercised through a non-objection procedure, on the other hand, can be regarded as the introduction of a system of *de facto* balances between the bodies involved in the ECB's supervisory decision-making process, namely the Supervisory Board and the Governing Council. The specific nature of the relationship between the Supervisory Board and the Governing Council is further emphasised by the fact that it is not the latter which delegates these responsibilities to the former, but the Union legislator itself (in this case, the Council).

Based on the abovementioned considerations, it might be argued that the legislative attribution to the Supervisory Board of certain exclusive responsibilities with respect to the ECB's supervisory decision-making process by means of Union secondary law assimilates, to a certain extent, the idea of the constitutional allocation of monetary policy competence between the Governing Council and the Executive Board as evidenced in the Eurosystem setting.

3.2 Delegation of supervisory policy powers within the ECB/SSM

The issue of whether the ECB's decision-making authority in supervisory matters, capable of producing legal effects vis-à-vis third parties, could also be delegated to the Supervisory Board in the same way as from the Governing Council to the Executive Board has been the subject of controversy from the very start of the preparatory work on the SSM.

Mirroring the regulatory solution provided by the second paragraph of Article 12.1 of the ESCB/ECB Statute, the draft SSM Regulation foresaw the possibility of the delegation of decision-making powers by the Governing Council to the Supervisory Board.¹²⁷ More specifically, Article 19(3) of the draft provided the Governing Council with the option to delegate 'clearly defined supervisory tasks and related decisions regarding individual or a set of identifiable credit institutions, financial holding companies or mixed financial holding companies...' to the Supervisory Board.

This delegation clause was, however, not endorsed in the final version of the SSM Regulation¹²⁸ as the Council Legal Service argued that the Treaties establish the Governing Council and the Executive Board as the only decision-making bodies of the ECB.¹²⁹ According to the Council Legal Service's interpretation, by virtue of the second paragraph of Article 12.1 of the ESCB/ECB Statute, the Executive Board is

¹²⁷ As initially proposed by the Commission, see Commission (2012) '[Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions](#)', COM/2012/0511 final – 2012/0242 (CNS), 12 September 2012.

¹²⁸ See Council (2013) '[Council approves single supervisory mechanism for banking](#)', Press release 14044/13, 15 October 2013.

¹²⁹ See Council (2012) '[Opinion of the Legal Service: Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions](#)', 14752/12 JUR 527.

the only possible addressee of delegation of decision-making authority from the Governing Council within the ECB.¹³⁰ Consequently, delegating the Governing Council's decision-making powers to ECB administrative structures other than the Executive Board would be equivalent to a modification of the ECB's decision-making arrangements set by the Treaties, and to the infringement of the institutional balance provided therein. In other words, a stronger administrative deconcentration of the Governing Council decision-making powers could only be achieved by the establishment of a two-tier institutional framework which includes the Executive Board.¹³¹

Against this backdrop, early experience of the SSM's functioning confirms that there was a stringent institutional need for the simplification of the ECB's complex decision-making process in supervisory matters by means of internal delegation, especially with respect to routine and executive supervisory decisions.¹³² To address this need, and to improve the efficiency of the ECB's decision-making process, the Governing Council decided to set up an institutional framework for the delegation of decision-making authority in this context to ECB internal administrative structures other than the Executive Board.

Although the Council Legal Service is of the view that the only legally permissible delegation of powers within the ECB is from the Governing Council to the Executive Board in accordance with the second paragraph of Article 12.1 of the ESCB/ECB Statute, the issue needs to be approached in a broader context, also taking into account, *inter alia*, the literal interpretation of Article 12.1, the relevant case law of the CJEU,¹³³ and the principle of separation between the ECB's monetary and supervisory policy functions.

First, the second paragraph of Article 12.1 should be interpreted as one of the options for delegation available for the Governing Council, and not as the only one. This interpretation is supported by the fact that had the drafters of the Treaty wished to limit the scope of the addressees of the Governing Council's delegated decision-making authority solely to the Executive Board, they would have expressly indicated it. Such an express indication was given in the case of the responsibilities of the General Council, which are listed 'in full'.¹³⁴

Second, the CJEU has expressly recognised that the powers conferred on an institution include 'the right to delegate, in compliance with the requirements of the Treaty, a certain number of powers which fall under those powers, subject to conditions to be determined by the institution.'¹³⁵ Consequently, delegation of the

¹³⁰ In this respect, Article 12.1 of the ESCB/ECB Statute provides that '...the Executive Board may have certain powers delegated to it where the Governing Council so decides.'

¹³¹ The powers delegated to the Executive Board by the Governing Council can be further sub-delegated. See *supra* footnote 54.

¹³² See Nouy, D. (2017) '[Banking union – safe and sound finance for Europe](#)', speech at the RZB EU Sky Talk, Vienna, 2 May 2017.

¹³³ See *supra* footnotes 55-61.

¹³⁴ See Article 44.3 of the ESCB/ECB Statute which stipulates that 'the responsibilities of the General Council are listed in full in Article 46 of this Statute.'

¹³⁵ See *supra* footnote 53.

ECB's decision-making powers from the Governing Council to ECB lower administrative structures is not legally prohibited provided it complies with the general conditions for legitimate delegation of powers as developed by the Union's case law.¹³⁶

Last but not least, it is disputable whether delegation of discretionary decision-making authority on supervisory matters from the Governing Council to the Executive Board under the second paragraph of Article 12.1 would be fully consistent with the principle of separation, given the pivotal role of the Executive Board in the ECB's decision-making process on monetary policy issues. It is evident that avoiding conflicts of interests between ECB monetary and supervisory policy decision-making, and ensuring that both monetary policy and supervision functions are exercised autonomously in accordance with the applicable objectives, were the two main rationales for the insertion by the drafters of a principle of separation into the SSM Regulation.¹³⁷ Therefore, it appears that delegation of supervisory powers by the Governing Council to the Executive Board would be possible only if it would be without prejudice to the maintenance of autonomous decision-making procedures for the ECB's monetary policy and supervision functions and would include an immediate sub-delegation by the latter of the transferred power to ECB lower administrative levels.¹³⁸ It is however doubtful whether the establishment of such a two-tier delegation arrangement would be appropriate from an institutional efficiency perspective.

In light of the abovementioned arguments, delegation of the ECB's supervisory decision-making powers from the Governing Council to ECB administrative structures other than the Executive Board should be deemed legally permissible.

To effectuate the ECB's right to delegate its supervisory powers, Decision ECB/2016/40¹³⁹ (the 'general framework decision') develops a dedicated framework allowing for the transfer of decision-making competence in supervisory matters from the Governing Council to lower administrative levels (heads of ECB working units). The general framework decision recognises the internal allocation of competence between the Governing Council, as the supreme decision-making body, and the Executive Board, which is responsible for the ECB's current business, the set-up of its internal structure and its staff.¹⁴⁰

¹³⁶ For the indicative list of conditions, see *supra* footnotes 55-61.

¹³⁷ See Recital 65 of the SSM Regulation; see also Decision ECB/2014/39 of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank.

¹³⁸ Under Article 5 of Decision ECB/1999/7 of the European Central Bank of 12 October 1999 concerning the Rules of Procedure of the Executive Board of the European Central Bank, sub-delegation of the delegated powers is permissible.

¹³⁹ See Decision (EU) 2017/933 of the ECB of 16 November 2016 on a general framework for delegating decision-making powers for legal instruments related to supervisory tasks (ECB/2016/40).

¹⁴⁰ See Article 11.6 of the Statute of the ESCB, which establishes the Executive Board's responsibility for the ECB's current business. In addition, Articles 10.1 and 10.2 of the Rules of Procedure of the ECB further specify this competence by establishing that all ECB work units fall under the managing direction of the Executive Board. Furthermore, Article 13m.1 of the Rules of Procedure provides that the Executive Board's competence in respect of the ECB's internal structure and the staff also extends to the ECB's supervisory function.

Thus, any delegation of decision-powers taking place under the general framework decision only becomes effective if the Executive Board adopts a decision to nominate a head of an ECB working unit to receive such a delegation from the Governing Council.¹⁴¹ This can be regarded as an example of the Executive Board's involvement in supervisory policy decision-making which does not interfere with the principle of separation. Crucially, delegation decisions need to set out in detail both the scope of the matter to be delegated and the conditions under which such powers may be exercised¹⁴² and, in addition, that such decisions are always exercised on behalf of, and under the responsibility of, the Governing Council.¹⁴³

The delegation of powers under the general framework decision should be clearly distinguished from the internal allocation of competence between the Governing Council and the Supervisory Board set out in the SSM Regulation. The Supervisory Board maintains its competence for planning, execution and preparatory work in respect of the tasks conferred on the ECB by that Regulation.¹⁴⁴ Similarly, the general framework decision does not affect the Supervisory Board's competence to propose complete draft decisions to the Governing Council under the non-objection procedure.¹⁴⁵

On the basis of the general framework decision, the Governing Council has decided to transfer its decision-making authority on supervisory affairs with respect to *inter alia*: 1) the amendments to the significance status of supervised institutions;¹⁴⁶ and 2) the assessment of fit and proper requirements for the persons responsible for the management of SIs.¹⁴⁷

The competence to determine the significance status of a supervised institution is relevant to organising the division of supervisory work and responsibilities between the ECB and the NCAs in the SSM in respect to almost 3,000 supervised institutions operating in participating Member States. As a rule, the ECB directly supervises SIs¹⁴⁸ while the NCA directly supervise LSs under the ECB's oversight.¹⁴⁹

¹⁴¹ See Article 5 of the general framework decision.

¹⁴² *Ibid*, Article 4.

¹⁴³ *Ibid*, Article 6.

¹⁴⁴ See Article 26(1) and (8) of the SSM Regulation.

¹⁴⁵ *Ibid*, in conjunction with Recital 7 of the general framework decision.

¹⁴⁶ See Article 6(4) of the SSM Regulation and Part IV of Regulation (EU) No 468/2014 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 (ECB/2014/17) (the 'SSM Framework Regulation') in conjunction with Decision (EU) 2017/934 of the European Central Bank of 16 November 2016 on the delegation of decisions on the significance of supervised entities (ECB/2016/41) and Decision (EU) 2017/937 of 23 May 2017 nominating heads of work units to adopt delegated decisions on the significance of supervised entities (ECB/2017/17).

¹⁴⁷ See Article 4(1)(e) of the SSM Regulation and Articles 93 and 94 of the SSM Framework Regulation in conjunction with Decision (EU) 2017/935 of the European Central Bank of 16 November 2016 on delegation of the power to adopt fit and proper decisions and the assessment of fit and proper requirements (ECB/2016/42) and Decision (EU) 2017/936 of the European Central Bank of 23 May 2017 nominating heads of work units to adopt delegated fit and proper decisions (ECB/2017/16).

¹⁴⁸ See Articles 6(4) and (5) of the SSM Regulation.

¹⁴⁹ See Article 6(6) in conjunction with Article 6(5)(c) of the SSM Regulation.

Despite its potential sensitivity, assigning the significance status is a rule-based process and the significance criteria are explicitly defined in the SSM Regulation. Those criteria include: 1) size;¹⁵⁰ 2) economic importance;¹⁵¹ 3) significance of cross-border activities;¹⁵² 4) whether public financial assistance is received;¹⁵³ and 5) being among the three most important banks in local jurisdictions of the participating Member States.¹⁵⁴ They are further supplemented by a number of specific provisions laid down in Part IV of the SSM Framework Regulation ('Determining the status of a supervised entity as significant or less significant').¹⁵⁵ The only criterion which involves broad discretion with respect of the determination of the significance status is provided by Article 70 of the SSM Framework Regulation, which allows for classifying an institution fulfilling the significance criteria as less significant under 'particular circumstances'¹⁵⁶ and which should however be interpreted narrowly.¹⁵⁷

With respect to the abovementioned delegated competence, Article 3 of the Governing Council's delegating decision (ECB/2016/41) sets specific criteria and limits under which the addressees of this delegation may exercise it. In particular, it stipulates the instances in which an amendment to a decision on significance shall¹⁵⁸ and shall not¹⁵⁹ be taken by means of a delegated decision. New decisions on significance as well as amendments to decisions on significance that cease to classify institutions as significant under Article 70 of the SSM Framework Regulation ('particular circumstances') should not be taken by means of a delegated decision.¹⁶⁰ The delegating decision is accompanied by a decision of Executive Board (Decision ECB/2017/17) nominating heads of working units receiving the Governing Council's delegated powers (the Directors General of Directorates General Micro-prudential

¹⁵⁰ According to the methodology provided in Article 6(4) of the SSM Regulation, this criterion is understood as the total value of its assets exceeds EUR 30 billion, or as the ratio of its total assets over the gross domestic product of the participating Member State of establishment exceeding 20%, unless the total value of its assets is below EUR 5 billion.

¹⁵¹ According to the methodology provided in Article 6(4) of the SSM Regulation, this criterion is understood as importance for the economy of the Union or any participating Member State.

¹⁵² According to the methodology provided in Article 6(4) of the SSM Regulation, 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 subject to the conditions laid down in the methodology. The criteria are that the total value of its assets exceeds EUR 5 billion and the ratio of its cross-border assets/liabilities in more than one other participating Member State to its total assets/liabilities is above 20%.

¹⁵³ According to the methodology provided in Article 6(4) of the SSM Regulation, this criterion is applied to those banks for which public financial assistance has been requested or received directly from the European Financial Stability Facility or the European Stability Mechanism. They are not considered less significant.

¹⁵⁴ According to Article 6(4) of the SSM Regulation, the ECB shall carry out the tasks conferred on it by this Regulation in respect of the three most significant credit institutions in each of the participating Member States, unless justified by particular circumstances.

¹⁵⁵ See, in particular, Articles 50-66 of the SSM Framework Regulation.

¹⁵⁶ See Article 70(1) of the SSM Framework Regulation.

¹⁵⁷ *Ibid*, Article 70(2). See also *supra* footnote 96 (Case T-122/15).

¹⁵⁸ See Article 3(1)-(4) of the Decision ECB/2016/41.

¹⁵⁹ *Ibid*, Article 3(5)-(6).

¹⁶⁰ *Ibid*, Article 3.

Supervision I and II as well as their Deputies),¹⁶¹ which is a legal requirement for the former to become effective.

Assessment of fit and proper requirements is another exclusive supervisory competence¹⁶² which has been delegated by the Governing Council to heads of supervisory work units. These assessments are an important part of the supervisory process and contribute to the effective management of credit institutions and balanced decision-making. They may have an impact not only on the safety and soundness of the institutions themselves, but also on the level of trust of the public at large in those who manage the EU financial sector.¹⁶³

When conducting an assessment of fit and proper requirements, the ECB assesses the suitability of the members of the management bodies and key function holders of SIs against five substantive criteria provided by Union law, including: 1) experience; 2) reputation; 3) conflicts of interest and independence of mind; 4) time commitment; and 5) collective suitability.¹⁶⁴ In doing so, the ECB fulfils a role of a gatekeeper to the European banking market.¹⁶⁵

With respect to the abovementioned competence, Article 3 of the Governing Council's delegating decision (Decision ECB/2016/42) limits the scope of delegation by carving out four groups of criteria pursuant to which a fit and proper decision cannot be adopted by means of a delegated decision in certain cases and, instead, must be adopted in a standard non-objection decision-making procedure.

The first group of criteria provides that the delegation of fit and proper supervision does not apply to the suitability assessments concerning 1) the entity at the highest level of consolidation of a supervised group; 2) the credit institution with the largest total value of assets in a significant supervised group, if this entity is different from the supervised entity at the highest level of consolidation, as well as 3) a significant supervised entity that is not part of a significant supervised group.¹⁶⁶

The second group of criteria excludes the adoption of delegated fit and proper decisions where 1) the assessed member does not fulfil the fit and proper requirements; or 2) conditions are imposed, unless such conditions are necessary to ensure that the member fulfils the fit and proper requirements and have been agreed in writing.¹⁶⁷

The third group of criteria excludes the adoption of delegated fit and proper decisions where, based on the information submitted to the ECB, 1) the person under the

¹⁶¹ See Articles 1 and 2 of Decision ECB/2017/17.

¹⁶² See Article 4(1)(e) of the SSM Regulation and Articles 93 and 94 of the SSM Framework Regulation.

¹⁶³ See ECB (2018) '[SSM Supervisory Manual: European banking supervision: functioning of the SSM and supervisory approach](#)', March 2018, page 72.

¹⁶⁴ See Article 91 of the CRD IV. When carrying out the assessment of fitness and propriety, the ECB applies relevant national laws transposing this Article which may differ in terms of scope and substance. Some countries have also gone beyond the minimum requirements provided by the CRD IV.

¹⁶⁵ See *infra* footnote 163 (SSM Supervisory Manual), page 73.

¹⁶⁶ See Article 3(1) of Decision ECB/2016/42.

¹⁶⁷ *Ibid*, Article 3(2).

suitability assessment is currently subject to criminal proceedings before a court of law or has been convicted of a criminal offence at first or final instance; or 2) national administrative, or sanctioning, proceedings concerning non-compliance with relevant financial regulations have been or are currently being carried out in relation to the person under the suitability assessment.¹⁶⁸

Finally, the fourth group of criteria provides that the adoption of delegated fit and proper decisions cannot take place where 1) the NCA does not submit to the ECB a draft delegated decision within 20 working days before the expiry of the deadline for the adoption of a fit and proper decision under applicable law; or 2) insufficient information or the complexity of the assessment require that the fit and proper decision is adopted under the non-objection procedure.¹⁶⁹

Pursuant to Article 4 of the Governing Council's delegating decision (Decision ECB/2016/42), where a delegated fit and proper decision can be adopted, the suitability assessment is carried out in accordance with applicable law (i.e. relevant national laws transposing Article 91 of the CRD IV) while taking into account *the rules of practice* formulated in the ECB Guide to fit and proper assessments.¹⁷⁰ Similar to the Governing Council's delegation decision on amendments to significance assessment, the fit and proper delegation is accompanied by the Executive Board's decision nominating heads of working units receiving the Governing Council's delegated powers.¹⁷¹

The delegation by the Governing Council of decision-making authority to heads of ECB working units does not entail a loss of responsibility for the delegated powers for the Governing Council as a constitutionally responsible actor set by the Treaties. In this respect, the general framework decision explicitly states that delegated decisions are taken on behalf of, and under the responsibility of, the Governing Council.¹⁷² Furthermore, under Article 26(8) of the SSM Regulation, the Supervisory Board may submit, at any time, a proposal for a complete draft decision to the Governing Council, proposing the abrogation or the amendment of a specific delegation decision.¹⁷³

3.3 Decentralised exercise of certain ECB supervisory tasks within the SSM

Whereas Article 4(1) of the SSM Regulation enumerates a list of micro-prudential supervisory tasks exclusively conferred on the ECB, Article 6(4)-(6) of the SSM

¹⁶⁸ *Ibid*, Article 3(2).

¹⁶⁹ *Ibid*, Article 3(4).

¹⁷⁰ See ECB (2018) '[Guide to fit and proper assessments \(consolidated version\)](#)', May 2018. The Guide is not, however, a legally binding document and cannot in any way substitute the relevant legal requirements stemming from applicable EU or national law.

¹⁷¹ See *supra* footnote 147 (Decision ECB/2017/16).

¹⁷² See Article 6(1) of the general framework decision.

¹⁷³ *Ibid*, Recital 8.

Regulation sets out a regime governing their operational implementation in relation to SIs and LSIs and the differentiated roles of the NCAs in this respect.

For SIs, the ECB directly carries out the micro-prudential supervisory tasks listed in Article 4(1) of the SSM Regulation and adopts relevant supervisory decisions on its own behalf.¹⁷⁴ Operationally, ECB direct supervision is exercised by dedicated joint supervisory teams (JSTs). Each SI is assigned to one JST, which is composed by supervisors appointed by the ECB and the relevant NCA(s), and which is managed by a JST coordinator designated by the ECB from its supervisory staff.¹⁷⁵ JST coordinators are supported by JST sub-coordinators, who are designated by the relevant NCA and who are usually direct managers of NCA supervisors assigned to a given JST by the relevant NCA.¹⁷⁶ A JST coordinator is competent to issue supervisory instructions to other JST members regarding their tasks and activities.¹⁷⁷ When appointing JST members, the ECB and NCAs should take into account geographical diversity, specific expertise and profile of the appointees,¹⁷⁸ as well as different types, business models and size of credit institution.¹⁷⁹ It therefore follows that providing JSTs with appropriate human resources is one of the important aspects of NCA assistance relating to the exercise of the ECB supervisory tasks vis-à-vis SIs. However, it should be noted that the SSM Framework Regulation does not provide any binding obligations in this respect and only provides that the ECB and NCAs shall consult with each other and agree on the use of NCA resources with regard to the JSTs.¹⁸⁰

JSTs operate as remote administrative structures and, as such, are not considered to be ECB working units. Whereas the members of JSTs appointed by the ECB (JST coordinator and ECB supervisors) are affiliated to one of the ECB work units pertaining to its supervisory arm,¹⁸¹ the members of JSTs appointed by the NCAs (JST sub-coordinators and NCA supervisors) remain based at their headquarters in the respective participating Member States. Given the geographical distance between ECB and NCA members of JSTs, it was decided that JST workflow management and business process would be fully digitalised. For this purpose a

¹⁷⁴ See Article 6(4) of the SSM Regulation.

¹⁷⁵ See Article 3(1) of the SSM Framework Regulation.

¹⁷⁶ *Ibid*, in conjunction with Article 6 of the SSM Framework Regulation. The sub-coordinators are responsible for clearly defined thematic or geographic areas of supervision and represent the views of relevant NCAs in JSTs, see ECB (2014) 'Guide to banking supervision', November 2014, page 17.

¹⁷⁷ See Article 6(1) of the SSM Framework Regulation. It needs to be pointed out however that the enforcement of supervisory instructions to NCA JST members by a JST ECB coordinator is constrained by national employment and civil service framework as NCA supervisors remain employed by their respective NCAs and the NCAs' authority in staff matters was not conferred on the ECB. The NCAs remain effectively free to move or otherwise deploy their supervisory staff as they see fit.

¹⁷⁸ See Recital 79 of the SSM Regulation.

¹⁷⁹ See Article 1 of the SSM Regulation, third paragraph.

¹⁸⁰ See Article 4(5) of the SSM Framework Regulation. It necessarily follows that the NCAs' assistance obligations in respect of staffing are not formalised. The number of NCA headcounts to be deployed to JSTs is a matter of explicit or implicit administrative agreement between the ECB and the NCAs based on a contractual basis. As part of the initial staffing process, the ratio of 25% ECB supervisory staff and 75% NCA supervisory staff was set as a target for JST composition, however not in a formalised form.

¹⁸¹ At the moment, JSTs are grouped in 15 divisions within the ECB's Directorates General Micro-Prudential Supervision I and II. See [Organigram of banking supervision at the ECB](#).

special cyberinfrastructure, including the Information Management System, was set up to provide JST members with secure communication channels.¹⁸²

Article 3(2) of the SSM Framework Regulation attributes to each JST a number of operational tasks dissected from the tasks conferred on the ECB by Article 4(1) of the SSM Regulation, which include but are not limited to:

1. performing the SREPs;¹⁸³
2. preparing a supervisory examination programme (SEP), including a yearly on-site inspection plan;¹⁸⁴
3. implementing the SEP;¹⁸⁵
4. coordinating on-site inspection teams in the context of inspection plans.¹⁸⁶

It needs to be emphasised that Article 3(2) of the SSM Framework Regulation does not transfer to JSTs any formal decision-making authority in respect of those tasks, which remains in the hands of the Governing Council exercised on the basis of the non-objection procedure.¹⁸⁷ Nevertheless, this arrangement can be regarded as introducing elements of organisational decentralisation, or more specifically deconcentration, with respect to the ECB supervisory process vis-à-vis significant institutions.

In the context of the supervision of LSIs, the SSM Regulation foresees another level of assistance by NCAs to the ECB with respect to the preparation and implementation of acts relating to the exercise of its supervisory tasks. Pursuant to Article 6(6) of the SSM Regulation, it is the NCAs, not the ECB, which directly carry out the bulk of micro-prudential supervisory tasks conferred on the ECB by Article 4(1) of the SSM Regulation.¹⁸⁸ The issue of whether this arrangement has legislatively reattributed the ECB's supervisory competence in relation to LSIs back to the national level has been the subject of debates among academics and practitioners.

The relation between Articles 4(1) and 6(6) of the SSM Regulation is somewhat confusing as they refer to two different notions: the (ECB's) competence and the (NCAs') responsibility. The question of wording is not purely semantic since it poses

¹⁸² See ECB (2014) 'SSM Quarterly Report: Progress in the operational implementation of the Single Supervisory Mechanism Regulation', 2014/4, page 11.

¹⁸³ See Article 3(2)(a) of the SSM Framework Regulation.

¹⁸⁴ *Ibid*, Article 3(2)(b).

¹⁸⁵ *Ibid*, Article 3(2)(c).

¹⁸⁶ *Ibid*, Article 3(2)(d).

¹⁸⁷ It needs however to be noted that in day-to-day supervision JST coordinators may issue use non-binding means of persuasion in a form of 'operational acts' in order to ensure timely action. See *supra* footnote 163 (SSM Supervisory Manual), page 100.

¹⁸⁸ With the notable exceptions of tasks related to 1) granting; and 2) withdrawing of authorisation of a credit institution; as well as 3) assessing the acquisition and disposal of qualifying holdings in credit institutions. The exercise of these three supervisory tasks is directly attributed to the ECB and governed by a special two-stage regime that nevertheless foresees substantial assistance of the NCAs in the preparatory work ('common procedures' regime). See Article 4(1)(a)(c) in conjunction with Articles 14-15 of the SSM Regulation.

the essential constitutional question of whether the ECB has been attributed with exclusive competence regarding prudential supervision of all credit institutions, or only regarding a subset of them (i.e. those considered significant).

In the theory of federalism, the notion of a competence expresses the idea of limits and designates the 'scope of application of power', and not the power itself.¹⁸⁹ In this sense, it is associated with the English notion of 'jurisdiction', which determines the sphere and the boundaries in which that power is allowed to be exercised.¹⁹⁰ This understanding of competence seems to be reflected in the Treaties which state that 'the Union shall act only within the limits of the competences conferred upon it by the Member States....'¹⁹¹

Seen from this perspective, it could be argued, *on the one hand*, that the purpose of the regime set out in Article 6(4)-(6) of the SSM Regulation is to set further limits on the exercise of the ECB's exclusive supervisory competence in relation to LSIs by 'splitting' that exclusive competence between the ECB and the NCAs, and reattributing it to the latter in relation to LSIs operating in their respective jurisdictions. This reattributed supervisory competence is, however, exercised under the ECB's oversight and under the condition that the ECB may decide to 'exercise directly itself all the relevant powers over one or more LSIs wherever necessary'.¹⁹² As a result, a system of concurrent competence rather than the ECB's exclusive competence would be established in relation to LSIs within the SSM.¹⁹³

On the other hand, one could also perceive the conceptual relationship between the ECB's exclusive competence and the NCAs' day-to-day responsibilities vis-à-vis LSIs as the application of the principle of decentralisation with respect to the exercise of the ECB's exclusive competence to that group of institutions. According to this approach, it could be argued that Article 6(4)-(6) of the SSM Regulation does not intend to 'split' and distribute the ECB's exclusive competence in relation to LSIs between the ECB and the NCAs, but merely sets up the modalities of the exercise of this exclusive competence in a truly decentralised framework.

This perspective on the scope of the ECB's exclusive competence appears to be supported by the purpose of the adoption of the SSM Regulation. It is clear that the intention of the Union legislator was that the ECB would have 'direct oversight of eurozone banks, although in a differentiated way and in close cooperation with national supervisory authorities'¹⁹⁴ in order to 'intensify the integration of banking supervision' and to enhance 'integration of supervisory responsibilities'.¹⁹⁵ It is also

¹⁸⁹ See Combacau, J. (2005) 'Conclusions generales' in *Les compétences de l'Etat en droit International*, Colloque de Rennes 2005, Paris: Pedone, page 308.

¹⁹⁰ See Beaud, O. (2014) 'The allocation of competences in a federation – a general introduction' in Azoulai, L. (Ed.) *The question of competence in the European Union*, Oxford University Press, page 36.

¹⁹¹ See Article 5(2) TEU.

¹⁹² See Article 6(5)(c) of the SSM Regulation.

¹⁹³ In a system of concurrent competence, Member States are allowed to exercise their public authority in a particular field as long as the Union has not exercised its power in that regard.

¹⁹⁴ See Council (2012) '[Council agrees position on bank supervision](#)', 17739/12 PRESSE 528, page 2.

¹⁹⁵ See Recitals 2 and 5 of the SSM Regulation.

clear that the Union legislator considered that ‘the objectives of this Regulation...namely setting up an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution...cannot be sufficiently achieved at the Member State level and can therefore...be better achieved at the Union level...’.¹⁹⁶

The abovementioned conceptual debate has recently been resolved by the CJEU in the *L-Bank* judgment in the favour of the second interpretation.¹⁹⁷ The CJEU held that ‘it is apparent from the examination of the interaction between Article 4(1) and Article 6 of the Basic [SSM] Regulation... that the logic of the relationship between them consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralised framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Article 4(1) of that regulation.’¹⁹⁸ The CJEU also observed that the sole purpose of Article 6 of the SSM Regulation ‘is to enable decentralised implementation under the SSM of [the ECB] competence by the national authorities, under the control of the ECB, in respect of the less significant entities and in respect of the tasks listed in Article 4(1)(b) and (d) to (i) of the Basic [SSM] Regulation.’¹⁹⁹

The *L-Bank* ruling clearly confirms that the exercise of supervision in the SSM is not based on the distribution of competence between the ECB and the NCAs vis-à-vis significant and less significant institutions, but reflects the decentralised exercise of the ECB’s exclusive competence in relation to the latter group of supervised entities, although in a very autonomous and non-hierarchical fashion.²⁰⁰ It also confirms the observation that the ECB’s exclusive supervisory competence is exercised within the SSM in a differentiated way that forms ‘a unique and unprecedented juxtaposition of European and national responsibilities which defies any clear definition or categorisation’.²⁰¹

3.4 Summary

This section has analysed three specific regulatory solutions which underpin the functioning of the SSM’s institutional design. The analysis has clearly indicated that a number of regulatory solutions previously applied to the workings of the Eurosystem have also been transplanted to the SSM operational framework. This observation is supported by the following examples.

¹⁹⁶ *Ibid*, Recital 87.

¹⁹⁷ See *supra* footnote 96 (Case T-122/15).

¹⁹⁸ *Ibid*, paragraph 54.

¹⁹⁹ *Ibid*, paragraph 63.

²⁰⁰ It is noted that the NCAs adopt supervisory decisions in relation to LSIs on their own behalf. Furthermore, they are only subject to general and not individual instructions of the ECB.

²⁰¹ See Teixeira, P. G. (2014) ‘Europeanising prudential banking supervision. Legal foundations and implications for European integration’, The European Union in crises or the European Union as crises, Arena Report Series (2014), page 554.

The internal allocation of supervisory responsibilities between the Governing Council and the Supervisory Board provides a system of factual balances within the ECB supervisory decision-making. In doing so, it assimilates the regulatory solution provided in the first paragraph of Article 12.1 of the ESCB/ECB Statute with respect to the Eurosystem, subject to the constraints under which the SSM operates. Attributing to the Supervisory Board a number of responsibilities related to planning, execution, carrying out preparatory work and proposing draft supervisory decisions to be adopted by the Governing Council in a non-objection procedure ensures the principle of separation between the ECB's monetary policy and supervision function and mitigates the excessive concentration of responsibilities in hands of one actor.

To further improve the efficiency of the ECB's supervisory decision-making process, the SSM has developed a dedicated delegation framework which allows the Governing Council to transfer a number of its supervisory decision-making powers to ECB lower administrative levels other than the Executive Board. This solution is inspired by the second paragraph of Article 12.1 of the ESCB/ECB Statute, which allows the Governing Council to delegate to the Executive Board some of its monetary policy powers.

Furthermore, the day-to-day operations of the SSM are underpinned by two dimensions of the principle of decentralisation, which also characterises the workings of the Eurosystem. With respect to the supervision of SIs, elements of organisational decentralisation (or deconcentration) are reflected in the establishment of the JSTs. As recently confirmed by the CJEU, the supervision of LSIs carried out by the NCAs constitutes 'decentralised implementation under the SSM of the ECB competence' rather than the exercise of their autonomous competence.²⁰²

²⁰² See *supra* footnote n. 96.

4 Conclusions

The purpose of this working paper is to demonstrate that there exists institutional continuity between the Eurosystem and the SSM when it comes to addressing constitutional constraints and operational challenges. This continuity is evidenced by the assimilation of three regulatory solutions governing the functioning of the Eurosystem to the SSM namely 1) the internal allocation of competences and responsibilities between ECB bodies; 2) the delegation of decision-making powers from the Governing Council to ECB lower administrative levels; and 3) the decentralised exercise of certain tasks conferred by the Union in a system centred around the ECB.

The assimilation of these regulatory solutions to the newly created SSM provides a clear example of how the institutional principles governing the Eurosystem's legal framework can be successfully applied to organise the exercise of new powers conferred by the Member States upon the Union. These solutions do not only improve the administrative efficiency of the ECB's supervisory function, they also promote the recognition by the ECB of the supervised entities' fundamental right to good administration constitutionalised by Article 41 of the CFR. Finally, they ensure that the constitutional hierarchy of the ECB's objectives is respected.²⁰³

The institutional experience of the Eurosystem and the SSM suggests the Union operates at its best when centralised decision-making on substantial issues is combined with a decentralised operational framework, allowing for substantive involvement of national administrations. It facilitates reaping the benefits of centralisation where necessary without the risk of excessive bureaucratisation. In this sense, both the Eurosystem and the SSM give support to the Union's constitutional and administrative framework in facing and successfully addressing the 'common and unchallengeable thread of federalism: striking a fair balance between unity and diversity'²⁰⁴ or, to put it differently, in finding 'the ways in which unity and differentiation may be combined within it'.²⁰⁵

²⁰³ See Article 127(1) TFEU.

²⁰⁴ See Millet, F. (2014) 'The respect for national constitutional identity in the European legal space – an approach to federalism as constitutionalism' in Azoulai, L. (Ed.) *The question of competence in the European Union*, Oxford University Press, page 267.

²⁰⁵ See Chiti, E. (2015) 'In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum', *Cambridge Yearbook of European Legal Studies*, 17(1), page 317.

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Abbreviations

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| BRRD | Bank Recovery and Resolution Directive |
| CFR | Charter of Fundamental Rights of the European Union |
| CJEU | Court of Justice of the European Union |
| CRD IV | Capital Requirements Directive IV |
| CRR | Capital Requirements Regulation |
| ESCB | European System of Central Banks |
| EU | European Union |
| JST | Joint Supervisory Team |
| LSI | Less significant institution |
| NCA | National competent authority |
| NCB | National central bank |
| SI | Significant institution |
| SSM | Single Supervisory Mechanism |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |

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